

**IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY**

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BETWEEN: REX

- **Appellant**

AND : 'ANISI KULUFEINGA BLOOMFIELD

- **Respondent**

BEFORE HON. JUSTICE NIU

**Counsel : Mr. V. Mo'ale for the applicant.
Mrs. L. Folaumoetu'i for the respondent.**

Hearing : 24 April and 1 and 19 May 2020

Ruling : 9 June 2020

RULING

Request

[1] The Government of the Republic of Fiji has requested the Prime Minister of Tonga that the accused be returned to Fiji to be tried for criminal offences which he is alleged to have committed whilst he was there between 2011 and 2014, and of which he has been charged and in respect of which a warrant for his arrest has been issued in the Magistrate Court of Fiji on 27 March 2018.

- [2] Furnished with that request were -
- (a) the warrant for the arrest of the accused,
 - (b) the particulars of the accused, and,
 - (c) the particulars of the facts upon which and of the law under which he is accused, and evidence sufficient to justify the issue of a warrant in Tonga for the arrest of the accused.

Authority to proceed

- [3] Upon the receipt of that request and particulars, the Prime Minister issued an authority to proceed to the Chief Magistrate in Tonga.

Arrest

- [4] By authority of a warrant issued by the Chief Magistrate, the accused was arrested on 22 November 2019.

Search

- [5] By authority of a search warrant issued, a search was made of the house of the accused and items which were the subject of one of the charges in Fiji were found and taken.

The charges

- [6] The accused is charged with having committed two criminal offences under the Crimes Act of Fiji as follows:

Count 1 (Complaint by a public officer)

Statement of offence (a)

General dishonesty, contrary to S.323 of the Crimes Act No. 44 of 2009.

Particulars of offence (b)

Kulufoinga Bloomfield between 1st day of December 2011 and the 31st day of January 2014 at Suva, in the Central

Division used a credit card no. 5163 2431 0068 0831 belonging to the Oceania Customs Organisation and made purchases with the said credit card that were not authorised by the Oceania Customs Organisation, with intent to dishonestly obtain a sum of \$161,506.66 from the Oceania Customs Organisation.

Count 2 (Complaint by a public officer)

Statement of offence (a)

Theft, contrary to S.291 of the Crimes Act no. 44 of 2009.

Particulars of offence (b)

Kulufoinga Bloomfield between 1st day of December 2011 and the 31st day of January 2014 at Suva, in the Central Division dishonestly appropriated items namely, MacBook Pro 17" Laptop with accessories, MacBook Pro 15" Retina, 2.7 Ghz, i 7, 16 G, 768GB, Jacket Medium 15" Laptop Bag, Apple Thunderbolt Gigabyte Eth. Adapter, Apple Mini Display Port to VGA Adapter, Microsoft Office Home/Business 1 user – Mac, Applecare Protection Plan for MacBook Pro 15" + 17", Aten 4 port USB 2.0 Hub with power supply, STD USB keyboard and Mouse Combo, Apple USB Superdrive, HP Colour MFP M375NW Printer, Computer set (Dell Alienware), Ben Q G2420HD, Mobile Phone and Internet Modem, to the total value of \$17,757.77 belonging to the Oceania Custom Organisation with the intention of permanently depriving Oceania Customs Organisation of the said property.

[7] The provisions of the sections of the Crimes Act of Fiji under which the charges are made are as follows:

"291 (1) A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property.

(2) For the purposes of this Act an offence against subsection (1) is to be known as the offence of theft."

"323. A person commits a summary offence if he or she does anything with the intention of dishonestly obtaining a gain from another person."

The Extradition Act

[8] Tonga has an Act called The Extradition Act. It authorises the request made by the Government of the Republic of Fiji for the return of the accused. S. 3 provides as follows (as relevant):

"3. Subject to the provisions of this Act, a person found in Tonga who is accused of a relevant offence in any other country being a country designated in terms of section 4 of this Act ... may be arrested and returned to that country as provided by this Act."

Some 50 countries, including Fiji, have been designated under S.4 of the Act.

[9] S.5 of the Act provides for what is a "relevant offence". It provides as follows (as relevant):

"5. (1) For the purposes of this Act an offence of which a person is accused ... is a relevant offence if the offence however described is punishable both in Tonga and in the designated country concerned by imprisonment for a term of 2 years or more.

(2) "An offence that is a relevant offence under subsection (1) shall not cease to be such by reason only that it is purely fiscal in character."

[10] The Act provides for the Magistrate's Court to be a court of committal with like jurisdiction and powers as nearly as may be including power to remand in custody or on bail, as a Magistrate's Court holding a preliminary inquiry in respect of an indictable offence triable only in the Supreme Court.

[11] In accordance with those provisions, the application of the Government of the Republic of Fiji was heard before the Magistrate Court and on 17 February 2020, the Principal Magistrate decided, to the effect, that the accused be returned to Fiji for trial on only one of the two charges with which he has been charged in Fiji, namely, the charge of theft. He held that the charge of general dishonesty cannot be proceeded with because the alleged offence was committed during a period in which the accused was accorded diplomatic immunity by the Government of the Republic of Fiji. He accordingly ordered the return of the accused to Fiji for trial in respect of the theft charge only.

Application for habeas corpus

[12] As provided under the Act, the accused has filed his application in this Court for a writ of habeas corpus to stop his return to Fiji, claiming that the Magistrate's Court was wrong to have made the order for his return for trial on the theft charge upon the ground that:

the charge of theft clearly alleges that the theft occurred between 1st December 2011 and 31st January 2014, just as the general dishonesty charge alleges, the same period during which the diplomatic immunity is held to have applied in respect of the general dishonesty charge.

Appeal

[13] At the same time, the Crown, who represents the Prime Minister who has approved the request of the Government of the Republic of Fiji, filed an appeal against the decision of the Magistrate's Court that the accused be returned to Fiji for trial on only the theft charge upon the ground that

- (a) the issue of diplomatic immunity ought to have been left to be decided by the trial court in Fiji, because all that the Magistrate was required to be satisfied of was whether or not there was sufficient evidence to commit the accused for trial on the charge of general dishonesty, and there was sufficient evidence for the same, as he said so in his ruling, and
- (b) there was no other consideration required by the Act to stop the return of the accused.

The hearing

[14] Due to other prior commitments of this Court, the hearing of this matter was held on 24 April and 1 May and 19 May 2020. During the hearing, I was informed that at the hearing before the Learned magistrate, the accused had asked and the Learned Magistrate allowed the accused to produce in evidence for the accused the Diplomatic Privileges and Immunities Act 1971 of Fiji and correspondence showing that the accused enjoyed immunity as head of the organisation which employed him, Oceania Customs Organisation, during the period of his employment as such, which period is the same period during which he is alleged to have committed these 2 offences.

[15] It was common ground during the hearing that the Learned Magistrate had made his ruling upon the evidence of that immunity, to hold that the general dishonesty charge (fraudulent conversion)

was committed during the period covered by the immunity and accordingly could not be the subject of the return of the accused for trial in Fiji, but that the theft charge could be because the theft could have happened when he left his position in Fiji after his immunity had ended.

[16] Both counsel argued two main things:

(a) Mr. Mo'ale for the accused, argued that -

(i) the immunity in Fiji applied and that the Learned Magistrate correctly applied it in respect of the general dishonestly charge, but that he erred in failing to apply it in respect of the theft charge because the charge specifically alleges that the theft occurred during the same period as the period during which the general dishonestly charge is alleged to have occurred.

(ii) by reason of application of immunity in the present case, the charges became trivial in nature, and that in accordance with S.10 (3) (a) of the Extradition Act, it would, having regard to all the circumstances, be unjust or oppressive to return the accused, in view of:

- (1) financial hardship, domestic upheaval and emotional distress to which he would be subjected if so returned;
- (2) this is a lesser crime than murder and such other more serious crimes, where the public interest in bringing an offender to justice is not so pressing;
- (3) the remarkable achievements of the accused in Tonga in these past few years in the Ministry of Customs and Revenue (making revenue surplus of

\$12 million per year for 3 years, and in the development of local business and fisheries sectors, as confirmed by letters from the Minister of Finance and from the Chamber of Commerce.

- (4) it is also in the public interest that a person's right to his private and family life is protected;
- (5) it is also in the public interest that the immunity accorded to international or regional bodies is upheld and enforced.

(b) Mrs. Folaumoetu'i, for the Crown, argued that the Crown had satisfied all the requirements of the Extradition Act for the return of the accused to Fiji, namely:

- (i) that the two offences with which the accused is charged are relevant offences for the purpose of extradition under the Act;
- (ii) that a record of the case, that is, the summary of the evidence of the accused having committed the two offences, as required by the Act, have been produced to the Magistrate Court.
- (iii) the Magistrate Court has properly found that that record of the case satisfied him of both offences as corresponding to the theft and fraudulent conversion in Tonga, and that the Court held "that the evidence in the record was there is sufficient evidence for the case to go to trial if the offence was committed in our jurisdiction".
- (iv) there is no provision in the Act to prohibit the return of the accused to Fiji for trial.

- (v) contrary to the requirements of the Act, the Magistrate's Court has gone on to consider and uphold a defence raised by the accused of diplomatic immunity under the Diplomatic Privileges and Immunities Act of Fiji, in breach of the Act.
- (vi) Whereas a court of committal in Tonga had been required to afford to an accused person the right to cross-examine witnesses and call evidence and give evidence in the committal proceedings, that had ceased when the Magistrate's Court Act was amended in 2012, and only required that the prosecution only provides a summary of the evidence of each witness for the prosecution, and the Magistrate only has to decide whether on those evidence, there is a sufficient case to commit the accused to the Supreme Court for trial. Accordingly, she submitted that the Magistrate erred in allowing the defence to produce the documents of diplomatic immunity and in upholding the accused's defence thereon to the charge of general dishonesty.
- (vii) The Act also allows offences, other than murder and much more serious offences, as well, although all extraditions would necessarily result in financial hardship, family upheaval and emotional distress, because it is in the public interest that offenders of all crimes listed the Act are brought to justice, irrespective where the offence occurred.

No defence in committal

[17] I agree with Mrs. Folaumoetu'i. The former procedure in the Magistrate's Court, called a preliminary inquiry where a defence could be raised and evidence given in support of such defence, ceased to be

the case when the Magistrate's Court (Amendment) Act 2012 came into force and S.32 (3) and (4) provide as follows:

"32. Committal hearings

- (1) ...
- (2) ...
- (3) For every preliminary inquiry the prosecutor shall lodge with the Magistrate, at least 5 days before the date thereof, 2 sets of documents each consisting of one copy of a fair summary of the statements of the prosecution witnesses, one copy of the list of exhibits he proposes to produce and one copy of any documentary exhibits he proposes to produce.
- (4) At the preliminary inquiry the Magistrate shall —
 - (a) cause to be handed to the accused in open Court, the accused's set of documents consisting of one summary of the statements of the prosecution witnesses, one copy of the list of exhibits, and one copy of the documentary exhibits; and
 - (b) endorse on the remaining copy that the accused has received his set of documents; and
 - (c) if he considers that the documents disclose that a sufficient case has been made out to put the accused upon his trial before the Supreme Court, commit the accused to the Supreme Court for trial in custody or on bail as appropriate, and forward the remaining

set of documents together with a record of the proceedings in Form 21 in the Schedule hereto to the Registrar of the Supreme Court; or

- (d) if he considers that the documents do not disclose that a sufficient case has been made out to put the accused upon his trial before the Supreme Court, shall discharge him."

[18] And S. 9(2) of the Extradition Act provides as follows:

"(2) For the purpose of proceedings under this section a court of committal consisting of a Magistrate shall have the like jurisdiction and powers, as nearly as may be, including power to remand in custody or on bail, as a Magistrate's Court holding a preliminary inquiry."

[19] A Magistrate's Court now holding a preliminary inquiry has to follow the procedure which the Legislature has directed in 2012 to be followed, namely the production of summary of evidence of each witness to be called in the Supreme Court and to decide whether, on those evidence, there is a sufficient case to be committed to the Supreme Court for trial. It leaves no room for raising of any defence and for the introduction of evidence by documents to substantiate such defence, such as was allowed by the Learned magistrate in the present case, especially after he had already found that the record of the case presented (as required by the Extradition Act) was sufficient to commit the accused for trial on both charges.

[20] By allowing the defence of immunity to be raised and to allow the documents relating thereto to be introduced into evidence, and furthermore to consider and to uphold the defence at least on one of the charges, the Learned Magistrate thereby acted as the trial court in

Fiji instead. I do not consider that that is the intention of the Extradition Act.

[21] All that a court of committal is required to do, such as is required by the Amendment in 2012, is to consider whether or not, on the summary of evidence provided there is a sufficient case, that is, a prima facie case to be committed for trial. I have read the record of the case in the present application of the Government of Fiji, and I agree with the Learned Magistrate, that there is a sufficient case, on both charges, to commit the accused for trial on both charges.

[22] I therefore hold that the decision by the Magistrate that the defence of immunity applied in respect of the charge of general dishonesty is wrong and that it is quashed.

No trivial nature in offences charged

[23] The Act provides that where a person is ordered to be returned to another Country for trial for offences of which the Magistrate's Court has found a sufficient case to be tried, the person may, within 15 days, apply to the Supreme Court for habeas corpus, and the Supreme Court may, without prejudice to any other jurisdiction of the Court, order the person to be discharged from the order if it appears to the Court that

- (a) the offence charged is of a political character;
- (b) the request is in fact made because of the race, religion, nationality or political opinion of the accused;
- (c) the accused might be prejudiced by reason of his race, religion, nationality or political opinions;
- (d) the accused had already been tried and convicted or acquitted of the offence charged;

- (e) it would, having regard to all the circumstances, be unjust or oppressive to return him,
 - (i) by reason of the trivial nature of the offence of which he is charged,
 - (ii) by reason of the passage of time since he is alleged to have committed it, or
 - (iii) because the accusation against him is not made in good faith in the interests of justice.

[24] The accused has made his application to this Court for habeas corpus upon the grounds which I have listed in paragraph 16 (a) of this Ruling, namely the immunity, which I have already dealt with, and the trivial nature of the offences with which he has been charged, in view of the financial hardship, domestic upheaval and emotional distress to which he would be subjected if returned to Fiji. He points to his remarkable achievements in Government here in Tonga, and in the local businesses and fisheries, and to the fact that this is not murder or other more serious crime, that it is also in the public interest that a person's right to his private and family life is protected, and that it is also in the public interest that the immunity accorded to international and regional bodies is upheld and enforced.

[25] In other words out of all the seven grounds which I have listed in paragraph 23 above which the Act has specified to order the discharge of a person requested to be returned, the application of the accused is only based on the ground that the two charges are of trivial nature. Yet, the accused points out no reason why he says that the two charges against him are of trivial nature. On the contrary, the amount which he is alleged in the general dishonesty charge to have fraudulently converted comes to a total of \$161,506.66 Fijian dollars, which in itself is a substantial amount. And the total value of the

properties which he is alleged to have stolen in the theft charge is \$17,757.77 Fijian dollars, which is not a small amount either. And what is more serious is that the two offences are said to have been committed against his employer whilst he was holding a position of trust as head of the employer Organisation at the time.

[26] His other grounds and reasons, such as financial hardship, domestic upheaval and emotional distress cannot be argued to be such that the offence of which he is charged thereby become trivial in nature because they do not.

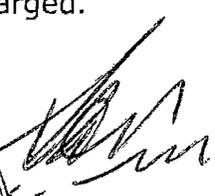
[27] I consider that this Court can only consider whether or not, having regard to all the circumstances, it would be unjust or oppressive to return a person if any one of (a), (b) or (c) of S. 10 (3) appears to be the case. In the case of Afu (AKA Koloamatangi) AC 6 of 2016, S.10 (3) (b) was clearly shown to be the case because of the passage of some 26 years since he was alleged to have committed the murder for which his return to Australia was sought. I do not consider that the case of the accused comes within any of the grounds enumerated in the Act. It would be wrong for this Court to allow any other ground, such as the accused has asked.

Conclusion

28. According, for the foregoing reasons, I dismiss the application of the accused for habeas corpus, and I uphold the appeal of the Crown and I order that the accused is committed to be returned to Fiji to be tried on both the two offences of which he has been charged.

NUKU'ALOFA: 9 May 2020




Niu J
JUDGE