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FIJI WATERSIDE WORKERS & SEAMEN'S UNION & OTHERS

v.

REGINAM

[SUPREME COURT, 1977 (Kermode J.) 10th November]

Appellate Jurisdiction

Trade disputes—whether Trades Disputes Act 1973 in conflict with Fiji Independence Act 1970 and thus void—whether Order of Minister of Labour valid prohibiting continuance of strike and declaring it unlawful—particulars of offence must be stated—Trade Disputes Act 1973 ss.3, 4, 5, 6, 8, 9, 10, 11, 12, 14, 16, 17, 20(1), 33(7), 37—Fiji Independence Act 1970 ss.2, 3, 12, 13,—Interpretation Ordinance 1967 ss.2(1), 21, 22—Criminal Procedure Code (Cap. 14) ss.120, 123(a)(ii), (iii) 123(a)(iv), 204(2), 292(4), 323—State Transport (Co-Ordination) Act 1931—1951 (N.S.W.)—Magistrates Courts Act 1952 (15 & 16 Geo and 1 Eliz. 2, c.55) (Imp) s.100.

Upon appeal against the conviction and sentence of the Fiji Waterside Workers & Seamen's Union for engaging in an illegal strike and of certain of its members and officials for taking part, and encouraging others to take part in an illegal strike thus breaking their contracts of service, it was held:

1. Section 6 and 12(1) of the Trade Disputes Act 1973 were not void as being in conflict with the Fiji Independence Act 1970. The Trade Dispute Act did not give the Minister of Labour unrestricted power to prohibit a strike but only a discretion to declare a strike unlawful in specified circumstances. The provisions, therefore, of the Trade Dispute Act were in the public interest and not unconstitutional.
2. When the Minister made the order declaring the strike unlawful on the 5th July, the dispute had not been referred to a tribunal in accordance with the Trade Disputes Act s.6(4), nor had the Union members been given an opportunity to comply with the order which did not, in fact, become lawful until it was gazetted on July 8th. It was a breach of natural justice to impose penalties on persons who had no means of knowing that they were committing offences under the Act at the same time they committed acts in breach of the law.
3. It was not sufficient to frame the charge as merely counselling members of the Union to break their contracts of service as this reveals no offence. The particulars of the offence must refer to one of the circumstances set out in the Trade Dispute Act s.14(1)(a) & (b).
4. Although the members of the Union by not reporting for work were in breach of their contracts of service and thus had committed an offence under Trade Disputes Act s.14(1), their sentence was reduced to allow their immediate release from prison.

- A** *Per curiam:* There was a patent drafting error in Trade Dispute Act s.11(2) in the words "under this section". No order could be made by the Minister under section 11.

Cases referred to:

- B** *Aladesuru & Ors v. R.* 39 Cr. App. R. 184; [1956] A.C. 49.
Olivier & Anor v. Buttigieg [1966] 2 All E.R. 459; [1967] 1 A.C. 115.
Hughes and Val Pty Ltd. v. State of New South Wales [1955] A.C. 241; [1954] 3 All E.R. 607.
Whitney v. California 274 US 357.
Brandenburg v. State of Ohio 395 US 444.
Francis v. Chief of Police (1970) 15 W.I.R. 1.
Collymore & Abraham v. Attorney-General (1967) 12 W.I.R. 9; [1970] A.C. 538.
- C** *Ujagar Singh & Ors v. D.P.P.* 22 F.L.R.
Lauri v. Renad (1892) 3 Ch. 402.
Woolooma Timber Co. Pty Ltd and Arbitration Act s.7 in re [1969] N.S.W. Rpts 168.
R. v. Dossi 13 Cr. App. R. 158; 34 T.L.R. 498.
D.P.P. v. Solomon Tui
- D** *R. v. West* (1948) 64 T.L.R. 241; [1948] 1 All E.R. 718.
R. v. Barraclough [1906] 1 K.B. 201; 22 T.L.R. 41.
R. v. Thompson [1914] 2 K.B. 99; 9 Cr. App. R. 252.
R. v. Walter (1934) 24 Cr. App. R. 117.

Appeal against conviction and sentence in the Magistrate's Court for offences under the Trade Disputes Act 1973.

- E** *Mr Newman* for the appellants.
R. Lindsay for the respondent.

KERMODE J.: [10th November 1977]—

- F** This is an appeal by the nine appellants against conviction and sentence by the Magistrates' Court Suva on the 6th day of August 1977. A large number of grounds are set out in the petition of appeal. These grounds were amended at the hearing by Mr Newman Q.C. counsel for the appellants.

Objection was taken to these amendments by Mr Lindsay for the Crown. This objection was overruled and I stated at the time I allowed the amendments that I would in my judgment give my reasons for so doing.

- G** Mr Lindsay in a letter to Messrs. Ramrakhas the solicitors for the appellants dated the 30th September 1977, requested further particulars in respect of 33 of the grounds of appeal. Most of these grounds allege the convictions are wrong in law or are against the weight of evidence. The remaining grounds allege that certain sections of the Trade Disputes Act are void as being in conflict with the Fiji Independence Act 1970.

- H** Mr Newman during his address, advised the Court that he would be making available to the court and to Mr Lindsay, a copy of his address from which Mr Lindsay could obtain the particulars Mr Lindsay sought. Mr Newman explained

that due to delay in the mails he had not received Mr Lindsay's letter in time to act on it. He suggested that an adjournment be granted after his address to enable Mr Lindsay to consider it. A

This course was followed.

Mr Newman considered however that the particulars should be incorporated in the grounds of appeal and after completing his address he applied to amend the grounds.

There are 11 grounds which allege the convictions are against the evidence and weight of evidence. B

[3(a), 6(h), 9(h), 12(h), 15(h), 18(g), 21(1), 23(h), 27(i), 30(h), and 33(h).]

Mr Newman has given particulars of all these grounds except 3(a) relating to the first count against the Union. I do not know whether this is an omission or abandonment of this ground. Certainly Mr Newman did not specifically address the court on this ground. C

Mr Lindsay's criticism of these grounds is valid although it is a very common ground in use in Fiji.

The case of *Aladesuru & Others v. R.* 39 Cr. App. R 184 which went to the Privy Council is authority for the proposition that it is not a sufficient ground of appeal to allege that the verdict is against the weight of evidence. D

The head note to this case however appears to go too far where it states:

"There is no ground of appeal known to English law in a criminal appeal that the verdict of judgment 'is against the weight of the evidence'."

Lord Tucker in his judgment in referring to the phrase "against the weight of the evidence" said: E

"It is submitted that the phrase had thus been treated as synonymous with 'unreasonable or which cannot be supported having regard to the evidence'. There can be no doubt that this phrase is inaccurate and is one which cannot properly be substituted for the words of the statute, although it has in one or two cases found its way into the judgments, though always with qualifying language but that does not mean that in a proper case the Court of Appeal will not give leave to appeal or review the evidence if a prima case were shown that the verdict appealed from is one at which no reasonable tribunal could have arrived." F

The words "the decision is unreasonable or cannot be supported having regard to the evidence" are used in section 294(2) of the Criminal Procedure Code. These words should have been used in the 11 grounds I have referred to. The wording used is inaccurate but I do not consider that anyone was misled by this inaccuracy. G

My reason for allowing the amendments was that the amendments did not raise additional grounds but were in the nature of further particulars requested by Mr Lindsay. Had they been additional grounds I would have had to consider section 292(4) of the Criminal Procedure Code.

With so many appellants and so many counts to consider, which have given rise to a very large number of grounds of appeal, it has proved a difficult task to decide how best to deal with this appeal. H

A I propose to incorporate the petition of appeal with the grounds as amended in this judgment, notwithstanding that this will considerably lengthen what will prove to be a very lengthy judgment. A number of grounds are repeated but they can be considered under various headings or issues. Consideration of these issues will either dispose of this appeal, if I find for the appellants, or reduce the number of grounds I have to consider.

B The petition of appeal as amended is as follows:

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Petition of Appeal

TO HER MAJESTY'S SUPREME COURT OF FIJI

C The Petition of THE FIJI WATERSIDE WORKERS & SEAMANS UNION, TANIELA VEITATA, VILIAME TAUFU, ERONI SERUKALOU, SEKIUSA SECAKE, AISEA DRALIA, AMINIASI VOSI, TAUTO RAWAQA and APISAI VERE sheweth:

1. That on the 6th day of August 1977 your Petitioner THE WATERSIDE WORKERS & SEAMANS UNION was convicted by the Magistrate's Court of the first class at Suva of the following offences:

D

*First Count
Statement of Offence*

UNLAWFUL STRIKE: Contrary to Section 12(5) of the Trade Disputes Act, No. 7 of 1973 and Section 37 of the said Act.

Particulars of offence

E

Between the 5th July and the 13th July 1977, at Suva the Fiji Waterside Workers & Sea-man's Union registered under the Trade Union Act, (Cap. 30) continuously engaged in a strike declared to be unlawful by the Minister of Labour on the 5th July 1977, under section 6(4) of the said Act.

F

2. That upon its conviction for the said offence your petitioner was sentenced to a fine of \$500.00. (FIVE HUNDRED DOLLARS).
3. That your petitioner desires to appeal against the said conviction and sentence upon the following grounds:

G

- (a) the conviction was wrong in law
- (b) the learned magistrate should have quashed the charge in that Section 12(5) and/or Section 6(4) of the Trade Disputes Act 1973 are void being in conflict with the Fiji Independence Act 1970
- (c) that in view of the circumstances stated in this court the learned magistrate was wrong in refusing to order further particulars of the act constituting the alleged offence

H

- (d) that the learned magistrate should have held that the complaint was ambiguous and that there was a defect of substance which prejudiced the petitioner and he should have dismissed this charge

- (e) alternatively the conviction was against the evidence, and weight of evidence **A**
 (f) alternatively the penalty was manifestly excessive.
4. That on the 6th day of August 1977 your petitioner TANIELA VEITATA was convicted by the Magistrates' Court of the first class at Suva of the following offences:

*Second Count
Statement of Offence* **B**

COUNSELLED AN UNLAWFUL STRIKE: Contrary to section 12(1) of the Trade Disputes Act, No. 7 of 1973, and section 37 of the said Act.

Particulars of Offence **C**

TANIELA VEITATA, between the 5th July and 13th July 1977, at Suva, counselled members of the Fiji Waterside and Seaman's Union and the Australia and New Zealand Unions to take part in a strike declared by the Minister of Labour to be unlawful under section 6(4) of the said Act on the 5th July 1977.

5. That upon his conviction for the said offence your petitioner was sentenced to 6 months imprisonment. **D**
6. That your petitioner desires to appeal against the said conviction and sentence upon the following grounds:
- (a) The conviction was wrong in law in that **E**
 (1) the Minister of Labour's order was invalid and/or
 (2) as a matter of law Australian and New Zealand Unions could not take part in the strike and/or
 (3) the charge was bad for duplicity
- (b) The learned magistrate should have quashed the charge in that the section 12(1) and/or section 6 of the Trade Disputes Act, 1973 are void being in conflict with the Fiji Independence Act 1970 **F**
- (c) The learned magistrate should have quashed the charge in that the charge did not charge your Petitioner with a matter that in law could constitute an offence provided by section 12(1) of the Trade Disputes Act 1973 **G**
- (d) The charge did not charge your Petitioner with matters which in law were capable upon proper evidence called by the prosecution of constituting an offence provided for by section 12(1) of the Trade Disputes Act 1973 **H**
- (e) That in view of the circumstances stated in this count the learned magistrate was wrong in refusing to order further particulars of the act constituting the alleged offence
- (f) That the learned magistrate should have held that the complaint was ambiguous and that there was a defect of substances which prejudiced the petitioner and he should have dismissed this charge

- (g) The learned magistrate erred in allowing evidence concerning certain cables to be given on behalf of the prosecution upon the grounds that the evidence was inadmissible in that it was improperly obtained and was contrary to the provisions of the Fiji Independence Act and the Telecommunications Act
 - (h) The conviction was against the evidence and weight of the evidence and the learned magistrate should have found,
 - (1) that the Minister of Labour's order was invalid
 - (2) that there was no evidence of counselling an unlawful strike
 - (3) that there was no evidence that any members of the Fiji Waterside Workers & Seamen's Union was in fact counselled as charged
 - (4) that there was no evidence that Australian and New Zealand Unions were counselled as charged
 - (i) Alternatively the penalty was manifestly excessive.
7. That on the 6th day of August 1977 your petitioner TANIELA VEITATA was convicted by the Magistrates Court of the first class at Suva of the following offence:

*Third Count
Statement of Offence*

ENCOURAGED AN UNLAWFUL STRIKE: Contrary to section 12(1) of the Trade Disputes Act, no. 7 of 1973, and section 37 of the said Act.

Particulars of Offence

TANIELA VEITATA, between the 5th July and 13th July, 1977, at Suva encouraged members of the Fiji Waterside Workers and Seamen's Union and Australia and New Zealand Unions to take part in a strike which was declared by the Minister of Labour to be unlawful under section 6(4) of the said Act, on the 5th July 1977.

- 8. That upon his conviction for the said offence your Petitioner was sentenced to 6 months imprisonment.
- 9. That your Petitioner desires to appeal against the said conviction and sentence upon the following grounds:
 - (a) The conviction was wrong in law in that:
 - (1) the Minister of Labour's order was invalid/or
 - (2) as matter of law Australian and New Zealand Unions could not take part in the strike and/or
 - (3) the charge was bad for duplicity.
 - (b) The learned magistrate should have quashed the charge in that section 12(1) and/or section 6 of the Trade Disputes Act, 1973 are void being in conflict with the Fiji Independence Act 1970.
 - (c) The learned magistrate should have quashed the charge in that the charge did not charge your petitioner with a matter that in law could constitute an offence provided by section 12(1) of the Trade Disputes Act 1973.

- (d) The charge did not charge your petitioner with matters which in law were capable upon proper evidence called by the prosecution of constituting an offence provided for by section 12(1) of the Trade Disputes Act 1973. A
 - (e) That in view of the circumstances stated in this count the learned magistrate was wrong in refusing to order further particulars of the act constituting the alleged offence.
 - (f) That the learned magistrate should have held that the complaint was ambiguous and that there was a defect of substance which prejudiced the petitioner and he should have dismissed this charge. B
 - (g) The learned magistrate erred in allowing evidence concerning certain cables to be given on behalf of the prosecution upon the grounds that the evidence was inadmissible in that it was improperly obtained and was contrary to the provisions of the Fiji Independence Act and the Telecommunications Act. C
 - (h) The conviction was against the evidence and weight of the evidence and the learned magistrate should have found:
 - (1) that the Minister of Labour's order was invalid
 - (2) that there was no evidence of encouraging an unlawful strike
 - (3) that there was no evidence that any member of the Fiji Waterside Workers & Seamen's Union was in fact encouraged as charged D
 - (4) that there was no evidence that Australian and New Zealand Unions were encouraged as charged
 - (i) The learned magistrate was wrong in law in that having convicted the petitioner on the 2nd count he should not then have convicted the petitioner on the 3rd count. E
 - (j) Alternatively the penalty was manifestly excessive.
10. That on the 6th day of August 1977 your petitioner TANIELA VEITATA was convicted by the Magistrate's Court of the first class at Suva of the following offence:

*Fourth Count
Statement of Offence*

F

COUNSELLING BREACH OF CONTRACT: Contrary to section 14(2) of the Trade Disputes Act, No. 7 of 1973 and section 37 of the said Act.

Particulars of Offence

G

TANIELA VEITATA, on the 5th July, at Suva counselled members of the Fiji Waterside Workers and Seamen's Union to break their contracts of service.

- 11. That upon his conviction for the said offence your petitioner was sentenced to 6 months imprisonment.
- 12. That your petitioner desires to appeal against the said conviction and sentence upon the following grounds: H
 - (a) The conviction was wrong in law in that:

- A** (1) Section 16 of the Trade Disputes Act being later than section 14, section 16 should prevail so that section 14 was of no effect in law or alternatively that the words breaks his contract of service" in section 14 do not include a strike and/or
- (2) the provisions of section 14 of the Trade Disputes Act when read in conjunction with other sections of the said Act were at least doubtful and that doubt should have been resolved in favour of the liberty of the petitioner and/or
- B** (3) the charge was bad for duplicity
- (b) The learned magistrate should have quashed the charge in that section 14(2) of the Trade Disputes Act, 1973 is void being in conflict with the Fiji Independence Act 1970
- (c) The learned magistrate should have quashed the charge in that the charge did not charge your petitioner with a matter that in law could constitute an offence provided by section 14(2) of the Trade Disputes Act 1973
- C** (d) The charge did not charge your petitioner with matters which in law were capable upon proper evidence called by the prosecution of constituting an offence provided for by section 14(2) of the Trade Disputes Act 1973
- D** (e) That in view of the circumstances stated in this count the learned magistrate was wrong in refusing to order further particulars of the act constituting the alleged offence
- (f) That the learned magistrate should have held that the complaint was ambiguous and that there was a defect of substance which prejudiced the petitioner and he should have dismissed this charge
- E** (g) The learned magistrate was wrong in law in that having convicted the petitioner on either the second or third count he should not then have convicted the petitioner on the fourth count
- (h) The conviction was against the evidence and weight of the evidence in that there was no evidence of any member of the Fiji Waterside Workers and Seamen's Union having heard the petitioner say anything on the 5th July 1977
- F** (i) Alternatively the penalty was manifestly excessive.
13. That on the 6th day of August 1977 your petitioner TANIELA VEITATA was convicted by the Magistrate's Court of the first class at Suva of the following offence:

G *Fifth Count*
Statement of Offence

INFLUENCING BREACH OF CONTRACT: Contrary to section 14(2) of the Trade Disputes Act, No. 7 of 1973 and section 37 of the said Act.

H *Particulars of Offence*

TANIELA VEITATA, on the 5th July 1977 at Suva, influenced members of the Fiji Waterside Workers and Seamen's Union to break their contracts of service.

14. That upon his conviction for the said offence your petitioner was sentenced to 6 months imprisonment. **A**

15. That your petitioner desires to appeal against the said conviction and sentence upon the following grounds:

(a) The conviction was wrong in law in that:

(1) Section 16 of the Trade Disputes Act being later than section 14, section 16 should prevail so that section 14 was of no effect in law or alternatively that the words "breaks his contract of service" in section 14 do not include a strike and/or **B**

(2) the provisions of section 14 of the Trade Disputes Act when read in conjunction with other sections of the said Act were at least doubtful and that doubt should have been resolved in favour of the liberty of the petitioner and/or

(3) the charge was bad for duplicity

(b) The learned magistrate should have quashed the charge in that section 14(2) of the Trade Disputes Act, 1973 is void being in conflict with the Fiji Independence Act 1970 **C**

(c) The learned magistrate should have quashed the charge in that the charge did not charge your petitioner with a matter that in law could constitute an offence provided by section 14(2) of the Trade Disputes Act 1973 **D**

(d) The charge did not charge your petitioner with matters which in law were capable upon proper evidence called by the prosecution of constituting an offence provided for by section 12(1) of the Trade Disputes Act 1973

(e) That in view of the circumstances stated in this count the learned magistrate was wrong in refusing to order further particulars of the act constituting the alleged offence **E**

(f) That the learned magistrate should have held that the complaint was ambiguous and that there was a defect of substance which prejudiced the petitioner and he should have dismissed this charge

(g) The learned magistrate was wrong in law in that having convicted the petitioner on either the 2nd, 3rd or 4th count he should not then have convicted the petitioner on the 5th count **F**

(h) The conviction was against the evidence and weight of the evidence in that there was no evidence of any member of the Fiji Waterside Workers and Seamen's Union having heard the petitioner say anything on the 5th July 1977

(i) The penalty was manifestly excessive.

16. That on the 6th day of August 1977 your petitioner VILIAME TAUFU, ERONI SERUKALOU, SAKIUSA SECAKE, AISEA DRALIA, AMINIASI VOSI, and TAITO RAWAQA were convicted by the Magistrate's Court of the first class at Suva of the following offence. **G**

*Sixth Count
Statement of Offence*

UNLAWFUL STRIKE: Contrary to section 12(4) of the Trade Disputes Act, No. 7 of 1973, and section 37 of the said Act. **H**

Particulars of Offence

- A** VILIAME TAUFU, ERONI SERUKALOU, SAKIUSA SECAKE, AISEA DRALIA, AMINIASI VOSI and TAITO RAWAQA, between the 5th July and 13th July 1977 at Suva refused to continue to work, being work which in terms of their employment as registered permanent dock-workers they were bound to do giving rise to reasonable suspicion that they were taking part in a strike declared to be unlawful by the Minister of Labour on the 5th July 1977.
- B** 17. That upon their conviction for the said offence your petitioners were sentenced to 6 months imprisonment.
18. That your petitioners desire to appeal against the said conviction and sentence upon the following grounds:
- C** (a) The conviction was wrong in law in that:
- (1) the Minister of Labour's order was invalid
- (2) that as a matter of law they were not bound to work
- (b) The learned magistrate should have quashed the charge in that section 12(4) and/or section 6 of the Trade Disputes Act, 1973 are void being in conflict with the Fiji Independence Act 1970
- (c) The learned magistrate should have quashed the charge in that the charge did not charge your petitioner with a matter that in law could constitute an offence provided by section 12(4) of the Trade Disputes Act 1973
- D** (d) The charge did not charge your petitioner with matters which in law were capable upon proper evidence called by the prosecution of constituting an offence provided for by Section 12(4) of the Trade Disputes Act 1973
- E** (e) That in view of the circumstances stated in this count the learned magistrate was wrong in refusing to order further particulars of the said act constituting the alleged offence
- (f) That the learned magistrate should have held that the complaint was ambiguous and that there was a defect of substance which prejudiced the petitioner and he should have dismissed this charge
- F** (g) The conviction was against the evidence and weight of the evidence in that
- (1) there was no evidence that they were bound to work
- (2) there was no proper evidence that the strike was unlawful
- (3) there was no proper evidence that they refused to continue to work as charged or at all
- (h) The penalty was manifestly excessive.
- G** 19. That on the 6th day of August 1977 your petitioner VILIAME TAUFU, ERONI SERUKALOU, SAKIUSA SECAKE, AISEA DRALIA, AMINIASI VOSI and TAITO RAWAQA were convicted by the Magistrate's Court of the first class at Suva of the following offence:

*Seventh Count
Statement of Offence*

- H** BREACH OF CONTRACT: Contrary to section 14(1) of the Trade Disputes Act, No. 7 of 1973 and section 37 of the said Act.

Particulars of Offence

VILIAME TAUFU, ERONI SERUKAULOU, SAKIUSA SECAKE, AISEA DRALIA, AMINIASI VOSI and TAITO RAWAQA, between the 5th July and 13th July 1977, at Suva wilfully broke their contracts of service, knowing or having reasonable cause to believe that the probable consequences of their doing so, in combination with other members of the Fiji Waterside and Seamen's Union and New Zealand and Australian Unions, would be to deprive the public to a great extent of an essential service to wit: Port and Docks services.

20. That upon their conviction for the said offence your petitioners were sentenced to 6 months imprisonment.
21. That your petitioners desire to appeal against the said conviction and sentence upon the following grounds:
 - (a) The conviction was wrong in law in that:
 - (1) section 16 of the Trade Disputes Act being later than section 14, section 16 should prevail so that section 14 was of no effect in law or alternatively that the words breaks his contract of service" in section 14 do not include a strike and/or
 - (2) the provisions of section 14 of the Trade Disputes Act when read in conjunction with other sections of the said Act were at least doubtful and that doubt should have been resolved in favour of the liberty of the petitioner and/or
 - (3) that as a matter of law Australian and New Zealand Unions could not combine as charged and/or
 - (4) the charge was bad for duplicity
 - (b) The learned Magistrate should have quashed the charge in that section 14(1) and/or section 6 of the Trade Disputes Act, 1973 are void being in conflict with the Fiji Independence Act 1970
 - (c) The learned Magistrate should have quashed the charge in that the charge did not charge your petitioners with a matter that in law could constitute an offence provided by section 14(1) of the Trade Disputes Act 1973
 - (d) The charge did not charge your petitioners with matters which in law were capable upon proper evidence called by the prosecution of constituting an offence provided for by section 14(1) of the Trade Disputes Act 1973
 - (e) That in view of the circumstances stated in this count the learned Magistrate was wrong in refusing to order further particulars of the act constituting the alleged offence
 - (f) That the learned magistrate should have held that the complaint was ambiguous and that there was a defect of substance which prejudiced the petitioner and he should have dismissed this charge
 - (g) The learned magistrate erred in allowing evidence concerning certain cables to be given on behalf of the prosecution upon the grounds that the evidence was inadmissible in that it was improperly obtained and was contrary to the provisions of the Fiji Independence Act and the Telecommunications Act

- A** (h) The learned magistrate was wrong in law in that having convicted the petitioners on the 6th count he should not then have convicted the petitioners on the 7th count
- (i) The conviction was against the evidence and weight of the evidence and the learned magistrate should have found
- B** (1) that there was no evidence of combining with Australian and New Zealand Union as alleged
- (2) that there was no evidence that they knew or had reasonable cause to know" the matters alleged in the charge
- (3) that other labour was available to the Fiji Port Authority and by the use of such labour the ports and docks services could have been kept open
- (j) The penalty was manifestly excessive.
- C** 22. That on the 6th day of August 1977 your petitioner APISAI VERE was convicted by the Magistrate's Court of the first class at Suva of the following offence:
- Eighth Count
Statement of Offence*
- D** COUNSELLING AN UNLAWFUL STRIKE: section 12(1) and section 37 of the Trade Disputes Act, No. 7 of 1973
- Particulars of Offence*
- E** APISAI VERE AND MANUELI VASIA, between the 20th June and 13th July 1977 at Suva counselled all members of the Fiji Waterside Workers and Seamen's Union and Australian and New Zealand Unions to take part in a strike declared unlawful by the Minister of Labour under section 6(4) of the said Act on the 5th July 1977.
23. That upon his conviction for the said offence your petitioner was sentenced to 6 months imprisonment.
- F** 24. That your petitioner desires to appeal against the said conviction and sentence upon the following grounds:
- (a) The conviction was wrong in law in that:
- (1) the Minister of Labour's order was invalid and/or
- (2) as a matter of law Australian and New Zealand Unions could not take part in the strike and/or
- (3) the charge was bad for duplicity
- G** (b) The learned magistrate should have quashed the charge in that section 12(1) and/or section 6 of the Trade Disputes Act, 1973 is void being in conflict with the Fiji Independence Act 1970
- (c) The learned magistrate should have quashed the charge in that the charge did not charge your petitioner with a matter that in law could constitute an offence provided by section 12(1) of the Trade Disputes Act 1973
- H** (d) The charge did not charge your petitioner with matters which in law were capable upon proper evidence called by the prosecution of con-
were capable upon proper evidence called by the prosecution of

stituting an offence provided for by section 12(1) of the Trade Disputes Act 1973

- (e) That in view of the circumstances stated in this count the learned magistrate was wrong in refusing to order further particulars of the act constituting the alleged offence **A**
 - (f) That the learned magistrate should have held that the complaint was ambiguous and that there was a defect of substance which prejudiced the petitioner and he should have dismissed this charge **B**
 - (g) The learned magistrate erred in allowing evidence concerning certain cables to be given on behalf of the prosecution upon the grounds that the evidence was inadmissible in that it was improperly obtained and was contrary to the provisions of the Fiji Independence Act and the Telecommunications Act **B**
 - (h) The conviction was against the evidence and weight of the evidence and the learned magistrate should have found **C**
 - (1) that the Minister of Labour's order was invalid
 - (2) that there was no evidence of counselling an unlawful strike **D**
 - (3) that there was no evidence that any member of the Fiji Waterside Workers and Seamen's Union was in fact counselled as charged
 - (4) that there was no evidence that Australian and New Zealand Unions were counselled as charged
 - (i) The penalty was manifestly excessive.
25. That on the 6th day of August 1977 your petitioner APISAI VERE was convicted by the Magistrate's Court of the first class at Suva of the following offence:

*Ninth Count
Statement of Offence*

ENCOURAGEMENT OF AN UNLAWFUL STRIKE: section 12(1) and section 37 of the Trade Disputes Act, 1973

Particulars of Offence

APISAI VERE AND MANUELI VASIA, between the 20th June and 13th July 1977, at Suva encouraged members of the Fiji Waterside Workers and Seamen's Union and Australian and New Zealand Unions to take part in a strike declared unlawful by the Minister of Labour under section 6(4) of the said Act on the 5th July 1977

- 26. That upon their conviction for the said offence your petitioner was sentenced to 6 months imprisonment. **G**
- 27. That your petitioner desires to appeal against the said conviction and sentence upon the following grounds:
 - (a) The conviction was wrong in law in that
 - (1) the Minister of Labour's order was invalid and/or
 - (2) as a matter of law Australian and New Zealand Unions could not take part in the strike and/or
 - (3) the charge was bad for duplicity **H**

- A** (b) The learned magistrate should have quashed the charge in that section 12(1) and/or section 6 of the Trade Disputes Act, 1973 is void being in conflict with the Fiji Independence Act 1970
- (c) The learned magistrate should have quashed the charge in that the charge did not charge your petitioner with a matter that in law could constitute an offence provided by section 12(1) of the Trade Disputes Act 1973
- B** (d) The charge did not charge your petitioner with matters which in law were capable upon proper evidence called by the prosecution of constituting an offence provided for by section 12(1) of the Trade Disputes Act 1973
- (e) That in view of the circumstances stated in this count the learned magistrate was wrong in refusing to order further particulars of the act constituting the alleged offence
- C** (f) That the learned magistrate should have held that the complaint was ambiguous and that there was a defect of substance which prejudiced the petitioner and he should have dismissed this charge.
- (g) The learned magistrate erred in allowing evidence concerning certain cables to be given on behalf of the prosecution upon the grounds that the evidence was inadmissible in that it was improperly obtained and was contrary to the provisions of the Fiji Independence Act and the Telecommunications Act
- D** (h) The learned magistrate was wrong in law in that having convicted the petitioner on the 8th count he should not then have convicted him on the 9th count
- (i) The conviction was against the evidence and weight of the evidence and the learned magistrate should have found
- E** (1) that the Minister of Labour's order was invalid
- (2) that there was no evidence of encouraging an unlawful strike
- (3) that there was no evidence that any member of the Fiji Waterside Workers and Seamen's Union was in fact encouraged as charged
- (4) that there was no evidence that Australian and New Zealand Unions were encouraged as charged
- F** (j) The penalty was manifestly excessive.

*Tenth Count
Statement of Offence*

CAUSING BREACH OF CONTRACT: section 14(2) with section 37 of the Trade Disputes Act No. 7 of 1973

G

Particulars of Offence

APISAI VERE and MANUELI VASIA, between the 15th June and 5th July 1977 at Suva caused members of the Fiji Waterside Workers and Seamen's Union to break their contract of service.

- H** 29. That upon his conviction for the said offence your petitioner was sentenced to 6 months imprisonment.

30. That your petitioner desires to appeal against the said conviction and sentence upon the following grounds:

- (a) The conviction was wrong in law in that
- (1) section 16 of the Trade Disputes Act being later than section 14, section 16 should prevail so that section 14 was of no effect in law or alternatively that the words breaks his contract of service" in section 14 do not include a strike and/or
 - (2) the provisions of section 14 of the Trade Disputes Act when read in conjunction with other sections of the said Act were at least doubtful and that doubt should have been resolved in favour of the liberty of the petitioner and/or
 - (3) the charge was bad for duplicity
- (b) The learned magistrate should have quashed the charge in that section 14(2) of the Trade Disputes Act 1973 is void being in conflict with the Fiji Independence Act 1970
- (c) The learned magistrate should have quashed the charge in that the charge did not charge your petitioner with a matter that in law could constitute an offence provided by section 14(2) of the Trade Disputes Act 1973
- (d) The charge did not charge your petitioner with matters which in law were capable upon proper evidence called by the prosecution of constituting an offence provided for by section 14(2) of the Trade Disputes Act 1973
- (e) That in view of the circumstances stated in this count the learned magistrate was wrong in refusing to order further particulars of the act constituting the alleged offence
- (f) That the learned magistrate should have held that the complaint was ambiguous and that there was a defect of substance which prejudiced the petitioner and he should have dismissed this charge
- (g) The learned magistrate was wrong in law in that having convicted the petitioner on either the 8th or 9th Count he should not then have convicted him on the 10th count
- (h) The conviction was against the evidence and weight of the evidence in that there was no evidence that the petitioner did or said anything to cause members of the Fiji Waterside Workers and Seamen's Union to break their contract of service as charged
- (i) The penalty was manifestly excessive.

31. That on 6th day of August 1977 your petitioner APISAI VERE was convicted by the Magistrate's Court of the first class at Suva of the following offence:

*Eleventh Count
Statement of Offence*

COUNSELLED BREACH OF CONTRACT: section 14(2) with section 37 of the Trade Disputes Act, No. 7 of 1973

Particulars of Offence

A

APISAI VERE and MANUELI VASIA, between the 15th June and 5th July 1977 at Suva, counselled members of the Fiji Waterside Workers and Seamen's Union to break their contracts of service.

B

32. That upon his conviction for the said offence your petitioner was sentenced to 6 months imprisonment

33. That your petitioner desires to appeal against the said conviction and sentence upon the following grounds:

(a) The conviction was wrong in law in that

C

(1) Section 16 of the Trade Disputes Act being later than section 14, section 16 should prevail so that section 14 was of no effect in law or alternatively that the words "breaks his contract of service" in section 14 do not include a strike and/or

(2) the provisions of section 14 of the Trade Disputes Act when read in conjunction with other sections of the said Act were at least doubtful and that doubt should have been resolved in favour of the liberty of the petitioner and/or

D

(3) the charge was bad for duplicity

(b) The learned magistrate should have quashed the charge in that section 14(2) of the said Trade Disputes Act, 1973 is void being in conflict with the Fiji Independence Act 1970

E

(c) The learned magistrate should have quashed the charge in that the charge did not charge your petitioner with a matter that in law could constitute an offence provided by section 14(2) of the Trade Disputes Act 1973

(d) The charge did not charge your petitioner with matters which in law were capable upon proper evidence called by the prosecution of constituting an offence provided for by section 14(2) of the Trade Disputes Act 1973

F

(e) That in view of the circumstances stated in this count the learned Magistrate was wrong in refusing to order further particulars of the act constituting the alleged offence

(f) That the learned magistrate should have held that the complaint was ambiguous and that there was a defect of substance which prejudiced the petitioner and he should have dismissed this charge

G

(g) The learned magistrate was wrong in law in that having convicted the petitioner on the 8th, 9th and 10th counts (or any of them) he should not then have convicted him on the 11th count

H

(h) The conviction was against the evidence and weight of the evidence in that there was no evidence that the petitioner did or said anything to counsel members of the Fiji Waterside Workers and Seamen's Union to break their contract of service as charged

(i) The penalty was manifestly excessive."

I propose to first consider whether sections 12(1) and/or section 6 of the Trade Disputes Act 1973 are void as being in conflict with the Fiji Independence Act 1970 which I will hereafter refer to as the 'Constitution'. This involves six grounds of appeal: A

3(b), 6(b), 9(b), 18(b), 24(b), and 27(b).

Section 2 of the Constitution provides:

"This Constitution is the Supreme Law of Fiji and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency be void." B

Chapter 2 of the Constitution is, as Mr Newman stated, in the nature of a bill of rights and the general aims of this chapter are set out in section 3 which reads as follows:

"3. Whereas every person in Fiji is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: C

(a) life, liberty, security of the person and the protection of the law; D

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest." E

Notwithstanding that section 3 starts with the word "Whereas", which is more appropriate to a preamble than to a substantive section, I agree with the views expressed by both counsel that section 3 must be given full force and effect. F

In *Olivier and Another v. Buttigieg* [1966] 2 All E.R. 459 the Privy Council considered section 5 of the Malta Constitution which is identical to section 3 of the Fiji Constitution. Lord Morris of Borth-Y-Gest stated at page 461:

"It is to be noted that section begins with the word "Whereas". Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement—coupled however with a declaration that though "every person in Malta" is entitled to the "fundamental rights and freedoms of the individual" as specified, yet such entitlement is "subject to respect for the rights and freedoms of others and for the public interest". The section appears to proceed by way of explanation of the scheme of the succeeding sections. The provisions of Part 2 are to have effect for the purpose of protecting the fundamental rights and G H

- A freedoms, but the section proceeds to explain that, since even those rights and freedoms must be subject to the rights and freedoms of others and to the public interest, it will be found that in the particular succeeding sections which give protection for the fundamental rights and freedoms there will be "such limitations of that protection as are contained in those provisions". Further words, which again are explanatory, are added. It is explained what the nature of the limitations will be found to be. They will be limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."
- B

I agree with Mr Newman's submission as regards section 3 when he stated:

- C "The effect in my submission, is that none of the subsequent limitations upon the freedoms guaranteed can be applied or understood in a sense which goes beyond ensuring that the exercise of the protected rights and freedoms does not prejudice the rights and freedoms of others or the public interest."

Mr Newman's argument is that section 12(1) of the Trade Disputes Act is invalid by reasons of section 12 or 13 of the Constitution.

- D Section 12(1) of the Trade Disputes Act reads as follows:

"12.(1) Any person who in connection with any strike, lock out or boycott declared under the provisions of this Act to be unlawful, causes or procures or counsels or in any way encourages, persuades or influences others to take part in any such strike, lock out or boycott shall be guilty of an offence."

- E Sections 12 and 13 of the Constitution read as follows:

"12.(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

- F (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

- G (a) in the interests of defence, public safety, public order, public morality or public health;
- (b) for the purpose of protecting the reputations, rights or freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or
- H (c) for the imposition of restrictions upon public officers, except so far as that provision or, as the case may be, the thing done

under the authority thereof is shown not to be reasonably justifiable in a democratic society.

13.(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) in the interest of defence, public safety, public order, public morality or public health;

(b) for the purpose of protecting the rights or freedoms of other persons; or

(c) for the imposition of restrictions upon public officers, except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

Mr Newman argues that for a person to counsel somebody else to engage in a strike would be exercising the right given by section 12 to hold opinions and to receive and impart ideas. He further argues that no part of section 12(1) of the Trade Disputes Act in any way falls within subsection 2 of section 12 of the Constitution and in any event such a provision is not reasonably justifiable in a democratic society.

Mr Newman referred to a number of cases in support of his argument that a strike is not unlawful at common law which I shall not cite as it is a well established proposition. Leading from this, however, is the question of whether a law which gives a Minister authority to declare a strike unlawful is a constitutional. Mr Newman contended that law which commits to the arbitrary discretion of a Minister a power to declare a strike unlawful with the consequential curtailment of freedom to encourage that strike is not consistent with the freedom of speech which section 12 of the Constitution guarantees. He quoted *Hughes and Vale Pty. Ltd. v. State of New South Wales* [1955] A.C. 241.

This case is distinguishable. It was concerned with the provisions of the State Transport (Co-Ordination) Act 1931–1951 of the State of New South Wales requiring application to be made for a licence which may be granted or refused by an official of the executive in his uncontrolled discretion. It was held this legislation was invalid as contravening section 92 of the Constitution of the Commonwealth of Australia which provides that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation shall be absolutely free”.

The Fiji Constitution does not give freedom to strike nor does it prohibit strikes. Nor does the Trade Disputes Act make strikes illegal. What the Act seeks to do is “to make provision for the settlement of trade disputes and the regulation of industrial relations”. There is a difference between prohibiting and regulating

strikes and *Hughes and Vale Pty. Ltd.*'s case cites many instances of regulating
 A legislation as regards inter state transport which do not infringe section 92 of the Australian Constitution.

The Trade Disputes Act does not give the Minister unrestricted power to declare any strike illegal, but it does give him a discretion to declare a strike unlawful in specified circumstances.

B Under section 6(4) the Minister may by order prohibit the continuance of a strike and declare it unlawful where the trade dispute has been referred to conciliation or to a tribunal. It is to be noted that the Minister can only act after the trade dispute has been so referred. He cannot prohibit the strike but only the continuation of it.

C Under section 8 of the Act, where there is an actual or declared strike, if the Minister is satisfied that all practical means of reaching a settlement of the dispute through the procedure laid down in the registered agreement or the procedure under the provisions of the Act have not been exhausted he may declare the strike to be unlawful.

D Under section 9 the Minister may also declare a strike unlawful where a dispute has been settled by agreement or by the terms of an award. (Section 10 of the Act which permits the Minister to declare sympathy and other strikes unlawful has not been brought into force).

E Thus the Minister's discretion is not unfettered, but is confined to instances where there is machinery to settle the dispute to which recourse should be had, or where the dispute has been settled. In my view this is in the public interest, and I find nothing unconstitutional in the provisions of the Act which provide for the Minister to declare a strike unlawful in such circumstances.

There remains the question whether section 12(1) of the Act is void, as submitted by Mr Newman.

F In my view this submission can be disposed of by the axiom that, if a course of action is unlawful, it is legitimate for sanctions to be imposed on persons who induce others to take part in an unlawful action. I have held that the Minister may declare a strike unlawful, from which it follows that provision may be made for penalties to be imposed on those who wilfully act in furtherance of a strike declared to be unlawful. However *ex abundante cautela*, I shall deal with points raised by Mr Newman.

G Mr Newman contends that section 12(1) of the Act infringes a person's right to freedom of expression. He referred to a number of United States decisions relating to the First Amendment of the United States Constitution and he contended that section 12 of the Fiji Constitution was derived from the First Amendment. The First Amendment (1791) reads:

H "Congress shall make no law respecting an establishment or religion or prohibiting the full exercise thereof; or abridging the freedom of speech or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."

Mr Newman referred to the case of *Whitney v. California* 274 US 357. This case was overruled by the U.S. Supreme Court in *Brandenburg v. State of Ohio* 395 US

444 where it was held that the constitutional guarantees of free speech and free press did not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy was directed to inciting or producing imminent lawless action and was likely to incite or produce such action. A

The legislation attacked in *Brandenburg's* case was one which by its own words and as applied purported to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. B

The Trade Disputes Act section 12 is not in the same category as the US legislation referred to. The section is confined to actions by a person to (*inter alia*) influence others to participate in a strike already declared unlawful.

In *Brandenburg's* case there are dicta which indicate that "free speech" does not mean absolute freedom to say what a person likes when he likes. At page 431 appears this passage: C

"For the purposes of determining whether constitutional guarantees of free speech and free press are violated, the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action and a statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments....." D

Section 12(1) of the Trade Disputes Act does not forbid a person "to hold opinions and to receive and impart ideas and information without interference" as referred to in section 12 of the Constitution. What it does prohibit is the active causing, procuring, counselling, encouraging, persuading or influencing others to participate in a strike declared unlawful. It is one thing to have freedom of expression but quite another thing to use that freedom to get others to take part in an unlawful strike. E

In *Francis v. Chief of Police* [1970] 15 W.I.R. 1 the Court of Appeal of the West Indies Associated States dealt with a case which considered whether an enactment violated rights of freedom of expression or assembly. Sections 10 and 11 of the Saint Christopher, Nevis and Anguilla Constitution Order 1967 are identical to sections 12 and 13 of the Fiji Constitution. F

Gordon C. J. stated in that case that all rights and freedoms to which persons in a democratic society are entitled must be limited to the extent that they do not interfere with rights and freedoms of others. He quoted the dictum of Wooding C. J. in *Collymore and Abraham v. Attorney General* (1967) 12 W.I.R. at p. 9: G

"My first observation is that individual freedom in any community is never absolute. No person in an ordered society can be free to be anti-social. For the protection of his own freedom everyone must pay due regard to the conflicting rights and freedoms of others. If not, freedom will become lawless and end in anarchy. Consequently, it is and has in every ordered society always been the function of the law so to regulate the conduct of human affairs as to balance the competing rights and freedoms of those who comprise the society." H

Cecil Lewis J. A. stated in that case:

- A ".... the fundamental rights and freedoms specified therein while they are protected by the Constitution are nevertheless subject to the limitation that their enjoyment should not prejudice the rights and freedoms of others or the public interest."

- B *Collymore's* case was a case which went to the Privy Council (1969) 15 W.I.R. 229 and the issue was whether a statute was *ultra vires* the Constitution of Trinidad and Tobago. The statute introduced compulsory arbitration and prohibited the calling of a strike in contravention of its provisions. It was held that the Act abridged the freedom to bargain collectively and the freedom to strike; but that neither of those freedoms could be equated with the freedom of association and assembly which merely connotes the right of persons to associate or assemble and does not include the purposes for which they associate or the objects which in association they pursue. Lord Donovan quoted an extract from Wooding C. J.'s judgment:

- D "In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country."

- E Mr Newman argued that section 12(1) of the Trade Disputes Act cannot be said to be a law which makes provision in any way covered by subsection (2) of section 12 of the Constitution. He contended that section 12(1) could not be said to be in the interests of defence, public safety, public order, public morality or public health (section 12(2)(a) of the Constitution).

- F If the section is not in the interests of public order, and I incline to the view that it is, it is a provision enacted for the purpose of protecting the rights or freedoms of others as provided in subsection (2)(b) of section 12 of the Constitution. In the Fiji context there can be few major strikes which do not adversely affect the general public. In the instant case the commercial public have the right or freedom to engage in trade or commerce. A refusal to work the ships interferes with the right or freedom.

- G Of more significance however is the wording of section 3 of the Constitution to which section the other sections of Chapter II are subordinate. I interpret subsection (2) of both sections 12 and 13 as specifying limitations on subsections (1) in both sections but not necessarily all the limitations. There still has to be taken into consideration the overriding final words of section 3:

- H ".... being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

I have underlined the words "the public interest".

There is no express reference to "the public interest" in subsections (2) of sections 12 and 13. While the limitations specified are in the public interest I do not consider the omission of any specific reference to "public interest" in the subsections to be exclusionary, as effect must be given to the operative provisions of section 3 where the words "the public interest" are used twice. A

Since sections 12 and 13 were, as section 3 states, designed to ensure that the public interest is not prejudiced by the enjoyment of individual rights and freedoms, the sections must be interpreted so as to protect the public interest. B

As I have already stated there can be few major strikes in Fiji which do not affect adversely the public. In a democratic society the general public have the right and freedom to work, to travel, to the amenities of life, to trade and to essential services to mention only a few of such rights; and legislation which seeks to protect such rights is clearly in the public interest.

The Trade Disputes Act does not prohibit strikes but it does seek to regulate the right to strike in the interests of the public. There is no freedom to strike provided by the Constitution. It is a right recognised by common law. No authority has been quoted to me which holds that the legislature cannot enact legislation which regulates that right to strike. A government which failed to regulate strikes which could adversely affect national or public interests would be failing in its duty to protect the rights and freedoms which the public are entitled to enjoy and exercise in a democratic society. C D

In *Collymore's* case where an enactment which prohibited strikes was considered by the Privy Council it was not held that such enactment as regards prohibition of strikes was unconstitutional.

The Trade Disputes Act recognises the right to strike but only if the procedure laid down is followed. If that procedure is not followed then a strike can be declared unlawful. E

There is no doubt in my mind that the provisions of the Trade Disputes Act are in the public interest and are not unconstitutional. The appeal on grounds 3(b), 6(b), 9(b), 18(b), 24(b), and 27(b) accordingly fails.

I have decided to consider counts 1, 2, 3, 6, 8 and 9 which all arise out of the alleged unlawful strike. This involves consideration of grounds 6(a), 6(h), 9(a), 9(h), 18(a), 24(a), 24(h), 27(a) and 27(i). While some of the other grounds overlap it is sufficient at this stage to deal only with the grounds stated above. F

The first matter to consider is whether the Minister's Order made under section 6(4) of the Trade Disputes Act is valid. If it is invalid then the convictions on the counts I have mentioned above are wrong in law. In *Ujagar Singh and Others v. D.P.P.* 22 F.L.R. the Court of Appeal stated it was not necessary for the prosecution to call evidence to establish the validity of the order of the Minister made under section 8 of the Trade Disputes Act 1973. It is *prima facie* valid. However it is open to the appellants to challenge the validity of the Minister's Order in the instant case in view of the evidence disclosed by the Record. G

Sections 4 and 6 of the Act contain various provisions enabling the Permanent Secretary and the Minister to refer a trade dispute to conciliation or to a tribunal; subsection 4 of section 6 vests the following power in the Minister: H

- A "6(4) Where a trade dispute has been referred to a Tribunal or to conciliation under this Act, the Minister may by order prohibit the continuance of and declare unlawful any strike or lock out in connection with such dispute which may be in existence on the date of the reference."

- B Thus, the trade dispute must have been referred to a tribunal or to conciliation, and there must be a strike in existence on the date of reference, before the Minister can act under this subsection; and his authority is limited to making an order prohibiting continuance of the strike and declaring it unlawful.

- C The facts in the instant case are that, some time between 7 and 8 a.m. on the 5th July 1977, union members stopped work at the Suva and Lautoka ports. The evidence of Mr Satyanand, the Permanent Secretary for Ministry of Labour, indicates he consulted the Minister on the morning of that day and it was decided to refer the dispute to a tribunal. The Minister appointed Mr Kapadia to be the tribunal and signed an order prohibiting the continuance of the strike and declaring the strike unlawful. This order was signed by the Minister between 9-10 a.m. on the 5th July 1977 and was published in the *Fiji Royal Gazette* on 8th July 1977 together with notice of Mr Kapadia's appointment and reference to the tribunal. All three notices are dated the 5th July 1977.

- D It is clear from the evidence that the Minister authorised the Permanent Secretary to refer the dispute to a tribunal, appointed the tribunal, and prohibited the strike and declared it unlawful, at about the same time.

The Minister's Order reads as follows:

- E "In exercise of the powers conferred upon me by subsection (4) of section 6 of the Trade Disputes Act, 1973, a trade dispute between the Fiji Waterside Workers and Seaman's Union and Ports Authority of Fiji having been referred to a Tribunal, I hereby order that with effect from the 5th day of July 1977 the continuance of the strike in connection with such dispute be prohibited and I declare such strike to be unlawful.

- F And I further order under the provisions of subsection (2) of section 11 of the said Act that this Order be published by being broadcast over the services of the Fiji Broadcasting Commission or by publication in the *Fiji Times* or in the *Fiji Sun*."

- G There was no notice to the Union or its members before the strike was declared unlawful, that the dispute had been referred to a tribunal, so as to give Union members the opportunity of going back to work with knowledge that the dispute had been referred to arbitration and so avoid the penal provisions of section 12(4) of the Act; and in my view the Minister acted prematurely in making the order prohibiting the continuance of the strike and declaring it unlawful on the morning of the 5th July 1977.

Section 11 of the Act which is referred to in the Minister's Order reads as follows:

- H "11.(1) Any order made by the Minister under this Part of this Act shall come into force on the day following the day on which it is made unless otherwise specified.

(2) The Minister shall, for the purpose of bringing any order made by him under this section to the attention of the persons affected thereby as soon as practicable after the order has been made, publish such order in such manner as he sees fit." A

There is a patent drafting error in subsection (2) in the words "under this section". No order can be made by the Minister under section 11. An order would have to be made under sections 8 or 9 or, when section 10 is operative, under that section. The words should have been, in my view "under this Part of this Act" as in subsection 1. B

Section 11 is specific and has reference only to an order made under Part III of the Act. It can have no reference to the Minister's Order in this case, which was made under section 6(4) in Part II of the Act, in respect of which there are no provisions specifying when it shall come into force or regulating its publication. C

However, section 11(1) of the Act, which makes an order to which it applies effective on the day following the day it is made, indicates that Union members should be given an opportunity to comply with the order before they are in breach of the law. D

Further, the order is expressed to take "effect from the 5th day of July 1977" that is to say from mid-night on the 4th July 1977 before the strike had occurred and before a tribunal had been appointed. E

Since section 11 of the Act has no application to section 6(4) recourse must be had to the Interpretation Ordinance to determine whether and in what manner the order made by the Minister under section 6(4) should be published and whether the order can have retrospective effect. The Interpretation Ordinance also has application so far as the effective date of appointment of the Tribunal is concerned. F

Section 2(1) of the Interpretation Ordinance defines "subsidiary legislation" as: "Any legislative provision (including an appointment of any person or a transfer or delegation of powers or duties) made in exercise of any power in that behalf conferred by any written law by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument;" G

In the instant case, the appointment of a tribunal made by the Minister on the 5th July 1977 under section 20(1) of the Act and the order made by him under section 6(4) of the Act prohibiting continuation of the strike and declaring it unlawful both fall within the definition of "subsidiary legislation". Notice of the appointment and the order were published in the *Fiji Royal Gazette* on the 8th July 1977. H

Section 21 of the Interpretation Ordinance provides as follows:

"All subsidiary legislation shall be published in the *Gazette*, shall be judicially noticed and shall come into operation on the day of such publication, or, if it is enacted either in the subsidiary legislation or in some other written law that such subsidiary legislation shall come into operation on some other day then, it shall come into operation accordingly."

By virtue of section 21 the appointment and order made by the Minister either came into operation on the day of publication in the *Fiji Royal Gazette* or if the appointment and order specifies some other day, then they came into operation on that day.

A The appointment made by the Minister of a Tribunal dated the 5th day of July 1977 does not specify the date of appointment within the body of the notice although the notice of the appointment is dated 5th July 1977. The appointment did not in my view become effective until the 8th July 1977, the date the notice of appointment was gazetted. If I am correct in this view it follows that the trade dispute could not have been referred to the Tribunal on the 5th July 1977 when the Minister purported to make an order under section 6(4) of the Act.

B If I am wrong in my view that the appointment of a Tribunal is subsidiary legislation or that the appointment did not take effect until it was gazetted the order made by the Minister prohibiting continuation of the strike and declaring it unlawful must still be considered. This Order did specify that it was to take effect from the 5th day of July 1977.

C Section 21 of the Interpretation Ordinance would enable an order to be made with retrospective effect if the provisions of the Act under which the order was made could be construed so as to permit of such an order being made.

D I do not consider section 6(4) of the Act empowers the Minister to make an order declaring the strike unlawful from the time it commenced. At the time he makes the order the strike is in existence and the Minister's powers are limited to prohibiting continuance of that strike and declaring it unlawful. On that order being made the strike by virtue of such order becomes unlawful. There would have to be clear language in section 6(4) indicating the intention of the legislature to give the Minister power to make an order with retrospective effect.

In *Lauri v. Renad* (1892) 3 Ch. 402, 421 Lindley L. J. said:

E "It is a fundamental rule of English Law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly requires such a construction."

If I am wrong then section 22 of the Interpretation Ordinance must also be considered. It reads as follows:

F "Any subsidiary legislation may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which such subsidiary legislation is made, but so, however, that no person shall be made or become liable to any penalty whatsoever in respect of any act committed or of the failure to do anything before the day on which such subsidiary legislation is published in the Gazette.

G I have pointed out that, as worded, this order had retrospective effect. Quite apart from the fact that the Minister is not empowered by the Act to declare a strike unlawful before it has occurred, if the order is considered effective to retrospectively declare a strike unlawful from the moment it commenced, section 22 of the Interpretation Ordinance would in any event not make the appellants involved in the unlawful strike liable to any penalty in respect of the alleged offences arising out of that unlawful strike for any act committed by them before the 8th July 1977 when the order was gazetted.

H Section 22 of the Interpretation Ordinance and indeed section 11 of the Trade Disputes Act gives statutory expression to the principles of natural justice. It would clearly be unjust to impose penalties on persons who could have had no possible

means of knowing that they were committing an offence under the Act at the time they committed acts in breach of the law.

When Taniela Veitata addressed the dockworkers on the morning of the 5th July 1977 and when the dockworkers went on strike, the strike had not in fact been declared unlawful. In any event Veitata and the striking dockworkers could not be held liable for any acts committed before the 8th July 1977 when the order was gazetted.

There is still another aspect of the Minister's Order to be considered. Had the dispute in fact "been referred" to a tribunal when he made the order? If the appointment was subsidiary legislation then as I have stated it was not effective until 8th July 1977. There is however the factual position to consider.

There is evidence that the Minister authorised the Permanent Secretary to refer the dispute to a Tribunal but no evidence that it was in fact referred to Mr Kapadia on the 5th July 1977. The sequence of events related in evidence by the Permanent Secretary would appear to indicate that the order was signed before the Permanent Secretary settled the terms of reference and referred the dispute to the Tribunal.

The Minister's authorisation to the Permanent Secretary to refer the dispute is not a reference to the Tribunal. The Permanent Secretary must refer the dispute. The mere preparation of a reference to a tribunal is not evidence that "a trade dispute has been referred for a tribunal", within the meaning of those words in section 6(4) of the Act. Nor is the appointment of a Tribunal a reference to the Tribunal. Section 6(4) states "where a trade dispute has been referred to a tribunal."

In re Woolooma Timber Company Pty Ltd and Section 7 of the Arbitration Act (1969) 1 N.S.W. Reports 168 which considered whether a matter had been referred to arbitration. Nagle J. at page 170 said:

"The applicant's argument that the reference to arbitration is completed as soon as the parties agree to arbitrate and this does not require agreement as to the arbitrator or arbitrators or the precise terms of reference does not seem to me to do justice to the express words used in condition 12. What is there described is a reference to arbitration and not an agreement arrived at to arbitrate. It should be further noted that the clause cannot mean that a request to arbitrate is sufficient for the condition speaks in the past tense of something having been referred to arbitration and if it were meant that a mere request for arbitration was enough then one would expect some such specific words to have been included in the condition."

It was held in that case that there had been no reference to arbitration.

On the facts as appear in the record, when the Minister made his order declaring the strike unlawful the dispute had not in fact been referred to a tribunal and the Minister was not empowered by section 6(4) to make the order.

Mr Newman raised a number of other issues relating to the same counts which it is not now necessary to consider, but I propose to deal with the most important of them.

The second, third, eighth and ninth counts relate to counselling and encouraging an unlawful strike. The particulars of the second and third counts allege the offences were committed between the 5th and 13th July 1977.

The eighth and ninth counts allege the offences were committed between the
 A 20th June and 13th July 1977.

In respect of the first two of these counts, the evidence indicates that the second appellant addressed a number of dockworkers before the strike began on the 5th July 1977.

There is no doubt that the second appellant when addressing dockworkers that morning counselled or encouraged the strike which did take place. In so doing he
 B may have committed an offence under section 14(2) of the Act, a matter I have later to consider, but did he commit an offence under section 12(1) of the Act?

At the time he addressed the men the strike had not been declared unlawful. For there to be an offence under section 12(1) of the Act the strike must have been declared unlawful by an order of the Minister. As I am of the opinion that the
 C Minister cannot legally make an order with retrospective effect the factual position was that the strike had not been declared unlawful at that point of time. It may be that the strike was unlawful in the sense of a breach of contract on the part of the strikers vis-a-vis the employer but section 12(1) of the Act is concerned with a strike "declared unlawful" under the provisions of the Act and with criminal as distinct from civil liability.

Further, the subsection refers to counselling "others" to take part in the strike and the prosecutor's interpretation of this subsection led to the amendment during the trial of a number of counts by adding the words "and the Australian and New Zealand Unions" in the particulars of the offences. Mr Newman submitted that the subsection when referring to "others" is confined to others capable of taking part in the strike, and I uphold this submission.

From the definition of "strike" in section 2 of the Act it is clear that a strike is concerned with a body of employees and the employer of those employees. Section 12(1) refers to "take part in a strike", not "to support a strike" such as a sympathy strike by another union. Quite apart from the fact that the Australian and New Zealand Unions, which are not specified in the particulars, are outside the jurisdiction of the Court, members of such unions not being employed by the Ports Authority of Fiji cannot "take part in the strike". All they can do is give moral or financial
 F support

Section 12(1) in my view is intended to cover the situation where employees who are not engaged in an unlawful strike by fellow employees are encouraged or counselled to join the strike. In my view it is no offence under section 12(1) of the Act to cause, procure, counsel, encourage, persuade or influence persons other than those who can participate in a strike to assist the strikers in any way. Whatever
 G action the Australian and New Zealand Unions might take, and in the instant case it could and did have serious consequences for Fiji, the members of those unions are not subject to the laws of Fiji for acts done outside Fiji. Nor would another Fiji union which went on strike in sympathy be committing any offence unless and until section 10 is brought into operation. The members of that union would be taking part in their own strike but not in the unlawful strike of the other union.

If section 12(1) had the wider interpretation sought by the prosecution, striking members of other unions would commit offences under section 12(4) of the Act if they ceased work in sympathy with the unlawful strike—in which case there would have been little need for section 10.

Mr Newman also submitted that as the particulars of some counts refer to the dates "5th July to 13th July 1977" without including both dates, the prosecution had to establish that the offence was committed between 6th and 12th July 1977 both dates inclusive, and that what occurred on the 5th July 1977 was at a time outside the particulars alleged. The date however in this instance is not material. Atkins J. in *R. v. Dossi* 13 Cr. App. R. 154 said:

"From time immemorial a date specified in an indictment has never been a material matter unless it was actually an essential part of the alleged offence."

Further, section 204(2) of the Criminal Procedure Code makes amendment of charges unnecessary if there is a discrepancy between the date on the charge and that established by the evidence.

As I am of the opinion that the Minister's order was invalid, being *ultra vires* the enabling subsection and purporting to operate retrospectively, it follows that the strike of the 5th July 1977 had not been declared unlawful when the counselling and encouragement of that strike occurred.

I accordingly allow the appeal against conviction on counts 1, 2, 3, 6, 8 and 9 which all relate to an unlawful strike.

The conviction of the first appellant on the first count is quashed and the sentence set aside. As my understanding is that the Union has been deregistered the fine if paid is to be repaid to the person entitled to the property of a deregistered Union.

The conviction of the second appellant on the second and third counts is quashed and the sentences set aside.

The convictions of the third to eighth appellants both inclusive on the sixth count are quashed and the sentences set aside.

The conviction of the ninth appellant on the eighth and ninth counts is quashed and the sentences set aside.

There remains the fourth, fifth, seventh, tenth and eleventh counts to consider. These all relate to offences under section 14 of the Trade Disputes Act.

Grounds of appeal 12(b), 15(b), 21(b), 30(b) and 33(b) in respect of these five counts all allege that section 14(1) or (2) is void as being in conflict with the Constitution.

I have already dealt at length with the constitutional position, and for the reasons given I hold that section 14 is not void as being in conflict with the Constitution. The appeal on these five grounds fail.

The other grounds of appeal are similar in respect of each of the five counts except that there is an extra ground as regards the seventh count alleging that the trial magistrate erred in admitting evidence concerning certain cables.

It is convenient to first consider the fourth, fifth, tenth and eleventh counts all laid under section 14(2) of the Act.

In dealing with grounds 12(c) and 12(d) relating to the fourth count, which are identical with grounds in the fifth, tenth and eleventh counts, Mr Newman put forward an argument that section 16 of the Act nullified section 14.

- A He first argued that section 16 was in conflict with section 3 in that section 3 states that a trade dispute "may" be reported whereas section 16 states that a trade dispute "shall" be reported "in accordance with the provisions of section 3 of this Act".

- B In my view there is no conflict between the two sections. Section 3(1) is of general application and relates to any trade dispute existing or apprehended. Subsection (2) of this section sets out the matters to be specified in a report. Section 3 is not concerned with a strike but a trade dispute and is intended to provide a procedure for settling a dispute.

- C Section 16 on the other hand is directly concerned with persons employed in or in control of essential services where a strike or lockout is contemplated in pursuance of a trade dispute. Where section 16 has application it is mandatory to report the trade dispute to the Permanent Secretary "in accordance with the provisions of section 3 of this Act."

The provisions of section 3 which have to be complied with are subsections (2) and (3) of section 3. Subsection (1) is clearly a declaratory and permissive provision and is replaced by 16(1)(a) which is mandatory where a strike in an essential service is contemplated.

- D Subsections (b) to (e) inclusive of section 16 are not in conflict with subsections (2) and (3) of section 3 but they go further and refer also to a strike a matter not within the ambit of section 3.

- E The basic difference between sections 3 and 16 is that section 3 does not seek to prevent a strike or delay it. The combined effect of sections 16 and 17 however is designed to delay a strike until the procedure set out in section 16 has been complied with and until 28 days after notice of the strike has been accepted by the Permanent Secretary has elapsed.

Mr Newman also referred to sections 4, 5 and 6 at some length and contended that the combined effects of these sections is that a strike is permissible in an essential service. I would agree that there is nothing in sections 4, 5 and 6, which refer only to a trade dispute, that would prohibit a strike in an essential service.

- F Nor does section 16 prohibit a strike, but the combined effect of sections 16 and 17 would make it an offence under section 14, if there was a strike involving the breaking of employees' contracts of service with the probable consequences referred to in subsection (1) of section 14, and if section 16 has not been complied with and the 28 days referred to in section 17 have not elapsed.

- G Subject only to elapse of the 28 days referred to in section 17 and prior compliance with section 16, I entirely agree with Mr Newman's contention that a strike in an essential service is permissible and remains so until such time, if ever, that the Minister makes a lawful order in accordance with the powers vested in him.

- H Mr Newman's second argument on this issue is that section 16 nullifies section 14. As I understand his argument if breaking a contract of service referred to in section 14 is synonymous with a strike or embraces a strike then the sections are repugnant and the later section 16 must prevail and section 14 falls. He stated in his address:

"There would be little point in having the mechanics of section 16 and recognising the right to strike if section 14 still produce the results claimed for it."

That is if section 14 prohibits strikes.

This argument misses the point that section 14 does not prohibit a strike nor does the breaking of a contract of service necessarily arise out of a strike. A single employee can be guilty of an offence if he breaks his contract of service with the probable results that section 14 refers to. There could be more than one employee who broke his contract in circumstances where a strike did not arise. A strike involving cessation of work would result in breaches of contract and section 14 would apply, not because of the strike, but because of those breaches if those breaches had the consequences I have referred to. Section 16 does not prevent breaches of contract. All that section 16 and section 17 do is to delay such breaches if they arise out of a strike. If the procedure has been followed and the 28 days referred to in section 17 have elapsed an employee may with impunity cease work and thereby break his contract. In other words he can then fully participate in a strike.

If however the dispute is settled by agreement or arbitration, and the employees still strike, and the Minister properly declares the strike unlawful, the employees could then be guilty of offences under section 12(4) if they refused to work. The ultimate result, if the law is complied with, is that the strike is at an end if the dispute is not settled by that stage; but the right to strike is not prohibited either by sections 14 or 16.

Mr Newman further argued that the only allegation against the appellants was in relation to the strike and that one must construe the breach of contract of service as something quite different from failure to turn up for work.

I cannot accept this argument. If the breach was wilful, that is if there was no valid excuse for cessation of work such as illness or accident for example, then the failure to turn up to work is *prima facie* a breach of the contract of service.

One of the elements of a strike as defined by section 2 of the Act is the cessation of work. If the appellants who went on strike were found to have gone on strike in the period alleged, that would involve a cessation of work and breach of their contracts of service unless they gave an acceptable explanation for their absence from work. In the instant case the appellants who went on strike did not offer any explanation.

Mr Newman criticised the Permanent Secretary's rejection of the Union's report which was given on the 17th May 1977 and belatedly accepted on the 21st June 1977. Although the Union attempted to comply with section 16 of the Act, the notice was clearly defective, and rightly rejected by the Permanent Secretary.

The notice stated the strike would be carried out in two stages. The main strike was set for July 1, 1977 but as forerunner there was to be a stop work in all five ports of Fiji "soon after the expiry of the 28 days notice". This does not specify the date as required by section 16 and under that section the report is "deemed not to have been made".

The 28 days referred to in section 17 is not 28 days after the date of the report as the Union apparently believed but 28 days after the notice is accepted, not received, by the Permanent Secretary. The date of receipt and acceptance may be the same but not necessarily so; as for example in the instant case where, after seeking clarification, the Permanent Secretary accepted it some weeks later.

A Even if the Permanent Secretary had wrongfully rejected the report this would not have assisted the appellants. The strike on 5th July 1977 did not take place "soon after the expiry of the notice" nor on 1st July 1977; so that section 16(2) which provides that where the strike "does not take place *on the date* it is contemplated the report shall be deemed not to have been made" would apply.

B Mr Newman's next argument is that the counts laid under section 14(2) disclose no offences and are bad for lack of particularity. As subsection (2) has relation back to subsection (1) I set out the whole of section 14 which is as follows:

"14(1) Any person who wilfully breaks his contract of service, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others. will be—

C (a) to deprive the public, or any section of the public wholly or to a great extent of an essential service, or substantially to diminish the enjoyment of that service by the public or by any section of the public; or

(b) to endanger human life or cause serious bodily injury or to expose valuable property whether real or personal, to destruction, deterioration or serious damages,

D shall be guilty of an offence.

(2) Any person who causes or procures or counsels or influences any employee to break his contract of service or any employer causing a lock out to be declared in any of the circumstances referred to in the last preceding subsection, shall be guilty of an offence."

E Subsection 2 of section 14, like some other sections in the Act, may not have been drafted with clarity, but it is quite clear to me that as a person can only be guilty of an offence under subsection (1) if he wilfully breaks his contract of service in the circumstances set out in subsection (1) and paragraphs (a) and (b) thereof, a person can only be guilty of an offence under subsection (2) of counselling him to break his contract of service if the same circumstances apply.

F Thus the words "in any of the circumstances referred to in the last preceding subsection" refer not only to "any employer causing a lock out to be declared" but also to the preceding words, so as to read:

"Any person who causes or procures or counsels or influences any employee to break his contract of service in any of the circumstances referred to in the preceding subsection, shall be guilty of an offence."

G Mr Newman argued that the subsection even on that interpretation was void as being in conflict with section 12 of the Constitution. I do not consider it is void for the reasons given when considering sections 6 and 12 of the Act.

The fourth count is as follows:

"Statement of Offence

H

Counselling Breach of Contract: Contrary to section 14(2) of the Trade Disputes Act No. 7 of 1973 and section 37 of the said Act.

Particulars of Offence

Taniela Veitata, on the 5th July (no year stated) counselled members of the Fiji Waterside Workers and Seamen's Union to break their contracts of service." **A**

In framing the charge the prosecution relied on section 123(a)(iv) of the Criminal Procedure Code for the statement of the offence. What was not appreciated was the fact that the statement of offence does not state an offence under section 14(2) of the Act. It is *counselling breach of contract of service* the probable consequences of which will be to deprive the public of an essential service which is the offence alleged in the instant case, that is one of the circumstances referred to in subsection (1) which makes an otherwise lawful act an offence. **B**

The particulars of the offence also omit any reference to any of the circumstances referred to in subsection (1). **C**

The charge in my view discloses no offence under section 14(2) of the Act and is clearly defective.

Section 120 of the Criminal Procedure Code states:

"120. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." **D**

Section 123(a)(iii) of the Criminal Procedure Code states:

"123(a)(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: **E**

Provided that where any rule of law or any Ordinance limits the particulars of an offence which are required to be given in a charge of information, nothing in this paragraph shall require any more particulars to be given than those so required;" **F**

The specific offence must be stated in the statement of offence and particulars of such offence must also be stated in the particular of the offence. All the charge discloses is that the second appellant is charged with "Counselling a breach of contract" which is not an offence unless the counselling is done in any of the circumstances referred in subsection (1). **G**

A necessary ingredient of the offence in my view was the counselling of an employee to break his contract of service in any of the circumstances referred to in subsection (i) of section 14 of the Act and this should have been covered by the particulars of the offence.

I have considered whether section 323 of the Criminal Procedure Code has any application and whether this section could be used to rectify the defect in the charge. **H**

Grant C. J. in *D.P.P. v. Solomone Tui* Cr. App. 2 of 1975 considered the scope of section 323 and stated:

"Despite its apparent scope, it has been held that the provision of this section cannot validate a fundamental error going to the root of the matter; such as failure to include in the charge a necessary ingredient of the offence in question or a charge which discloses no offence known to law."

Grant C. J. also referred to the statement of Humphreys J. in the English Criminal Court of Appeal in *R. v. West* (1948) 64 T.L.R. 241 at 243:

"It is an essential feature of the criminal law that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him so as to be in a position to put forward his defence and to direct his evidence to meet them."

Grant C. J. in the extract from his judgment which I first quoted was referring to section 100 of the English Magistrate's Courts Act 1952 which replaced section 1 of the English Summary Jurisdiction Act 1848 which is very similar to section 323 of the Criminal Procedure Code.

In my view the failure to include in the charge any of the circumstances referred to in subsection (1) of section 14 of the Act was a fundamental error which cannot be validated by applying section 323 of the Criminal Procedure Code.

The conviction of the appellant on count four cannot stand. The same applies to counts five, ten and eleven.

The convictions of the second appellant on the fourth and fifth counts are quashed and the sentences are set aside.

The convictions of the ninth appellant on the tenth and eleventh counts are quashed and the sentences are set aside.

This leaves only the seventh count to consider. This is laid under section 14(1) of the Act.

I agree with Mr Newman's contention that "others" in the subsection refers to others who break their contracts of service. The members of the "New Zealand and Australian Unions" cannot be included amongst "others" but this allegation in the particulars is not fatal to the validity of the charge. The allegation is not essential to constitute the offence and can be omitted without affecting the charge and may be rejected as surplusage: *R. v. Barraclough* [1906] 1 K.B. 201, 210.

Nor do I consider that the members of the Fiji Waterside Workers Union should have been named. There was in my view sufficient particulars of the offence given.

As regards the date of the offence "between the 5th July and 13th July 1977" the evidence indicates that the appellants concerned did not turn up to work on any of the days between those dates.

Mr Newman quoted *R. v. Thompson* [1914] 2 K.B. 99. The indictment in that case charged in one count that offences were committed "on divers days between the month of January 1909, and October 4, 1910". The indictment was held to be bad for duplicity but as the prisoner had not in fact been embarrassed or prejudiced in his

defence by the presentment of the indictment in that form it was held that there had been "no substantial miscarriage of justice" and the appeal was dismissed under section 4 subsection 1 of the Criminal Appeal Act 1907. A

In view of the conditions of service under which the appellants were employed the prosecution's difficulty in specifying an exact date is appreciated. Another difficulty arose because so many were charged and tried together.

While there may in fact have been several breaches of contract in the period or a continuance of one breach I do not consider the appellants were prejudiced in their defence. It was open to them to give an acceptable explanation as to why they ceased work on the 5th July 1977 and did not turn up for work on any of the days between the 5th July and 13th July 1977. I am of the view that no substantial miscarriage of justice occurred and would apply the proviso to section 300(1) of the Criminal Procedure Code. B

I will now deal specifically with the other grounds of appeal relating to the seventh count. C

Paragraph 21(a) of the appeal is that the conviction was wrong in law on four grounds.

The first two grounds allege that section 14 is of no effect in law because (1) of the effect of the later section 16 and (2) the words "breaks his contract of service" in section 14 do not include a strike and that the provisions of section 14 are doubtful and the doubt should have been resolved in favour of the liberty of the appellants. D

I have already dealt with the first ground at some length and have found no merit in the argument raised by Mr Newman. As to the second ground, section 14(1) in my view is clear and there is no doubt to be resolved. E

The third and fourth grounds have already been disposed of.

Paragraph 21(b) and (c) of the appeal have also been disposed of. As to ground 21(d), the particulars of the charge once the reference to the New Zealand union is omitted are capable on proper evidence being called of constituting an offence under section 14(1) of the Act and this ground fails. F

Ground 21(3) refers to the alleged refusal of the trial magistrate to order further particulars and ground 21(p) alleges the particulars were ambiguous. Sufficient particulars of the charge were given and in my view the appellants were well aware of what charge they had to meet. They were not prejudiced by any lack of particulars or alleged ambiguity. It was not necessary to name the members of the union who also went on strike. These grounds also fail. G

Ground 21(g) refers to the admission of the cables in evidence, but as I have rejected any reference to the New Zealand unions this ground no longer has any relevance. This rejection also disposes of ground 21(i)(1).

Ground 21(i)(2) alleges that there was no evidence that the appellants in question "knew or had reasonable cause to know" the matters alleged in the charges. H

Section 14(1) of the Act states the mens rea of the offence. There must be in this case a wilful breach of the contract, knowing or having reasonable cause to believe

- the probable consequences of such breach in combination with others (who also break their contracts of service), would be to deprive the public to a great extent of an essential service to wit: Port and Docks Services.

- There was no dispute that the appellants were employed in an essential service under contracts of service. These contracts on the evidence were verbal contracts and by virtue of section 33(7) of the Act the relevant and applicable provisions of the collective agreement between the union and the shipping companies mentioned in the master agreement (exhibit P3) which the Ports Authority of Fiji adopted and by agreement (exhibit P4) between the Authority and the Union intended to govern the relations between the parties, became implied terms in the contracts of service. The trial magistrate's finding that the appellants numbered 3 to 8 inclusive in not turning up to work on any of the inclusive days 5th-13th July 1977 as they were obliged to without excuse were breaking their contracts of service was in my view a correct finding. Part of that finding referred to an illegal strike. It may have been illegal in one sense but it was not a strike properly declared unlawful under the Act as I have held.

The finding that they were on strike connotes a cessation of work and in the absence of any lawful excuse that is *prima facie* a breach of their contracts of service.

- But Mr. Newman alleges the evidence disclosed they were not obliged to work. The recruiting officer P.W.2 Filimone Romano did say "they can stay away if they wish but they don't get paid".

- This witness did however state that "workers have to report in every morning, except Sunday whether there is a ship there or not. They have to report whether there is work or not". His evidence was confirmed by P.W.4 Henry Jones the Authority Manager of Labour.

There was clear evidence which the magistrate accepted that it was a condition of each dockworker's employment that he had to report for work. In failing to report for work, whether available or not, the appellants were in breach of their contracts of service as the magistrate found.

- Mr. Newman acknowledge there was work available during the relevant period but he also stated the evidence indicated there was a pool of other labour on which the Authority could have drawn. This is only relevant in my view to the question whether the probable consequences of the appellants' acts would have the results the section refers to. I will refer to this aspect later after discussing the other elements of the offence.

- The breaking of the contract of service must be wilful.

The expression "wilfully" means the act is done deliberately and intentionally, not by accident or inadvertance but so that the mind of the person who does the act goes with it. (Avory J. in *R. v. Walter* (1934) 24 Cr. App. Rep. 117 at page 122).

- The necessary mens rea will be presumed from the actual or imputed knowledge of the person breaking his contract as to the probable consequences of his conduct.

It is not, as I stated in Cr. App. No. 53 of 1977 *D.P.P. v. Singh and Other*, necessary for the prosecution to prove that harmful consequences were intended as

a result of the breach of contract provided the conduct constituting the breach was itself intended.

A

In *Singh's* case I quoted an extract from *Citrines* 3rd Edition at page 526 which I repeat:

"It is sufficient to show that such consequences were probable and that, at the time of the breach the accused knew or had reasonable cause to believe that they would result from his conduct. The onus of proof on the prosecution will be discharged by showing that circumstances of which the accused knew, or must have known were such as would have led any reasonable man to believe that such consequences would probably ensue."

B

I then went on to say in that case:

"The learned author goes on to discuss the term "that the probable consequences" and says, "It should be noted that the actual consequences are not material, except in so far as they are evidence of what was probable. It is therefore not sufficient to prove that the actual consequences were to deprive the public of their supply (in the instant case an essential service) if such consequences were improbable in the circumstances".

C

In the instant case there was considerable evidence that the public were deprived of an essential service and of the disastrous effect of the strike. This evidence was material, although it went a lot further than was necessary, to establish that the consequences were probable.

D

While I agree there was no direct evidence that any of the appellants actually knew that such consequences would follow their breaches of contract, the circumstances namely that the dockworkers would not load or unload vessels would lead any reasonable man to believe that the consequences as alleged in the charge would probably ensue notwithstanding the alleged availability of a pool of labour, and that the appellants knew and should have known the consequences would probably arise.

E

Despite the alleged availability of a pool of labour the clear evidence is that the probable consequences did in fact arise which as I have indicated is evidence that the probable consequences could arise as a result of the appellants' actions in going on strike and thereby breaking their contracts of service.

F

All the elements of the offence were established by the prosecution and the appellants were in my view properly convicted. The appeal against conviction on the seventh count fails.

G

The appellants numbered 3 to 8 inclusive also appeal against sentence. They were all sentenced to six months' imprisonment in respect of their convictions on the seventh count and have now served a little over three months of their terms.

The six appellants are all members of the Union's executive. The third appellant, Viliame Taufa, is the President. He has nine previous convictions seven of them for being drunk and disorderly behaviour, the last one on 6th December 1976. Many of the offences were committed several years ago. There has been no previous conviction for a similar offence.

H

A The fourth appellant, Eroni Serukalou, has two previous convictions one involving a police officer in the due execution of his duty. He is Vice President of the Union.

The eighth appellant, Taito Rawaqa, has a long string of prior convictions between the years 1957-1974. There are 19 previous convictions three involving larceny one of which was from a ship. Nine convictions resulted in terms of imprisonment being imposed. He is a committee member of the Union.

B The trial magistrate clearly expressed why he considered a sentence of six months imprisonment necessary and on the facts before him the sentences were fully justified.

C However, there is no doubt that the Union executive relied very heavily on the advice of the second appellant Taniela Veitata, the Industrial Adviser of the Union, and his convictions have now been quashed on technical grounds.

Further the Union did give 28 days written strike notice to the Permanent Secretary purporting to comply with section 16 of the Act.

D I have pointed out that for several reasons the notice was bad in law and by law the notice was deemed not to have been given. The Union knew the Permanent Secretary was seeking clarification of the notice but it was also aware that he later accepted the notice. Although the notice was in the circumstances invalid the strike did not take place until 28 days had elapsed from the time the notice was delivered to the Permanent Secretary.

E As will now be apparent the Act is very complex and involves difficult questions of law and construction. These difficulties were recognised by the trial Magistrate in his lengthy and well considered judgment. He did not have the benefit I have had of having heard argument in two appeals from two eminent Australian counsel one in support of the Act and one severely critical of it.

F As for the members of the Union executive they are laymen who attempted to follow legal procedures but failed to do so. Had the written strike notice been properly framed and had the Union strictly followed the procedure laid down by the Act the appellants could legally have gone on strike subject to any lawful order thereafter made by the Minister in accordance with the powers vested in him. To that extent it was not a case of deliberately flouting the law.

G Having said that, the nature of the strike and the manner in which it was conducted was such that the appellants must accept responsibility for their actions which they well knew would have and did have a disastrous effect on Fiji. They showed a total lack of concern for the interests of the public and plans were put in hand to obtain overseas support some considerable time before the strike occurred. Their actions merited convictions and a custodial sentence but in view of the circumstances to which I have referred I think it proper to take a course of action which will effectively reduce their time in prison by a little over three weeks.

H The sentence of six months' imprisonment is set aside and in lieu thereof is substituted a term of imprisonment which will permit of their immediate release from prison.

Certain appeals against conviction allowed; certain dismissed, but sentences reduced to allow immediate release from prison.