

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 170/2007

BETWEEN:

STATE

A N D:

MAIKA VUNIWAWA

Counsel: Mr. W. Kuruisaqila and Mr. S. Qica for the State

Mr. H. A. Shah and Mr. J. Boseiwaqa for the Accused

Date of Hearing: Thursday 26th March, 2009

Date of Ruling: Monday 30th March, 2009

RULING

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

Statement of Offence

MURDER: Contrary to sections 199 and 200 of the Penal Code, Cap 17.

Particulars of Offence

MAIKA VUNIWAWA on the 5th day of January 2007 at Nausori in the Eastern Division murdered NIMILOTE VEREBASAGA.

- [2] The Accused is a military officer. The allegation arose while he was acting in his official capacity as a military officer. The deceased is a civilian. The prosecution case is that the Accused took the deceased from his village to a military camp where he assaulted him. The prosecution says the deceased died as a result of the assault.
- [3] Counsel for the Accused raises a preliminary issue. The issue is whether the Accused is immune from prosecution under the Immunity (Fiji Military Government Intervention) Promulgation 2007.
- [4] The Promulgation which was enacted by His Excellency, the President of the Republic of Fiji Islands, came into effect on 18 January 2007. The Promulgation reads:

INTERIM GOVERNMENT OF THE REPUBLIC OF THE FIJI ISLANDS

IMMUNITY (FIJI MILITARY GOVERNMENT INTERVENTION) PROMULGATION 2007

(INTERIM GOVERNMENT PROMULGATION NO. 3)

IN exercise of the powers conferred upon the Interim Government and upon the exercise of my own deliberative judgment as President of the Republic of the Fiji Islands as to what is in the best good of the beloved people of Fiji, and by the executive authority of the State in accordance with clause 85 of

the Constitution and all such other powers as may appertain, I, Josefa Iloilovatu Uluivuda, President of the Republic of the Fiji Islands hereby make this Promulgation.

Short Title and Commencement

1. This Promulgation may be cited as the Immunity (Fiji Military Government Intervention) Promulgation 2007 and comes into force immediately upon its enactment with full retrospective and prospective effect.

Unconditional Grant of Immunity

WHEREAS the state of national governance and the condition of integrity in our political institutions had so deteriorated because of pervasive corruption as to cause serious long term deleterious effects to the Nation and its citizens.

AND WHEREAS the Commander of the Republic of the Fiji Military Forces reluctantly intervened by a Declaration of a State of Emergency on 5th December 2006 and other acts subsequently including as holding the office of Acting President of the Republic of the Fiji Islands between 5th December 2006 and 4th January 2007, to return the governance of the Nation to an honest plan.

AND WHEREAS the Commander as Head of the Interim Government of Fiji assumed and exercised the executive and legislative power of the State up until 4th January 2007.

AND WHEREAS it is my sincere and firm deliberative believe that those actions and events were properly motivated, demonstrably overdue and profoundly for the common good of the Nation which had been teetering on the brink of an abyss of irremediable corruption, misfeasance, nonfeasance and dysfunction.

AND WHEREAS the aforesaid actions and events have my full and complete concurrence and approval.

AND WHEREAS for the avoidance of any doubt as to the lawfulness of the aforesaid intervention.

AND WHEREAS it is my sincere and firm deliberative belief that the best and wisest course, in the interest of restoring law and order, peace, harmony and good government so that our beloved Nation will become stable and grow prosperous, is by the reserve powers of the Constitution inherent in the President and by the constitutional law and common law of Fiji and by all other laws so appertaining to grant FULL AND UNCONDITIONAL IMMUNITY from all criminal or civil or legal or military disciplinary or professional proceedings or consequences, instituted or to be in instituted whatsoever, against or in relation to any person or persons who by his or her or their agreement, acts or omissions, caused or facilitated or confederated in or incited or conspired or aided or abetted or counseled or procured or in any way (whether before 5th December 2006 or on it and up until 5th January 2007) to intervene in, oust and remove from office the ten legislative and executive organs of Government of the Fiji Islands, Its Prime Minister, Ministers, Officials and also of other persons whose office or employment were not conductive to the public interest of the beloved people of Fiji.

I DO IRREVOCABLY GRANT FULL AND UNCONDITIONAL IMMUNITY to all persons scheduled below from any prosecution and for any civil liability and all other legal or military, or disciplinary or professional proceedings or consequences as a result of directly or indirectly or pertaining to or arising from the acts and omissions of the Fiji Interim Military Government from 5th December 2006 until the restoration of executive power of the State in me the President and no Court or Tribunal whatsoever shall have any jurisdiction to entertain any action or proceeding or make any decision or order, or grant any remedy or relief in any such proceedings.

Schedule of Persons Granted Immunity

- (a) Commodore J V Bainimarama, OSJ, MSD, jssc, psc; Acting President of the Republic of the Fiji Islands, Commander of the Republic of the Fiji Military Forces and Head of the Interim Military Government of Fiji; and***
- (b) Jona Senilagakali, Caretaker Prime Minister; and***
- (c) All Officers and members of the Republic of Fiji Military Forces; and***
- (d) All Officers and members of the Republic of Fiji Military Forces Reserves; and***
- (e) All Officers and members of the Fiji Police Force; and***
- (f) All Officers and members of the Fiji Prisons Service; and***
- (g) All other persons who acted under the directions, orders or instructions of any of the above persons.***

Ex-Gratia Provision of Compensation

Notwithstanding this Promulgation, the State may on an ex-gratia basis and without the matter being justiciable in any Court or Tribunal whatsoever, in any aspect, pay compensation to any person who proves to have suffered any unlawful injury to either that person or to property of that person, directly attributable to the acts of any of the above Disciplined Forces during the State of Emergency commencing on 5th December 2005.

Entrenched Provision

This Promulgation shall be and remain an entrenched provision in the law of Fiji, incapable of repeal or abrogation.

Made at Suva this 18th day of January 2007

J. I. ULUIVUDA

President of Fiji

- [5] Counsel for the Accused submits that in absence of clear wordings to exclude the offence of murder, the Accused is immune from prosecution, because his alleged conduct formed part of the acts of the Fiji Military Forces that led to the removal of the legislative and executive organs of the State.
- [6] Counsel for the State submits that the immunity covers only those acts which led to the removal of the legislative and executive organs of the State by the Fiji Military Forces, and not acts of violence on civilians by military officers. Counsel concedes that the ambit of the immunity could be determined without considering the validity of the Promulgation.
- [7] I have carefully read the contents of the immunity. In my judgment, the ambit of the immunity is limited. Not every conduct of those persons who have been granted immunity under the Promulgation is immune from prosecution. The immunity only extends to those acts that led to the ousting or removal of the Officials of the legislative and executive organs of Government from their offices and also of other persons holding public office. It surely does not immune anyone from prosecution for an offence of murder allegedly committed in the process of removing the Officials. In this respect, there is no ambiguity about the ambit of the immunity.
- [8] For these reasons, without determining the validity of the Immunity Promulgation 2007, I hold the Accused is not immune from prosecution on the charge of murder as contained in the Information by the Director of Public Prosecutions.

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Daniel Goundar

JUDGE

At Suva

Monday 30th March, 2009

Solicitors:

Mr. W. Kuruisaqila and Mr. S. Qica for the State

Mr. H. A. Shah and Mr. J. Boseiwaqa for the Accused