PENIASI KUNATUBA v STATE (HAM0066 of 2006)

HIGH COURT — CRIMINAL JURISDICTION

SHAMEEM J

25 September 2006

Legal practitioners — admission — abuse of office — DPP filed and signed information and sanction — Constitution required DPP to practice either as barrister or solicitor — whether information and sanction validly signed by DPP — presumption of validity — Constitution of the Republic of Fiji ss 114, 114(2), 130 — Criminal Procedure Code s 233 — Legal Practitioners Act — Penal Code s 111.

The Applicant was charged on two counts of abuse of office contrary to s 111 of the Penal Code, wherein the sanction of the Director of Public Prosecutions (DPP) was required before prosecution can be instituted. The case was transferred to the High Court and the DPP filed and signed the information and sanction. Section 114(2) of the Constitution required that a DPP must be a person who was qualified to be appointed as judge and s 130 provided that a person was not qualified to be appointed as judge unless he/she had not less than 7 years' practice as barrister and solicitor in the Fiji Islands or in another country prescribed by the parliament. The defence alleged that the DPP did not practice either as a barrister or a solicitor to be qualified as such, while the prosecution presented the affidavit of the principal assistant secretary of the Office of the DPP together with the DPP's letters of appointment, degree certificates and admission to the High Court of New Zealand certificate. The defence filed an application to quash the information on the ground that the information and sanction was not validly signed by the DPP.

Held — There was a presumption that the DPP was validly appointed and that he signed both the sanction and information in the proper discharge of his duties. The presumption was reinforced by his letters of appointment and certificates. The defence had not discharged the burden that the DPP had invalid qualifications under the Constitution. First, it was not disputed that the DPP was appointed by the Constitutional Officers Commission. Second, the challenge to the appointment was launched in a judicial review application in a civil court. Third, the validity of the appointment required a proper judicial determination of the words practice and barrister or solicitor.

Application dismissed.

Cases referred to

Berryman v Wise (1791) 4 Term Rep 366; *Gage v Jones* [1983] RTR 508; *R v Gordon* (1789) 1 Leach 515; 168 ER 359, cited.

Campbell v Wallsend Shipway and Engineering Co Ltd [1977] Crim LR 351, considered.

T. Fa for the Applicant

D. Goundar for the Respondent

Shameem J. This is a preliminary application, made by the defence that the information is invalid on the ground that the Director of Public Prosecutions (the DPP) who signed it was not validly appointed. The application is to quash the information and is made in the inherent jurisdiction of the High Court. It is made by motion, supported by the affidavit of Peniasi Kunatuba.

The facts set out therein are that the accused (Peniasi Kunatuba) is charged on two counts of abuse of office, contrary to s 11 of the Penal Code. That section requires the sanction of the DPP, before a prosecution can be instituted. On

28 June 2006, after the transfer of the case to the High Court, the information was filed. It is signed by Josaia Naigulevu, Director of Public Prosecutions. A sanction is also on file, signed by him.

The DPP is appointed under s 114 of the Constitution, by the Constitutional Officers Commission. Subsection (2) provides *"The Director of Public Prosecutions must be a person who is qualified to be appointed as a Judge"*. Section 130 of the Constitution provides that a person is not qualified for appointment as a judge unless he or she (b) *"had not less than seven (7) years practice as a Barrister and Solicitor in the Fiji Islands or in another country prescribed by the Parliament"*.

The affidavit states that it is believed that Mr Naigulevu is not a barrister and solicitor of the High Court of Fiji, that he has not practiced as a barrister and solicitor in Fiji or anywhere else, and that he is therefore not qualified to be either a judge or the DPP. The affidavit states that: *"It would therefore follow that the sanction required under section 111 of the Penal Code and the information filed in the present proceedings against me by Mr Josaia K. Naigulevu are bad in law and therefore invalid"*.

In response, the prosecution has filed the affidavit of Jone Ciwa Vukikomoala, principal assistant secretary of the Office of the DPP. That affidavit states that Mr Naigulevu was admitted as a barrister and solicitor of the High Court of New Zealand in December 1986, after he had obtained a Bachelor of Laws degree from the University of Otago. He then practiced law in New Zealand prior to his appointment to the DPP's Office in Fiji on 27 September 1988. After several promotions over the years, he was appointed DPP by the Constitutional Officers Commission on 18 January 2001, and for a further term of 5 years on 13 January 2006. His letters of appointment, together with his degree certificates and admission to the High Court of New Zealand certificate are annexed to that affidavit.

The arguments for defence and prosecution can be summarised as follows. Counsel for the defence says that s 130 of the Constitution requires a person to be admitted as a barrister and solicitor in Fiji, and to have post-admission experience of at least 7 years, before he or she is qualified for appointment as a judge. He says that Mr Naigulevu was never admitted as a barrister and solicitor in Fiji, and that therefore his experience as state counsel in the DPP's Office cannot be treated as post-admission experience. He was therefore invalidly appointed.

State counsel submits that Mr Naigulevu was appointed as a barrister and solicitor in New Zealand, and that he practiced as state counsel in the DPP's office for more than 7 years thereafter. He says that DPP's officers are exempt from the provisions of the Legal Practitioners Act (which requires admission to the High Court of Fiji) and that therefore his years as a public prosecutor are deemed to be *"practice"* for the purposes of the Constitution.

The question of whether Mr Naigulevu's experience as state counsel in the DPP's office, and his admission to the High Court of New Zealand, can be said to qualify as *"practice as a barrister and solicitor in the Fiji Islands or in another country prescribed by Parliament"* is a matter currently due for determination by the Suva High Court in its civil jurisdiction. I am told by counsel that Mr Naigulevu's appointment is challenged by an unsuccessful applicant for the post by way of judicial review proceedings.

For the purpose of these proceedings, the question is whether on the information before me, the sanction and the charges have been validly signed by the DPP in accordance with s 233 by the Criminal Procedure Code.

There is a legal maxim known in both civil and criminal jurisdictions, as *"omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium"* which means that until the contrary is proved, a man (or woman) who acts in an official capacity, is presumed to have been duly and properly appointed and has properly discharged his or her official duties. Although the maxim is an old one and can be found to have been applied as early as 1789 (in *R v Gordon* (1789) 1 Leach 515; 168 ER 359), it was applied more recently in *Campbell v Wallsend Shipway and Engineering Co Ltd* [1977] Crim LR 351 (*Campbell*).

In that case, the divisional court held that the presumption applied to the validity of the appointment of a health and safety inspector. In *Gage v Jones* [1983] RTR 508, it was held that when a constable in uniform discharges official duties there is a presumption that he was validly appointed.

In the commentary to the *Campbell*, the doctrine was described thus:

> A well established instance of the omnia praesumuntur rule is that a person who acts as the holder of a public office is to be presumed to have been duly appointed to it: *Berryman v Wise* (1791) 4 Term Rep 366. The rule applies in criminal as well as civil cases — affording sufficient proof of the appointment of a constable on a charge of assaulting a constable in the execution of his duty or of a postman on a charge of stealing the mail … The presumption is said to be one of law — that is, the person acting in the office must be taken to have been appointed to it until some evidence is given to the contrary sufficient (in a criminal case) to raise a reasonable doubt.

In this case therefore, there is a presumption that Mr Naigulevu was validly appointed and that he signed both sanction and information in the proper discharge of his duties. That presumption is reinforced by his letters of appointment and his certificates. It is for the defence to prove that he was not validly appointed and that he had invalid qualifications under the Constitution, and therefore to raise a reasonable doubt about the validity of the sanction and charge. I do not consider that the defence has discharged its burden. First, Mr Naigulevu was in fact appointed, by the Constitutional Officers Commission. That is not in dispute. Second, any challenge to that appointment must be brought as a judicial review application in the civil counts. Such a challenge has in fact been launched. Third, the question of whether or not Mr Naigulevu was validly appointed is not at all clear-cut. It requires a proper judicial determination of the meaning of the word *"practice"* and the words *"barrister or solicitor"*. Do the words include practice as state counsel at the DPP's Office? Do they presuppose practice after admission to the High Court of Fiji? Does non-admission in Fiji disqualify a person applying for a position as a judge or the DPP? Are lawyers admitted only in a foreign jurisdiction disqualified from holding judicial positions in Fiji?

These points are clearly arguable. However, they do not, in my view succeed in satisfying the burden on the defence, to show that the information is invalid and the sanction irregular, on the ground of invalidity of an official position. There must be more than a good argument to displace that burden.

Finally, in applications of this nature, the criminal courts must be cautious in venturing into fields which are within the jurisdiction properly of the civil courts — a failure to exercise such caution could lead to ancillary inquiries being launched during a criminal trial about the validity of the appointments of police officers, prosecutors and holders of statutory bodies with powers to prosecute.

In this case I hold that the presumption of validity applies, to Mr Naigulevu's position as DPP, and therefore to the information and the sanction. This application is dismissed.

The pleas are valid. The trial may proceed.

Application dismissed.