**IN THE RESIDENT MAGISTRATE'S COURT**

**AT SUVA**

Criminal Case No. **873/2011**

**STATE**

**V**

**RISTO HARMAT**

| | | |
|---|---|---|
| Prosecution | : | Mr. Mosese Korovou & Mr. D. Prakash for State |
| Accused | : | Mr. Gavin O'Driscoll for Accused |
| Date of hearing | : | 27, 28 ~~May~~ August 2012<br>03, 04, 05 September 2012 |
| Date of Ruling | : | 24 September 2012 |

# R U L I N G

(on No Case to Answer)

## *Introduction*

[1] The Accused is charged with the following offence:

*Statement of Offence*

***Obstructing to defeat the Course of Justice*** *contrary to section 190(e) of Crimes Decree 44 of 2009*

*Particulars of offence*

**Risto Harmat** on 09/05/11 in Kadavu, in the Eastern Division took Ratu Uluilakeba Mara the accused in case CF 742/11 in the Magistrate Court Suva who has been accused of uttering seditious words against the Government of Fiji into open seas and thereby facilitated the escape of the said accused out of the jurisdiction of the Republic of Fiji and thereby obstructed, prevented, perverted or defeated or attempted to obstruct, prevent, pervert or defeat the course of justice.

[2] The prosecution called 16 witnesses and both parties by consent agreed to tender 20 witness statements. Parties also filed agreed facts and agreed to tender the caution interviews statement. Various other documents were tendered via the agreed facts by the parties.

[3] At the close of the Prosecution case, Counsel for the Accused made an oral application for No Case to Answer. After oral arguments, leave was granted to Prosecution and the Defence to file written submissions. Both parties filed very helpful submissions.

***The Law on No Case to Answer***

[4] The law on a No Case to Answer application is well established. Section 178 of the Criminal Procedure Decree states:

*"If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused."*

[5] The test for no case to answer in the Magistrates' Court is adopted from the Practice Direction, issued by the Queen's Bench Division in England and reported in [1962] 1 All E.R 448 (**Moiden v R** (1976) 27 FLR 206). There are two limbs to the test under section 210:

[i] Whether there is no evidence to prove an essential element of the charged offence;

[ii] Whether the prosecution evidence has been so discredited or is so manifestly unreliable that no reasonable tribunal could convict.

[6] **In Abdul Gani Sahib v. State [2005] HAA0022/05S, 28th April 2005**, Justice Shameem held that the correct test in Magistrate's Court under Sec. 210 of the Criminal Procedure Code is,

[i]. Whether there is relevant and admissible evidence implicating the accused in respect of each element of the offence, and;

[ii]. Whether on the prosecution case at its highest, a reasonable tribunal could convict.

[7] In order to decide whether there is sufficient evidence to put the accused to his defence, it is important to determine the elements of the offence and the evidence adduced in support of the said elements.

***The Charge***

[8] Section 190 (e) reads as follows:
190. A person commits a summary offence if he or she —
*(e)* in any way obstructs, prevents, perverts or defeats, or attempts to obstruct, prevent, pervert or defeat, the course of justice.

Penalty — Imprisonment for 5 years.

***The Elements***

[9] The elements of the offence that the Prosecution must prove are:
[i] A person;
[ii] In any way;
[iii] obstructs, prevents, perverts the course of justice;
[iv] attempts to obstruct, prevent, pervert;

[10] Section 23 of the Crimes Decree applies to this charge and intention is the fault element of this offence.

[11] I will now move on to each element of the offence and observe the evidence adduced in support of each element.

[12] [i] A person;- *the accused*
[ii] In any way;- *the accused admits to taking Ratu Tevita Uluilakeba Mara in his boat to Kadavu on Sunday 08/05/11(paragraph 2 of Agreed facts) and when he returned to Pacific Harbour on 09/05/11, the said Ratu Tevita Uluilakeba Mara did not return with him(pargraph 10 of agreed facts)*
I find that there is evidence to prove the above elements.

[13] [iii] obstructs, prevents, perverts the course of justice;

- *in the Caution Interview, tendered by consent, Q 132 to 135, the accused states*
  *Q132 "He (Ratu Uluilakeba Mara) told me to drop me of at a sandy beach along the coast of where lighthouse of Cape Washington is located"*
  *Q133* ***Apart from that, did he mention anything else?***
  *"He said some people are coming to pick him up"*
  *Q134* ***What did you do then?***

*"I went straight to the beach and he jumped off from the boat and said he will be ok"*

*Q135* ***What did he take?***

*"Only the napsak and his bag"*

- *PW2, PW3, PW4, and the captain of the fishing vessel 'Rabi 1' also confirms having seen the "Savea" in the waters near Kadavu on 09/05/11 between midday and 4 p.m.*
- *Prosecution Exhibit # 20, Tonga Government Portal- Rescue at Sea by Tongan Navy also suggests that*

  *"13 May 2011. While on routine patrol His majesty's patrol Boat SAVEA was attracted to a distress signal South of Ono-i-lau and to which it immediately responded and the navy reports that there was, thankfully, no loss of life.*

  *The rescued passenger as been brought to Nuku'alofa where arrangements have been made for his accommodation by the Royal Household Office in deference to his rank. The King, who is travelling in Central Europe, has been fully informed of events by the Lord Keeper of the Privy Seal"*
- *Paragraph 11 of the Agreed Facts states that the said Ratu Tevita Uluilakeba Mara arrived in Tonga onboard the naval vessel Savea on or about 14th May 2011.*
- *A bench warrant was issued for the arrest of Ratu Tevita Uluilakeba Mara in Magistrates Court Criminal Case number: 742/11 on 16th May 2011.*

*From the above evidence and admissions, it is evident that Ratu Tevita Uluilakeba Mara, travelled to Tonga on-board the Tongan Navy Vessel –Savea and subsequently a bench warrant was issued against him for failing to appear in Court on Bail to answer charges.*

I find that there is evidence to support the above elements as well.

[14] [iv] attempts to obstruct, prevent, pervert;

His Lordship, Mr. Justice Goundar in his ruling dated 18.03.2010 in **FICAC v Sunil Kumar**, HAC 181 of 2008, considered the constituent elements of the offence under Section 131(d) of the Penal Code. I respectfully call the formulation by His Lordship on the issue of intention based on ***R v Vreones*** (1891) 1 QB 360 to support the above proposition. It was held that:

*"[13] The accused is specifically charged with an attempt to prevent the course of justice, contrary to section 131(d) of the Penal Code. This charge can be sustained in law and fact,* ***if it could be shown that the accused did an act with an intention to***

***prevent the course of justice***. *It was held in* ***R v Vreones*** *(supra) that the offence* ***requires proof of a specific intention to prevent the course of justice and not an act that has a known tendency to prevent the course of justice***."

[Emphasis added]

[15] Furthermore, in **R. v Farrel**, [1973] 2 W. W. R. 447, C.C.C. (2d)30 it was confirmed as:

"[26] *This distinction is crucial to the determination of whether or not a person is guilty of the offence...Conduct alone, no matter what it may consist of, cannot constitute the offence. Even though a person may do something deliberately (as opposed to accidentally) that results in the course of justice being defeated, that person does not commit an offence if he or she had no intention to attempt to defeat the course of justice.*

*[27] ...In these kinds of offences the focus or gravamen of the crime is primarily on the guilty intent to attempt to obstruct justice rather than on the specific means utilized to achieve this objective.*

*[28] ...Most s139(2) obstruction of justice convictions involve conduct that is either obviously wrong in itself or that could obviously precipitate an obstruction of justice."*

In paragraph 3, page 14, the State in its Submissions in Reply explains that it relies on circumstantial evidence in proving this element of the offence. It invites the Court "to draw an inference from the circumstantial evidence that this was not a normal fishing trip but a prior plan to get Roko Ului to the naval vessel Savea to escape his Court case."

[16] The Prosecutions bases its case in paragraph 2, page 14:

"It is not disputed that Risto returned to Pacific harbour alone while Roko Ului arrived in Tonga on board the Savea. Although no one saw Roko Ului board the Savea, there is no doubting that he boarded the same. This is confirmed by Prosecution exhibit 20 and the agreed facts. The state submits that Roko Ului did not board the Savea at Nasoso beach. The only other reasonable inference is that Roko Ului boarded the Savea directly from Ristos Boat. Prosecution submits that given all the evidence, this is the only reasonable explanation or inference that can be drawn from it."

[17] Upon perusing the evidence in this Case from the Prosecution I find 2 problems with the above:

a) I have quoted above the entire contents of Prosecution Exhibit 20. If Prosecution intends to rely on this exhibit, then there is a mismatch of the date on which Ratu Tevita Uluilakeba Mara was picked up by the Savea. According to Exhibit 20, the date of the distress was 13 May 2011 which is different from the date of this alleged offending.

b) PW 7, Savenaca Vulawalu also told this Court that on 10th May 2011, at about 6:30 a.m he saw the Savea going behind Nagiagia. If it had really picked up Ratu Tevita Uluilakeba Mara, why would it still be lurking around in Fiji that day.

[18] I find that the circumstantial evidence in this case is more focussed on proving the escape of Ratu Tevita Uluilakeba Mara. There is no evidence that would show collusion. Neither has motive been established. The Accused in his caution interview submits that it was a normal fishing trip and that they had caught some fish. Prosecution witnesses also confirm that the accused's boat was seen trolling on 09/05/11.

[19] No evidence has also been produced of any reward or benefits the accused was given to transport Ratu Tevita Uluilakeba Mara to the Tongan Navy.

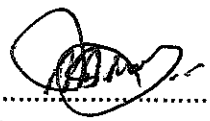
[20] From the evidence led by the Prosecution, I am unable to infer that the accused intended to obstruct, prevent or defeat the course of justice. This element has not been proven by the prosecution.

**Conclusion**

[21] In applying **Moiden v R**, I find that the Prosecution has failed to establish an essential element of the offence I uphold the No Case to Answer submission by the Defence in this case.

[22] Pursuant to section 178 of the Criminal Procedure Decree, I dismiss this case and Acquit the Accused.

[23] I order that after the expiration of the necessary appeal period, the Accused's passport be released to him together with any Bail Bond paid into Court, if any.



.....

Mohammed Saneem [Mr.]

**Resident Magistrate**