

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 361 of 2016

STATE

v.

1. JOSAIA WAQABACA
2. ANARE RAVULA
3. FRED WESLEY
4. HANK ARTS
5. FIJI TIMES LIMITED

Counsel: Mr. L. Burney, Mr Y. Prasad for State
Mr Ravindra Singh A. for Accused 1
Mr D. Sharma for Accused 2
Mr N. Barnes, Mr M. A. Corlett (QC) for Accused 3 & 4
Mr W. Clarke for Accused 5

Hearing: 01st March 2018

Ruling: 09th April 2018

RULING

Introduction

1. The Prosecution files this Notice of Motion pursuant to Section 214 (9) of the Criminal Procedure Act, seeking the leave of this court to amend the information. The proposed amendment to the information is that:

AMENDED INFORMATION BY THE
DIRECTOR OF PUBLIC PROSECTIONS

JOSAIA WAQABACA, ANARE RAVULA, FRED WESLEY, HANK ARTS AND FIJI TIMES LIMITED are charged with the following offence[s]:

COUNT 1
[First Accused only]

Statement of Offence

SEDITION: Contrary to section 67 (1) (a) and 66 (1) (v) of the Crimes Act 2009 read with sections 66 (2), 60 (c) and 61 of the Crimes Act 2009.

Particulars of Offence

JOSAIA WAQABACA between the 20th and 27th April 2016 at Suva in the Central Division did a seditious act, namely submitted an article written by him for publication in the Nai Lalakai newspaper, annexed hereto as “*Annexure 1*” together with an agreed English translation thereof “*Annexure 1(a)*”, with a seditious intention to promote feelings of ill-will and hostility between different classes of the population of Fiji.

COUNT 2
[Second Accused only]

Statement of Offence

AIDING AND ABETTING SEDITION: Contrary to section 67 (1) (c) and section 66 (1) (v) of the Crimes Act 2009 read with sections 45, 66 (2), 60 (c) and 61 of the Crimes Act 2009.

Particulars of Offence

ANARE RAVULA on or about the 27th April 2016 at Suva in the Central Division aided and abetted Hank Arts to publish an article in the Nai Lalakai newspaper published on 27th April 2016, annexed hereto as “*Annexure 2*” together with an agreed English translation thereof

“Annexure 2(a)”, which was a seditious publication in that it had a tendency to promote ill-will and hostility between different classes of the population of Fiji (‘the said seditious publication’). As the editor of Nai Lalakai newspaper Anare Ravula was under a contractual duty to assist Hank Arts to publish the 27th April 2016 edition of Nai Lalakai newspaper by ensuring editorial standards were maintained, including a duty to prevent the publication of any seditious publication therein, and his failure to prevent the publication of the said seditious publication aided and abetted Hank Arts to publish the said seditious publication.

COUNT 3
(Third Accused only)

Statement of Offence

AIDING AND ABETTING SEDITION: Contrary to section 67 (1) (c) and section 66 (1) (v) of the Crimes Act 2009 read with sections 45, 66 (2), 60 (c) and 61 of the Crimes Act 2009.

Particulars of Offence

FRED WESLEY on or about the 27th April 2016 at Suva in the Central Division aided and abetted Hank Arts to publish an article in the Nai Lalakai newspaper published on 27th April 2016, Annexed hereto as “Annexure 2” together with an agreed English translation thereof *Annexure 2 (a)*”, which was a seditious publication in that it had a tendency to promote ill-will and hostility between different classes of the population of Fiji (‘the said seditious publication’). As the editor-in-chief of Nai Lalakai newspaper Fred Wesley was under a contractual duty to assist Hank Arts to publish the 27th April 2016 edition of Nai Lalakai newspaper by ensuring editorial standards were maintained, including a duty to prevent the publication of any seditious publication therein, and his failure to prevent the publication of the said seditious publication aided and abetted Hank Arts to publish the said seditious publication.

COUNT 4
(Fourth Accused only)

Statement of Offence

SEDITION: Contrary to section 67(1) (c) and 66(1) (v) of the Crimes Act 2009 read with sections 66 (2), 60 (c) and 61 of the Crimes Act 2009.

Particulars of Offence

HANK ARTS on the 27th April 2016 at Suva in the Central Division as the publisher of Nai Lalakai newspaper did publish an article in the 27th April 2016 edition of Nai Lalakai newspaper, annexed hereto as “*Annexure 2*” together with an agreed English translation thereof “*Annexure 2 (a)*”, which was a seditious publication in that it had a tendency to promote ill-will and hostility between different classes of the population of Fiji.

COUNT 5
(Fifth Accused only)

Statement of Offence

SEDITION: Contrary to section 67 (1) (c) and 66 (1) (v) of the Crimes Act 2009 read with sections 51, 52, 53(1), 53(2) (a), 53(2) (b), 66 (2), 60 (c) and 61 of the Crimes Act 2009.

Particulars of Offence

FIJI TIMES LIMITED, a company having its registered office at 177 Victoria Parade, Suva, on or about the 27th April 2016 at Suva in the Central Division as the printer of Nai Lalakai newspaper did print the 27th April 2016 edition of Nai Lalakai newspaper which contained an article, annexed hereto as “*Annexure 2*” together with an agreed English translation thereof “*Annexure 2(a)*”, which was a seditious publication in

that it had a tendency to promote ill-will and hostility between different classes of the population of Fiji.

2. All the accused persons objected to the proposed amendment on the ground that it will embarrass them in their defence. Accordingly, the parties were directed to file their written submissions, which they filed as per the directions. The Notice of Motion was then proceeded for hearing on the 01st of March 2018. The learned counsel for the Prosecution and the Defence made their respective oral arguments and submissions during the course of the hearing.
3. Having carefully considered the Notice of Motion, the proposed amendment to the Information, the respective oral and written submissions of the parties, I now proceed to pronounce my ruling as follows.

The Law

4. Section 214 (9) of the Criminal Procedure Act has stipulated that the court could grant leave to the Prosecution to amend the information, where it states that:

“The Court may, upon application by the prosecution, grant leave to amend an information, whether by way of substitution or addition of charges or otherwise.”

5. In granting leave to an application to amend the information, the court has to consider whether such an amendment could embarrass the accused in his defence. Section 214 (10) of the Criminal Procedure Act states that:

“In deciding whether or not to grant leave, the Court may consider whether the amendment might embarrass the accused in his defence and whether such embarrassment might be appropriately mitigated by way of adjournment of trial.”

6. Accordingly, the court has to determine whether the proposed amendment to the information causes embarrassment to the accused in their defence.

7. The prosecution in its written submissions stated that the purpose of this amendment is to properly organize the information. In the proposed amendment to the information, the prosecution alleges that the article published in the Nai Lalakai newspaper on the 27th of April 2016, was a seditious publication as it has a tendency to promote feelings of ill-will and hostility between different classes of the population of Fiji. The prosecution's allegation against the defence is based upon the contention that the entire article is seditious. The prosecution proposed to annex the original version of the alleged article together with the English language translation to the proposed amended information.

8. The objections of the defence are based upon three main grounds. Those are:
 - i) The failure of the prosecution to specifically state the seditious words or the seditious parts in the article, causes embarrassment to the accused in their defence,
 - ii) The annexure of the alleged article to the proposed amendment to the information is in contravene to Section 58 of the Criminal Procedure Act,
 - iii) The proposed amendment to the information does not disclose an essential element of the offence.

Embarrassment

9. The defence argued that the proposed amendment has no clarity about the specific seditious words or the seditious passages in the article, which causes embarrassment to the defence. The learned counsel for the defence argued that the present information is founded on the allegation that a certain passage in the article has a seditious tendency in promoting the feeling of ill-will and hostility between different classes of the population of Fiji. In contrast to the present information, the prosecution now proposes, through this amendment, that the entire article as a whole is a seditious publication. The proposed amendment has not specifically identified the seditious part or the seditious words in the article, in which the prosecution relies on. The learned counsel for the second accused and the learned Queen's Counsel for the third, fourth and fifth accused (herein after referred to as the learned Queen's Counsel) in their respective oral and

written submissions argue that certain parts and words in the alleged article are not seditious. Therefore, it is the duty of the prosecution to specifically identify the seditious words or the seditious passages in the alleged article; otherwise it would embarrass the accused in their respective defence.

10. In reply, the learned counsel for the prosecution submitted that the words and certain passages in the article cannot be taken in isolation in order to determine the seditious nature of it. The learned counsel for the prosecution further submitted that, the article in its entirety has the tendency in promoting the feeling of ill-will and hostility between different classes of the population of Fiji, namely the Muslim and non-Muslim population. Accordingly, the prosecution relies on the entire article in charging the five accused in the proposed amendment.
11. Having taken into consideration the submissions made by the prosecution and the defence, I find two main issues that needs consideration. They are:
 - i) Can the prosecution rely on the entire article in charging the accused for the offence of sedition?
 - ii) What information has to be stated in the particulars of the offence, if the charge is founded on words?
12. The learned Queen's Counsel in his submissions mainly relied on two case authorities, they are: **Charles Bradlaugh and Annie Besant v The Queen (1878) Vol 3, QB 607** and **Ganesh Chand v Fiji Times Limited and Another [2011] FJSC 2; CBV0005.2009 (8 April 2011)**, in order to substantiate his argument. The learned Queen's Counsel submitted that it is a requirement to provide detailed particulars of the seditious part or the seditious words in the article, if the charge is founded on published words.
13. I now take my attention to **Charles Bradlaugh and Annie Basant v the Queen (supra)**, which the learned Queen's Counsel relied upon during the course of his submissions. In this case, the two accused were indicted for obscene libel for publishing an obscene book. The Queen's Bench Division of the Court of Appeal held that it was not sufficient to describe the book by its title only. The words alleged to be

obscene must be set out. If they are omitted, the defect will not be cured by a verdict of guilty. The decision of the **Charles Bradlaugh and Annie Basant v the Queen (supra)** is based on the common law principles on indictment that were prevailed in 1878.

14. Brett LJ in **Charles Bradlaugh and Annie Basant v the Queen (supra)** having taken into consideration the offences that consisted with words, held that:

“I think it will be found that indictments for committing any of these offences are all within the principle which I have stated, namely, that inasmuch as the crime consists in the words, the words must be stated; and I think I shall show that in every one of those cases there is authority for saying that the words must be set out, unless the necessity for setting out the words is excused by statute; and it seems to me that each of the statutes which have been passed to excuse the necessity of setting out the words, is an authority that without the statute, by the common law, the words must have been set out.”

15. In view of the above observation of Brett LJ, the common law principle as expounded in **Charles Bradlaugh and Annie Basant v the Queen (supra)** applies only when there is no specific statute governing the formation and drafting of the indictment.
16. The Indictment Act of 1915 of UK has significantly changed the laws pertaining to the indictment. Departing from more detailed and lengthy format of indictment, the Indictment Act of 1915 has introduced a more simplified approach, stating that the indictment must contain such particulars as may be necessary for giving reasonable information as to the nature of the charge. Presently, rule 10 of Criminal Procedure Rules governs the laws relating to Indictments in UK. Hence, the principles discussed in **Charles Bradlaugh and Annie Basant v the Queen (supra)** have no significant relevancy in UK.
17. Division 2 of Part VII of the Criminal Procedure Act of Fiji stipulates the statutory legal framework for the drafting of charges and information. Hence, I find that the common law principles on indictment discussed in **Charles Bradlaugh and Annie**

Basant v the Queen (supra) have no direct relevancy to the issues that are considered in this application.

18. The learned Queen's Counsel in his extended oral submissions urged that there is no distinction between the pleadings in civil cases and criminal cases when the alleged offence is based upon published words. Having submitted that, the learned Queen's Counsel invited the court to rely on the judgment of **Ganesh Chand v Fiji Times Limited and Another (Supra)** in order to determine the correctness of the proposed amended information.
19. The Supreme Court of Fiji in **Ganesh Chand v Fiji Times Limited and Another (Supra)** states that:

"The primary question that arises for consideration is whether the pleadings contained in the Amended Statement of Claim have adequately met the standards of pleadings required in an action for defamation. In the Republic of Fiji, Order 18 of the High Court Rules generally deals with pleadings, and Order 18 Rule 6(1) lays down that as a general rule "every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits." Order 18 Rule 11 requires that "every pleading must contain the necessary particulars of any claim, defence or other matter pleaded" except when such particulars exceed 3 folios, which may be then "set out in a separate document referred to in the pleading". (paragraph 17 of the Judgment)."

20. Accordingly, it is clear that **Ganesh Chand v Fiji Times Limited and Another (Supra)** has focused on the Order 18 of the High Court Rules. The learned Queen's Counsel relied on the observation made by Bramwell LJ in **Charles Bradlaugh and Annie Basant v the Queen (supra)** in order to support his contention that there is no distinction between the pleadings in civil cases and criminal cases. Bramwell LJ in **Charles Bradlaugh and Annie Basant v the Queen (supra pg 622)** has held that:

“I think it is necessary to say where there is a question of pleading at common law there is no distinct between the pleadings in civil cases and criminal cases.”

21. Order 18 rule 6 (1) of the High Court Rules states that, every pleading must contain a statement of the material facts, in a summary form, on which the party pleading relies for his or her claim or defence. However, Section 58 (b) of the Criminal Procedure Act states that the information must contain such particulars which give reasonable information as to the nature of the offence. Accordingly, it is clear that the pleadings in civil matters require to provide the material facts in a summary form that the party relies on for its claim. However, in the criminal matters, it is sufficient enough to provide particulars of reasonable information as that of, the nature of the offence. Therefore, I do not concur with the contention of the learned Queen’s Counsel that there is no distinction between the pleadings in civil cases and the criminal cases.

22. Be that as it may, I find that neither **Charles Bradlaugh and Annie Basant v the Queen (supra)** nor **Ganesh Chand v Fiji Times Limited and Another (Supra)** has specifically stated that the Prosecution cannot rely on the entire article in order to charge the accused for an offence based on the published words. In fact, the Supreme Court of Fiji in **Ganesh Chand v Fiji Times Limited and Another (Supra)** has acknowledged that a party can rely on the entirety of an article in order to file a civil litigation for defamation, where the Supreme Court of Fiji held that:

*“It is, in this context, necessary to stress that there is no real conflict between decisions such as **DDSA Pharmaceuticals Ltd. v. Times Newspaper (supra)** on the one hand, and the decisions in **Churchill Forest Industries (Manitoba) Ltd. v. Finkel, [1971] 1 W.W.R. 745 (Man. C.A.) (supra)**, and **Fiji Daily Post Company Limited & Others v. Sakiusa Rabuka & Another (supra)** on the other, and they are easily reconcilable on the basis that each line of decisions represent an end of a spectrum. At one end, there is the publication which is long, and containing along with material which are allegedly defamatory of the plaintiff, other material that are not at all defamatory, or do not even relate to the*

plaintiff, where it is incumbent on the part of the plaintiff to set out very clearly in his pleadings the part or parts of the publication which is or are allegedly to be defamatory, and on the other end there is the very brief article, which is in its entirety defamatory of the plaintiff, where the aforesaid rule of pleading could have no application. The question is, on what side of the spectrum did the facts in this case fall.” (paragraph 22 of the Judgment)

23. In view of the above discussed legal principles, it is my opinion that the offences or disputes founded on published words, could be based either upon certain words or certain passages in an article, or the entire article as a whole.
24. In this matter, the prosecution submitted that the proposed amendment to the information is based on the entire article as a whole. Meanwhile, the learned counsel for the defence, in their respective submissions stated that, certain parts of the article are not seditious. Therefore, the prosecution has to specifically state the seditious words or the passages in the article.
25. Section 117 (8) of the Constitution has stipulated the powers of the Director of Public Prosecution, where it states that:

The Director of Public Prosecutions may—

- a) institute and conduct criminal proceedings;*
- b) take over criminal proceedings that have been instituted by another person or authority (except proceedings instituted by the Fiji Independent Commission Against Corruption);*
- c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or conducted by the Director of Public Prosecutions or another person or authority (except proceedings instituted or conducted by the Fiji Independent Commission Against Corruption); and*

d) intervene in proceedings that raise a question of public interest that may affect the conduct of criminal proceedings or criminal investigations. Procedure Act governs the law relating to information

26. According to Section 198 of the Criminal Procedure Act, only the Director of Public Prosecution or the Commissioner of Fiji Independence Commission Against Corruption is allowed to file information in the High Court. The Director of Public Prosecution has the discretion to charge the accused with any offence which is commonly known as the prosecutorial discretion. Section 198 of the Criminal Procedure Act states that:
- i) An information charging an accused person and drawn up in accordance with section 202 shall be filed by the Director of Public Prosecutions or by the Commissioner or Deputy Commissioner of the Fiji Independent Commission Against Corruption with the Chief Registrar of the High Court within 21 days of the order for transfer except that the High Court may grant leave to extend the 21 days. The power of the Director of Public Prosecutions to file information may be delegated by him to a public prosecutor in writing.*
 - ii) In the information, the Director of Public Prosecutions or Commissioner of the Independent Commission Against Corruption may charge the accused person with any offence, either in addition to or in substitution for the offence in respect of which the accused person has been transferred to the High Court for trial.*
27. In Sections 198, 214 (9) and (10) of the Criminal Procedure Act, the court is required to determine whether the proposed amendment to the information causes embarrassment to the accused in defence. At this stage of the proceedings, it is not required to determine whether certain words or the passages in the alleged article are not seditious.
28. Accordingly, I find that there is no requirement for the prosecution to specifically state certain words or passages in the article, if the charge of sedition is based upon the entire article as a whole.

Section 58 of the Criminal Procedure Act.

29. The second objection of the defence is that the particulars of the offence as stated in the proposed amendment are not in consistent with Section 58 and 61 of the Criminal Procedure Act.
30. Sections 58 and 61 of the Criminal Procedure Act stipulate what should contain in the charge or information. It states that:

“Every charge or information shall contain—

- i) A statement of the specific offence or offences with which the accused person is charged; and*
- ii) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged.”*

31. Section 61 of Criminal Procedure Act states that:

- i) A count of a charge or information shall commence with a statement of the offence charged, and this shall be called the statement of offence.*
- ii) Each statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence.*
- iii) The charge shall contain a reference to the section of the law creating the offence.*
- iv) After the statement of the offence, particulars of the offence shall be set out in ordinary language, and the use of technical terms shall not be necessary.*

32. The statement of offence and the particulars of offence are the two main components of the information. The statement of offence describes the offence and the particulars of offence explain the nature of the offence.
33. The Fiji Court of Appeal in **Shekar & Shankar v State (Criminal Appeal No AAU0056 of 2004)** discussed the purpose of a charge, where it held that:
- “The purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as it reasonably practicable, it is not necessary slavishly to follow the section in the Act.”*
34. In **State v Singh (Criminal Appeal No AAU0097 of 2005S)** the Fiji Court of Appeal outlined the purpose of the particulars of offence, where it observed that:
- “The purpose of the particulars of offence is to indicate to the person accused of the offence the nature of the case the state intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented. What is important is the evidence the prosecution adduces.”*
35. The particulars of the offence have to provide the accused, a reasonable information about the nature of the offence. It is not required to provide the summary of the evidence that the prosecution intends to adduce against the accused in the hearing.
36. The particulars of the offence, as stipulated in the proposed amendment, have specifically stated that the article published in the Nai Lalakai newspaper on the 27th of April 2016 is seditious, on the ground that it has a tendency to promote feelings of ill-will and hostility between different classes of the population of Fiji. Having specially stated the details of the article, and it’s nature and the effect, the Prosecution has then specifically stated about the nature of the role allegedly performed by each of the accused in each of the five counts, in respect of writing, publishing and printing of the alleged article.

Different Classes of the Population of Fiji

37. I now take my attention to the objections made by the learned Queen's Counsel, stating that the prosecution has failed to specifically identify the different classes of the population of Fiji in the proposed amendment. The learned counsel for the prosecution, in his reply submissions stated that it is obvious from the article, to understand what are the two classes of the population, for which this article promotes the feeling of ill-will and hostility. However, it is the duty of the Prosecution to provide that information in the particulars of offence, as it sufficiently assist the defence to properly understand the nature of the offence.

Non-disclosure of Essential Elements of the Offence

38. The learned counsel for the second accused argued in his written submissions that, the prosecution has failed to state how this alleged seditious article has a tendency or the possibility of creating public disorder, disturbance of law and order, or subvert the authority of the government in the proposed amendment.
39. This court in its ruling dated 11th of December 2017, provided a definition for the physical element of the offence of sedition as stipulated under Section 67 of the Crimes Act, stating that an act or a publication would become seditious based upon its nature and the effect. The prosecution has stated that this article is seditious, as it has a tendency of promoting the feeling of ill-will and hostility between different classes of the population. Hence, I find that the proposed amendment has sufficiently provided the nature and effect of this alleged article.

Annexure to the Information

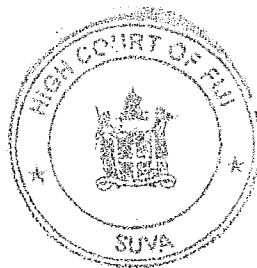
40. The learned counsel for the second accused further objected that the annexure of the copy of this alleged article and its English language translation to the proposed amendment is in contravene to Section 58 of the Criminal Procedure Act. The learned counsel argued that by annexing the said documents to the information, the prosecution is trying to provide evidence through the information.

41. The learned counsel for the prosecution in his submissions stated that, there are no provisions in the Criminal Procedure Act preventing the prosecution to annex any documents to the information. Therefore, the annexure of the copy of this article and its English language translation has not contravened the provisions of the Criminal Procedure Act.
42. As discussed above, there is no need for the prosecution to state the entire article in the information. It is sufficient to provide reasonable information about the identity, nature and the effect of the article.
43. Section 65 of the Criminal Procedure Act states that:
- i) *Where it is necessary to refer to any document or instrument in a charge or information, it shall be sufficient to describe it by any name or designation by which it is usually known, or by the purpose of the document or instrument.*
 - ii) *It shall not be necessary to set out a copy of any document referred to in accordance with sub-section (1).*
44. Moreover, Section 66 of the Criminal Procedure Act states that:
- “Subject to any other provisions of this Division, it shall be sufficient to describe any place, time, thing, matter, act or omission to which it is necessary to refer in any charge or information in —*
- i) *ordinary language; and*
 - ii) *in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to.*
45. Accordingly, I do not find that the prosecution is required to provide the entire article as an annexure to the information, since the name, the date, the nature, the effect and the place of the publication of this alleged article have already been given in the

proposed amendment. Moreover, if the defence wants more particulars of the article, they can request it from the prosecution as disclosures (*vide Dakuidreketi v Fiji Independent Commission Against Corruption [2011] FJHC 359; HAM038.2011 (24 June 2011)*). In this case, the prosecution has already provided the defence a copy of the entire article together with the English language translation as disclosures.

Conclusion

46. In view of the reasons discussed above, I do not find that this proposed amendment to the information causes any embarrassment to the accused in their defence, provided that the prosecution removes the annexure to the information and also specifically identifies the classes of the population for which this article promotes the feeling of ill-will and hostility.
47. The Orders of the court are:
- i) The Prosecution is granted leave to amend the information as proposed in the Notice of Motion with the following two conditions. They are:
 - a) To remove the annexure to the information,
 - b) To specifically provide the details of the classes of the population for which this article promotes the feeling of ill-will and hostility in the particulars of the offence.




R.D.R.T. Rajasinghe
Judge

At Suva
09th April 2018

Solicitors

Office of the Director of Public Prosecutions for the State
Aman Ravindra Singh Lawyers for Accused 1
R Patel Lawyers for Accused 2
Munro Leys for Accused 3 & 4
Howards Lawyers for Accused 5.