

TANIELA VEITATA

v.

REGINAM

[SUPREME COURT, 1977 (Grant C. J.), 28th December]

Appellate Jurisdiction

Magistrate—previous knowledge of accused's character and antecedents having presided over earlier trial for similar offence—whether biased—whether estopped from hearing second case.

Trade disputes—whether Trade Disputes Act 1973 s.14 in conflict with Fiji Constitution ss.12.13.

A professional magistrate who had heard a previous charge against the appellant was in no way debarred from proceeding with a subsequent trial, nor did the fact that he was aware of the appellant's record disqualify him. There was nothing in the present case to suggest that the magistrate was biased or would fail to judge the case on its merits regardless of what had occurred at the earlier trial.

Trade Disputes Act s.14(1) was not *ultra vires* s.12 of the Constitution, and did not limit an individual's freedom of expression.

Cases referred to:

R. v. Brixton Prison Governor ex parte Thompson [1970] Crim. L.R. 281; 114 S.J. 187.

Vassiliades v. Vassiliades [1945] A.L.R. 38.

R. V. Taylor & Ors (1898) 14 T.L.R. 185.

Stirling v. Herron [1976] S.L.T. (Notes) 2.

R. v. Duffy ex parte Nash [1960] 2 All E.R. 891; [1960] 3 W.L.R. 320.

R. v. Sussex J. J.s ex parte McCarthy [1924] 1 K.B. 256; [1923] All E.R. 233.

R. v. Camborne J. J.s ex parte Pearce [1955] 1 Q.B. 41; [1945] 2 All E.R. 850.

R. v. Watson (1976) 9 A.L.R. 551.

Allinson v. General Council of Medical Education and Registration [1894] 1 Q.B. 750.

Metropolitan Properties Ltd. v. Lannon [1968] 3 All E.R. 304; [1969] 1 Q.B. 577.

Hannam v. Bradford City Council [1970] 2 All E.R. 690; [1970] 1 W.L.R. 937.

Frome United Breweries Co. v. Bath Justices [1926] A.C. 586; 42 T.L.R. 571.

R. v. Grimsby Borough Quarter Sessions ex parte Fuller [1955] 3 All E.R. 300; [1956] 1 Q.B. 36.

R. v. Altringham J. J.s ex parte Pennington [1975] 2 All E.R. 78.

Du Cros v. Lambourne [1907] 1 K.B. 40; 70 J.P. 525.

Gould & Co. v. Houghton [1921] 1 K.B. 509; 37 T.L.R. 291.

R. v. James (1890) 24 Q.B. 439; 54 J.P. 615.

- A** *Attorney-General v. Vijaya Parmanandum* 18 F.L.R. 90.
Arthur v. Bokenham (1707) 88 E.R. 957.
Taniela Veitata & Ors v. R. 23 F.L.R.
R. v. Seymour (1954) 1 All E.R. 1006; 38 Cr. App. R. 68.
R. v. Nassa Ginnors Ltd. (1955) 22 E.A.C.A. 434.
R. v. Cosma s/o Nyadago (1955) 22 E.A.C.A. 450.
R. v. Mbithi s/o Kisoi & Ors (1955) 22 E.A.C.A. 484.
- B** *Pope v. Minton* [1954] Crim. L.R. 711.
Smith In re 157 E.R. 455; 22 J.P. 450.
Ferguson v. Weaving [1951] 1 K.B. 814; [1951] 1 All E.R. 412.

Appeal against conviction and sentence in the magistrate's court for offences against the Trade Disputes Act 1973.

C GRANT C. J.: [28th December 1977]—

D On the 6th October 1977 the appellant was convicted after trial of two offences contrary to section 14(2) of the Trade Disputes Act 1973, the first offence being that of counselling breach of contract of service and the second offence being that of influencing breach of contract of service. Both offences arose from the same set of facts, and the appellant was sentenced to nine months' imprisonment on each count concurrent. He has appealed against conviction and sentence.

E The first and second grounds of appeal are that the conviction should be set aside because of the bias of the learned magistrate who should have disqualified himself from hearing the charge, and because the learned magistrate refused the appellant an adjournment to enable him to be properly represented by counsel at the trial. I would emphasise at the outset that there was no suggestion that the learned trial magistrate was in fact biased; and the appeal was argued with propriety on the basis that the circumstances raised a reasonable apprehension of bias.

To place these grounds of appeal in perspective it is necessary to summarise the history of the proceedings before the learned trial magistrate.

F On the 3rd August 1977 the appellant appeared before the chief magistrate on the charge the subject matter of this appeal and entered a plea of not guilty. The matter was adjourned until the 5th August for a hearing date to be fixed, on which date the appellant was represented by counsel and the trial was set for the 12th September to suit his convenience.

On the 6th August the appellant with others was convicted by a resident magistrate at Suva of contravening the Trade Disputes Act, in respect of which a petition of appeal was lodged on the 19th August.

G On the 12th September the instant charge was listed for trial before the same resident magistrate, whereupon defence counsel applied for it to be heard before another magistrate as the resident magistrate was aware of the facts of the previous case and the antecedents of the appellant; applied for an adjournment until the appeal in the previous case had been decided, on the grounds that some of the counts were the same; and applied for the trial to be converted into a preliminary inquiry as constitutional matters would be raised which should be heard by the Supreme Court. These applications were opposed by prosecuting

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counsel and after hearing full argument the resident magistrate adjourned to consider the matter and thereafter delivered his written reasons for proceeding with the trial, of which I need only quote the following extract: A

"In asking that this case be heard by another magistrate [defence counsel] cites the oft-used aphorism "Justice must not only be done but must manifestly be seen to be done". He says that this court knows the facts of the last case against the accused and that the court also knows the accused's antecedents. B

I know of no authority which precludes any court from hearing several separate and distinct charges against the same accused arising on different occasions. Were courts to be limited to one hearing per accused then it might very well be found that the judicial system would break down. Such a system would lead to inordinate delays and would result in delayed justice which in itself would be intolerable. This would be very apparent in those jurisdictions where there is only one magistrate sitting in isolation. C

So far as the court knowing the accused's antecedents is concerned there is nothing unusual, or prejudicial to the accused, in such being the case. There is a wealth of cases relating to the court's being advised, when bail is being opposed, as to the accused's previous convictions. These are as follows D

Also an application to cause a magistrate not to hear a case because he knew of previous convictions failed in *R. v. Brixton Prison Governor ex p. Thompson* [1970] Crim. L.R. 281; 114 S.J. 187.

It would therefore appear to me that the magistrate's knowledge of antecedents relative to the accused in no way estops him hearing the case against that accused. E

It has been said that the facts in this case are the same as in the other case this court heard. That cannot be so because if the same facts are being argued then the accused can plead autrefois acquit or convict as the case may be. If the facts are not the same then there is a different case to be heard to which this court must in justice apply its mind openly, freshly, fearlessly and fairly.... F

On consideration of all the arguments I have heard on these matters I am of the considered view that there are not sufficient grounds in any of them to cause me to, in any way, alter the existing position in this case. I shall hear this case and shall make my decisions on the evidence before me. In so doing will justice not only be done but manifestly be seen to be done." G

Defence counsel then informed the court that he had instructions from the appellant to withdraw from the case to which the trial magistrate responded:

"I should not like to see [accused] abandoned in his defence. I feel that, no matter what he thinks, he should have the opportunity to discuss this matter further with his defence counsel. I shall give a 15 minute adjournment to allow him to further consider the matter. At H

- A "the end of that time he must do as he is best advised either by himself or defence counsel."

On resumption defence counsel reiterated that the appellant wished to discharge him and asked leave to withdraw which the trial magistrate reluctantly granted. Because of defence counsel's withdrawal and so as to give the appellant more time the trial magistrate adjourned the trial to the 16th September.

- B On the 16th September the appellant was represented by another defence counsel, but as the appellant was unwell and so as to enable him to concentrate on his election campaign for an imminent general election, the trial magistrate adjourned the trial to the 26th September.

On the 26th September defence counsel informed the trial magistrate that he wished to argue similar grounds to those raised by the previous defence counsel as to why the trial should not proceed before him, and the trial magistrate permitted him so to do. Defence counsel then made full submissions after which the trial magistrate gave his ruling, of which the following is pertinent:

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- D "In this case, whilst I have heard these arguments now put by [defence counsel No. 2] from [defence counsel No. 1] when he was appearing for the accused, I have allowed [defence counsel No. 2] to put them afresh because he has come into the case and I wished it to be seen that the Defence was being in no way inhibited in its defence of the accused. [Defence counsel No. 2] although covering the same ground as [defence counsel No. 1] has carefully covered the ground and cited a number of cases in support of his contention that this case should be heard by another magistrate. I say, with respect, that I cannot find that I am convinced of the need to recuse myself. For me to withdraw at this stage could in a small community establish the principle that a magistrate must withdraw after hearing one case against an accused. I consider that that would be an unwelcome and, indeed, dangerous precedent. It could very well create the position where an accused could pick and choose his own magistrate. There is also the point that in a small community, where cases are covered very fully in the local press, cases would be read by all the magistrates, who would know very well the position in each case before they went into court. I have given my reasons quite fully when I decided this matter formerly. I see no reason to recuse myself. As I said previously, I shall try this case openly, freshly, fearlessly and fairly."
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- H Defence counsel then informed the court that he had been advised to apply for a writ of prohibition, by which he meant, no doubt, that he had been instructed to apply for leave to apply for an order of prohibition; and defence counsel went on to ask for further particulars of the charge to be supplied. The trial Magistrate intimated that he saw no objection to certain of the particulars sought being supplied and, subsequently, an amended charge was tendered by the prosecution incorporating same. Defence counsel then submitted at length that the whole of the Trade Disputes Act was *ultra vires* the Constitution of Fiji and that the matter should be referred to the Supreme Court. After hearing prosecuting counsel in

reply the trial magistrate delivered a written ruling rejecting the application, whereupon defence counsel requested another adjournment until the following day, which was granted. A

On the 27th September, the amended charge to which I have referred having been tendered by the prosecution, defence counsel applied for a further adjournment, this time on the grounds that the Supreme Court would be hearing his application for leave to apply for an order of prohibition on the 28th September. This application was refused (as indeed was his application to the Supreme Court on the 28th September). Upon being refused this adjournment defence counsel applied to withdraw from the case, but the trial magistrate was not prepared to give permission, his reasons being as follows: B

"In criminal cases counsel have to ask leave to withdraw. This is generally granted for good reason shewn. However, the courts are not rubber stamps and they have a discretion whether to allow a counsel to withdraw or not. When defence counsel took this case he already knew that the very points he raised had been already dealt with. He was allowed to make those points again and they were refused, as they already had been, by this court. I do not think that this court would be doing justice if it allowed different counsel to come in and out of this case and to at any time withdraw because they did not get their will. I refuse defence counsel's application to withdraw." C D

Thereupon defence counsel stated that he had been discharged by the appellant and "I am walking out of this Court", which he did. The amended charge was then put to the appellant who requested yet another adjournment to consult a new lawyer. Although two defence counsel had already been discharged by the appellant, the trial Magistrate allowed a limited adjournment until later that morning. On resumption the appellant was represented by a third counsel who informed the court that his instructions from the appellant were limited to applying for an adjournment for a further six days. Needless to say this was opposed by prosecuting counsel, and the trial magistrate's decision was as follows: E

"Accused discharged [defence counsel No. 1] and the court gave leave for [defence counsel No. 1] to withdraw. [Defence counsel No. 2] said that he had informed accused that he would ask to withdraw if his applications were rejected. I did not give leave to [defence counsel No. 2] to withdraw. So far as I am concerned he is still defence counsel for accused. I welcome [counsel No. 3's] appearance at this stage as I do not, as I said when [defence counsel No. 1] withdrew, wish to see [accused] abandoned even though by his own doing. I recognise that [counsel No. 3] has just come into this case but it appears to me that there have been too many delays and procrastination at the request of the defence, for whatever reason I do not know. I do not wish [accused] to be inhibited in his defence but his present position vis-a-vis defence counsel is his own doing. This court has tried to safeguard his position on the matter of counsel. This court knows where its duty lies. I am prepared out of courtesy to [counsel No. 3] to allow an adjournment until 2.15 this afternoon but not later than that." F G H

- A** The third counsel formally asked leave to withdraw in view of his limited instructions and was permitted to do so. The trial proper then commenced—eight weeks after the plea had first been taken.

- B** That is the salient history, on which it was submitted by learned counsel for the appellant at the hearing of this appeal that any reasonable person, having heard what took place, could reasonably think that the learned magistrate had made up his mind; and that as the learned magistrate had heard a previous charge against the appellant for contravening the Trade Disputes Act and know an appeal was pending, and as he had knowledge of his previous convictions, any reasonable person could think that the learned magistrate was biased.

- C** This I am quite unable to accept. Indeed, it is perfectly clear from the record, and would have been obvious to any reasonable person, that far from there being any likelihood of bias the trial magistrate was leaning over backwards, almost to the point of falling off the bench, to be fair to the appellant.

In *Vassiliades v. Vassiliades* [1945] A.L.R. 38, the Privy Council stated:

- D** "It is a matter of public policy that justice should not only be done but should appear to be done. Judges, however, are only human, and their patience is sometimes sorely tried by counsel and litigants. It is always to be regretted if their patience even appears to give way. But the administration of justice depends on the cooperation of the judges and the parties. Parties cannot complain whose improper or unreasonable conduct has led to a departure from the more regular course of "procedure so long as no substantial injustice is done."

- E** Had the learned trial magistrate in this case been provoked into precipitate action by the tactics adopted by certain defence counsel, it would hardly have been surprising. But he was not. He displayed commendable patience and restraint throughout and no reasonable person could have suspected that justice was not being done or have gained an impression of bias. What a fool may have suspected is of no relevance (per Day J. in *R. v. Taylor & Ors.* (1898) 14 T.L.R. 185)

- F** That the trial Magistrate had heard a previous charge against the appellant of contravening the Trade Disputes Act in no way debarred him from proceeding with this trial, nor did the fact that he was aware of the appellant's record; and the fact that he knew an appeal was pending in respect of the first trial is neither here nor there. It has been held (in Scotland) that where a judge hears a second trial, even if a number of witnesses are the same as in the first trial at which he made up his mind about their credibility, there is no oppression so long as he deals with each case on its own merits (*Stirling v. Herron* (1976) S.L.T. (Notes) 2). And it is long established law that "a judge is in a very different position to a jurymen. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case. This, indeed, happens daily to judges on assize" (per Lord Parker, C.J. in *R. v. Duffy* (1960) 3 W.L.R. 320 at 325). It also happens, although not necessarily daily, to the Resident Magistrates of Fiji, and it is common knowledge that they are professional magistrates. As a consequence of the very wide criminal, and civil, jurisdiction of the Fiji Resident Magistrates it is a condition precedent to appointment that they have been admitted as barristers or solicitors in England, Northern Ireland or the Republic of
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Ireland, or as advocates or law agents in Scotland, or as barristers or solicitors in Australia or New Zealand; and that they have had not less than five years post-admission experience. I might add that the learned resident magistrate who tried the appellant was of considerable experience, having served on the Bench in two other Commonwealth countries besides Fiji. **A**

Reliance was placed by learned counsel for the appellant on, *inter alia*, the well known dictum of Lord Hewart C.J. in *R. v. Sussex Justices* [1924] 1 K.B. 256 at 259; but equally in point is the following passage from the judgment of the Divisional Court (Lord Goddard C.J., Cassells and Slade JJ.) in *R. v. Camborne Justices* [1955] 1 Q.B. 41 at 51-52: **B**

"The frequency with which allegations of bias have come before the courts in recent times seems to indicate that Lord Hewart's reminder in the *Sussex Justices* case that it 'is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' is being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done." **C D**

I see no useful purpose in referring to all the cases cited in argument, but with regard to the decision of the High Court of Australia in *R. v. Watson* (1976) 9 A.L.J.R. 551 I must say, with respect, that I find myself in firm agreement with the dissenting judgment. The confidence of the public in the administration of justice could be destroyed just as effectively by too readily acceding to allegations of this nature as by rejecting them out of hand. **E**

The following tests for determining bias have been formulated:

1. can the person in question "be reasonably ... suspected of bias" (*Allinson v. General Council of Medical Education and Registration* [1894] 1 Q.B. 750 at 759; and see (*Metropolitan Properties Ltd. v. Lannon* [1968] 3 All E.R. 304; and *Hannam v. Bradford City Council* [1970] 2 All E.R. 690); **F**
2. is there "such a likelihood of bias as entitled the Court to interfere" (per Lord Carson in *Frome United Breweries Co. v. Bath Justices* [1926] A.C. 586 at 618);
3. has "a real likelihood of bias been shewn" (*R. v. Camborne Justices* (*supra*)) or
4. "a real likelihood of prejudice" (*R. v. Grimsby Borough Quarter Sessions* [1955] 3 All E.R. 300 at 303) **G**

Applying each of these tests, severally or jointly (*R. v. Altrincham Justices* (1975) 2 All E.R. 78 at 82), to the facts of this case, I am of the opinion that no bias or prejudice has been established.

As to the contention that the conviction should be set aside because the learned magistrate refused the appellant yet another adjournment on the 27th September to enable him to be represented by counsel at the trial, in the circumstances of this **H**

- case I see no merit in it. If an accused, for reasons best known to himself, exercises his right to discharge his counsel or limit their instructions to such an extent as to end up without counsel, he cannot complain.

The third ground of appeal is that the learned magistrate was wrong in refusing to order further particulars of the act or acts constituting the alleged offence.

- On the hearing of the appeal it was argued that the prosecution should have been ordered to specify the members of the Fiji Waterside Workers and Seamen's Union who were alleged to have broken their contracts of service; the date on which each member broke his contract of service; and in respect of each such member whether the counselling alleged was written, oral or implied, if in writing a copy to be supplied, if oral the terms of the counselling, and if implied the facts and circumstances that gave rise to the implication.

- With regard to the offence under count 1 of which the appellant was convicted, the particulars were framed as follows:

- "Taniela Veitata, between the 28th day of July, 1977 and the 7th day of August, 1977 inclusive at Suva, counselled members of the Fiji Waterside Workers and Seamen's Union to wilfully break their contracts of service knowing or having reasonable cause to believe that the probable consequences of their so doing, in combination with other members of the Fiji Waterside Workers and Seamen's Union, will be to deprive the public to a great extent of an essential service, to wit Port & Docks Services."

- The particulars of the offence under count 2 of which the appellant was convicted were in identical terms except that the word "influenced" was substituted for the word "counselled".

I am satisfied that those particulars not only were in compliance with the provisions of the Criminal Procedure Code but were adequate.

The fourth ground of appeal is that the learned magistrate should have quashed the charge in that subsection 2 of section 14 of the Trade Disputes Act is void, being in conflict with section 12 and/or section 13 of the Constitution of Fiji.

- Subsection 1 of section 14 of the Trade Disputes Act is in the following terms:

- "(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—
- (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 damage,
- shall be guilty of an offence."

Some discussion took place on the hearing of the appeal as to the precise meaning to be attached to subsection 1, which is based on sections 4 and 5 of the English

Conspiracy and Protection of Property Act 1875, the history of which may be found in Citrine's *Trade Union Law* 3rd Edition Chapter 1. The Subsection is aimed primarily at preventing damage to the public weal arising from disruption of an essential service. This could arise in certain circumstances from a wilful breach of contract of service by only one person in a key position, such as an air traffic controller; or in other circumstances only by a combination of persons wilfully breaking their contracts of service. An apposite example of the latter is a dock labourer. In the ordinary way his breach of contract of service would not result in a disruption of an essential service rendering him liable to prosecution under this subsection. But if he combined with other dock labourers, all of whom wilfully broke their contracts of service in a sufficient number to disrupt the essential service of the port and docks, each of them would become liable to prosecution.

Perhaps this would have been clearer if the opening paragraph of the subsection had read: "Any person who wilfully breaks his contract of service either alone, or in combination with the wilful breach of contracts of service of others knowing or having reason to believe that the probable consequences of so doing will be—"; but I am in no doubt that this is what the subsection means.

The appellant was convicted under subsection 2 of section 14 of the Trade Disputes Act, the relevant portion of which reads:

"(2) 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 last preceding subsection, shall be guilty of an offence."

Learned counsel for the appellant submitted that this subsection creates an offence *ultra vires* section 12 of the Constitution, but in my opinion this is based on a misconception. The words quoted do not "create" an offence. They are simply declaratory of the common law. Under the common law it has for centuries been an offence to instigate the commission of a crime. For historical reasons (a concise summary of which may be found in Stephen's *History of the Criminal Law of England* 1883 Vol. II at pages 231–237) the instigators of crimes of felony were charged as accessories before the fact whereas the instigators of treason and all offences other than felony were charged as principal offenders in the second degree, but this difference in terminology has been abolished by statute.

According to Coke (1 Inst. 182—commentary on the *Statute of Westminster The First*, 1275, Chapter 14) accessories before the fact embrace "... all those that incite, procure, set on, or stir up any other to do the fact" and "... all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act". Hale (1 P.C. 615) says "an accessory before, is he, that being absent at the time of the felony committed, doth yet procure, counsel, command, or abet to commit a felony". Hawkins (2 P.C. c29 s.16) states that "those who by shewing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it, that he could not be encouraged by the hopes of any immediate help or assistance from them, are all of them accessories before the fact".

That is the common law, and statutes which make specific reference to the criminal liability of accessories before the fact or principals in the second degree are "really only declaratory of the common law on the subject" (per Lord Alverstone,

A C.J. in *Du Cros. v. Lambourne* [1907] 1 K.B. 40 at 44; and the Earl of Reading, C.J. in *Gould & Co. v. Houghton* [1921] 1 K.B. 509 at 515.

Where a statute creates a new offence—as does subsection 1 of section 14 of the Trades Disputes Act—the responsibility of instigators is not only implied under the common law (*R. v. James* (1890) 24 Q.B. 439 (C.C.R.)) it is also provided for by the Penal Code of Fiji, which codifies the common law liability of secondary parties. Those sections of the Penal Code material to this issue read as follows:

B “2. Except as hereinafter expressly provided nothing in this Code shall affect—

(a) the liability, trial or punishment of a person for an offence against the common law or against any other law in force in Fiji other than this Code;”

C “21.(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

(a) —

(b) —

(c) —

D (d) any person who counsels or procures any other person to commit the offence.”

In the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

E “(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

F (3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.”

G “23. When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.”

In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him.

H “If the facts constituting the offence actually committed are not a probable consequence of carrying out the counsel, the person who gave the counsel is not deemed to be responsible.”

This, then, is the context in which the provisions of the Constitution have to be considered. The apposite words of section 12 of the Constitution are:

"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...."

Are words such as the following to be read into that section:

"and freedom to preach sedition and racial hatred, to commit contempt of court, and to instigate the commission of crimes"?

The proposition only has to be stated to be rejected.

To quote from a judgment of a Full Court of the Supreme Court of Fiji in the *Attorney-General v. Vijaya Parmanandam* (18 F.L.R. 90) concerning criminal contempt:

"The Court has been addressed by counsel for the respondent on the right of the respondent under the Constitution of Fiji to freedom of speech. However there is a profound difference between freedom, be it freedom of action or freedom of expression, and licence...."

Abuses of the freedom of speech are the excrescences of liberty and to curtail such abuses is not to imperil liberty but to safeguard it and ensure its natural and healthy growth."

The Constitution of Fiji does not erode, it enshrines, the great principles of the common law which provide equally protection to the community from evil and protection to the evil-doer from oppression. It would require clear words in the Constitution to alter the common law (per Lord Trevor C. J. in *Arthur v. Bokenham* (1707) 88 E.R. 957 at 958). There are no such words here.

It should be noted that the Constitution does not provide for freedom of the individual in "the waste Wide Anarchie of Chaos" (Milton, *Paradise Lost*, Bk. X 1.283). It provides for freedom of the individual "in a democratic society", and respect for the limits on freedom is the essence of a democratic society, without which the entire democratic structure is undermined.

As to section 13 of the Constitution, this is irrelevant to the charge. It simply provides for protection of freedom of assembly and association including the right to form or belong to trade unions. Section 14 of the Trade Disputes Act in no way hinders those rights.

This ground of appeal accordingly fails.

The fifth and sixth grounds of appeal are that the learned magistrate should have held that section 16 of the Trade Disputes Act, being later than section 14, 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 did not include a strike or cessation of work; and that the learned magistrate should have held that 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 that doubt should have been resolved in favour of the liberty of the appellant.

This is not *terra incognita*. The same grounds were raised by the same counsel in
A *Taniela Veitata & Ors. v. Reg.* (Criminal Appeal 104/77) and were disposed of by Kermode J. in his judgment, and I do not propose to travel wholly the same terrain. As Kermode J. stated:

"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."

I think it necessary only to enlarge on one of the sentences above quoted, to wit
D "There could be more than one employee who broke his contract in circumstances where a *strike* did not arise." If a body of employees of an essential service acting in combination broke their contracts of service, not for the purpose of compelling their employer to accept terms of employment, but for some extraneous reason, it would not be a "strike" as defined by section 2 of the Trade Disputes Act and consequently section 16 (and section 17) of the Trade Disputes Act would have no application thereto.

E There being no conflict between the sections, and no room for doubt, these grounds of appeal fail.

The seventh ground of appeal is that the learned magistrate should have held that the charge was bad for duplicity, in that the appellant was charged under one count with instigating more than one employee to break his contract of service.

F There is no rule of law that where a person commits an offence, the subject matter of which is in the plural, there must necessarily be separate counts. If a person steals at one and the same time and place more than one article he is not charged under a separate count in respect of each article stolen. Indeed, such a procedure would be condemned as a multiplicity of charges.

G So it is here, where the instigation of the employees occurred on the 2nd August at one and the same time and place; and there is no duplicity.

For the reasons given, the appeal against conviction on the first count is dismissed.

As to the second count, there is one additional ground of appeal, in that the learned magistrate having convicted the appellant on the first count should not
H have convicted him on the second count.

On the hearing of the appeal the learned Director of Public Prosecutions conceded that it would have been preferable for the second count to be charged in

the alternative; in which case, once the learned magistrate had convicted on the first count, he would have made no finding on the second count (*R. v. Seymour* [1954] 1 All E.R. 1006; *R. v. Nassa Ginners Ltd.* (1955) 22 E.A.C.A. 434; *R. v. Cosma s/o Nyadago* (1955) 22 E.A.C.A. 450; and *R. v. Mbithi s/o Kiso & Ors.* (1955) 22 E.A.C.A. 484). A

However, although it was not argued before me, I have come to the conclusion that only one offence was in fact committed by the appellant and accordingly there should have been only one count. B

Where more than one word is used to describe an accessory before the fact, it is not a case of having recourse to a dictionary to ascertain the difference, if any, in meaning of each of the words used. As Lord Goddard, C.J. pointed out in *Pope v. Minton* [1954] Crim. L.R. 711, such words "are a term of art to describe what is commonly called an accessory before the fact".

In 1858 it was held that the words "aid, abet, counsel and procure" describe one offence, not distinct offences (*In re Smith* 157 E.R. 455 at 459). This was followed in *Ferguson v. Weaving* [1951] 1 K.B. 814, Lord Goddard stating (at 818-819): C

"It is well known that the words "aid and abet" are apt to describe the action of a person who is present at the time of the commission of an offence and takes some part therein. He is then described as an "aider and abettor". The words, "counsel and procure" are appropriate to a person who, though not present at the commission of the offence, is an accessory before the fact. That all these words may be used together to charge a person who is alleged to have participated in an offence otherwise than as a principal in the first degree was established by *In re Smith* (3 H. & N. 227)." D

In line with these authorities, the appellant having been properly convicted under count 1 of being an accessory before the fact contrary to section 14(2) of the Trade Disputes Act, I quash the conviction under count 2 and set aside the sentence in respect thereof. E

The final ground of appeal is that the sentence of nine months' imprisonment was manifestly excessive.

The appellant wilfully defied the law, regardless of the widespread harm to which his irresponsible conduct gave rise, and in the circumstances then pertaining the sentence was by no means excessive. F

However there has been a relevant change of circumstances, in that the appellant's previous convictions for contravening the Trade Disputes Act and a sentence of six months' imprisonment imposed in respect thereof have since been quashed (*Taniela Veitata & Ors. v. Reg. (supra)*). G

For this reason, the sentence will be varied to a term of six months' imprisonment.

Appeal against conviction dismissed. Appeal against sentence allowed in part.