Australia: Julian Moti defence closing submission outlines “oppressive and unfair” prosecution

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Defence counsel for former Solomon Islands’ attorney general Julian Moti issued its closing submission to the Queensland Supreme Court on Friday, arguing that the attempted prosecution on sexual assault charges that were discharged in Vanuatu a decade ago was “oppressive and unfair”. Moti has applied for a permanent stay of proceedings on the grounds that the Australian investigation and prosecution amounts to a politically motivated abuse of judicial process.

For the defence, Jim Kennan SC opened by raising that legal precedent had established two key grounds for stays of proceedings—“vexation, oppression and unfairness” and “bringing the administration of justice into disrepute”. Those outlined in Moti’s stay application constituted an abuse of process “individually and collectively”—i.e., considered as both isolated grounds and as part of a broader consideration of the circumstances of the case.

Kennan said that Moti’s “unlawful removal” from the Solomon Islands in December 2007—following the revoking of his position as attorney general by a pro-Australian government, which was installed after Prime Minister Manasseh Sogavare became victim of a protracted regime change campaign—was a “disguised extradition”, not a deportation as claimed by the prosecution. Under Commonwealth law, if the authorities of one country connived or colluded in the deportation of a person from another—thereby preventing that person from exercising their rights under international extradition law—the courts could find an abuse of judicial process and refuse to continue to trial.

Kennan argued that these precedents were directly applicable to Moti’s case. “We have a case of de facto, or disguised, extradition... The Australians were aiding and abetting this, acting in concert... there was aiding and abetting here, and they were effectively a party to this removal of Mr Moti in breach of his rights.”

Outlining the chronology of the Australian Federal Police investigation, Kennan noted that the Australian Federal Police (AFP) was aware of the Vanuatu allegations at least by 2001, yet no action was taken until late 2004, when Australia’s then High Commissioner in Honiara Patrick Cole requested an investigation as part of his efforts to prevent Moti being appointed attorney general. Kennan told the presiding judge, Justice Debra Mullins: “Where you have an investigation that’s commenced some seven years after the events, five years after it was last before the court, in the absence of a complaint from the victim ... then for the forces of the state to be unleashed on someone as a result of [the Australian government] wanting to stop him becoming attorney general really ought to be regarded as oppressive.”

Defence explained that early in the investigation, the AFP regarded the chances of extraditing Moti as “highly unlikely”. From mid-2006 the police began looking for alternative options.

Referring to the Australian government’s involvement in Moti’s allegedly unlawful removal from the Solomons on December 27, 2007 Kennan declared: “There is actually nothing more the Australians could have done to facilitate this disguised extradition than they did, other than fly him in a plane themselves; they did everything that was required to complete it... My client’s rights were breached, the rule of law was breached, his right to liberty was breached, he was illegally seized, and the Australians were knowing parties to all of that.”

Kennan then examined the extraordinary witness payments made to the alleged victim’s family. These now total more than $100,000, with the family continuing to receive a monthly payment between 27 to 33 times greater than the average monthly wage in Vanuatu. The AFP’s dispensation of cash had nothing to do with standard witness payments, which typically involve, for example, loss of income for time spent in court. Instead, the family has had their accommodation, food, medical, transport, and other daily expenses covered while they continued to live in Vanuatu. Kennan reviewed the series of threats made by the alleged victim and her relatives to withdraw from the case unless certain payments were made and conditions met. (See: “Enormous sums paid by Australian police to alleged victim’s family”)

“These payments are completely unjustified, and they scandalise the court, they bring the administration of justice into disrepute and, alarmingly, they create an amazing precedent for the future,” Kennan told Justice Mullins. “It would abuse the processes of this court to entertain this prosecution, because this court would then be saying that we’re prepared to entertain prosecutions where payments are really very high, and not authorised in any rational way.”

Defence concluded by reviewing the other particularised grounds for the stay application. Kennan said that with regard to the Vanuatu charges, while there was no “technical *autrefois acquit*” because the case had been discharged prior to trial, the attempted prosecution still amounted to double jeopardy, and was “oppressive by reason of that”. He also raised the late disclosure of documents by the Commonwealth Director of Public Prosecutions (CDPP) and AFP, which had given rise to the “extraordinary situation” where defence was forced to make its final submission under conditions where a number of subpoenaed documents had yet to be made available.

John Agius for the CDPP asserted in his closing submission "there is no evidence to suggest, let alone to establish, that Australia requested that Mr Moti be deported from the Solomon Islands, either in 2006 or in 2007". The prosecutor insisted that the court could not issue a ruling on the legality under Solomon Islands law of what occurred in Honiara in December 2007, adding that "if he [Moti] was denied rights, he was denied rights by the Solomon Islands authorities, and we don't invite a finding on that, but he certainly wasn't denied any rights by the Australian authorities".

Related to Agius's attempt to establish an absolute demarcation between the actions of Australian and Solomons' authorities, the prosecutor claimed that the "central feature of this whole process" was that Moti's deportation had been "a decision of a sovereign state made in relation to its domestic law". Whereas defence had maintained that the issuing by the Australian High Commission of travel documents in December 2007 for Moti and the two Solomons' officials accompanying him amounted to collusion in an unlawful deportation, Agius argued that it was "recognition by Australia of the sovereignty of the Solomon Islands in making its decision to deport Mr Moti".

The prosecution's arguments fly in the face of the reality of Solomon Islands' politics once the Australian-led Regional Assistance Mission to Solomon Islands (RAMSI) intervention force landed in July 2003. Canberra, with the help of the media, has promoted the fiction that the Solomons government remains "sovereign", in order to maintain RAMSI's "humanitarian" and "cooperative" façade, as well as to evade the issues of international law that would emerge with any form of open annexation. Australian authorities have nevertheless taken effective control over the country's state apparatus, including the legal system, police and prisons, public service, finance department and other bodies. All RAMSI personnel remain immune from Solomon Islands laws.

From July 2003 to April 2006, then Solomons' Prime Minister Alan Kemakeza operated under the clear understanding that he would not be prosecuted on corruption and other criminal charges only for so long as he did RAMSI's bidding. After May 2006, when Manasseh Sogavare was elected to office and proposed various changes regarded as contrary to Australian interests, including limiting RAMSI's control over the country's public finances and proposing a future RAMSI "exit strategy", the Australian government mounted a provocative campaign aimed at ousting his "sovereign government". Long before this campaign culminated in the ousting of Sogavare on December 13, 2007, through a parliamentary no-confidence vote, the then opposition parliamentary group was well aware that to maintain Australian government and RAMSI backing, it would have to immediately deliver Moti once it was installed in power. Only after 18 months of political manoeuvring and manipulation by Canberra and its authorities on the ground did the new Solomon Islands "sovereign" government decide to oust Moti as attorney general and deport him to Australia on December 27, 2007, just a week after the newly-installed government took office.

Agius told the court that High Commissioner Patrick Cole had done nothing wrong in asking the AFP to investigate Moti in light of the constitutional lawyer's pending appointment as attorney general in 2004-2005. "Part of Mr Cole's duty and responsibility was to protect the interests of Australia," Agius declared, "and if it should turn out from a diplomatic point of view that Australia was aware that one of its citizens who was being considered for the position of attorney general in such a state had committed such heinous offences and Australia had done nothing about it... It was a valid concern of Mr Cole's, (a) that that person not be appointed; and (b) that the person be investigated."

This position is similarly untenable. One can simply raise the question—if Moti had harboured a pro-RAMSI outlook, had been keen to advance Australian objectives in the Solomons, and was willing to report to Australian intelligence what he had learned in the course of his work, would the High Commissioner have had any objection to his becoming attorney general? The discharged Vanuatu allegations were dredged up for no other reason than that Moti represented a threat to the predatory economic and strategic interests of Australian imperialism in the South Pacific.

From the 1990s onwards, Moti had become well known to Australian authorities for his relations with a section of the Solomon Islands' elite, which sought to cultivate ties with Asian countries to counteract Australian dominance, and which promoted economic policies favouring small scale agricultural producers rather than international investors. His legal expertise later posed a considerable threat to Canberra's utilisation of military-police deployments across the South Pacific. Moti opposed the legal mechanisms that RAMSI relied upon from 2003 onwards; in 2005 he assisted a successful challenge to the constitutionality of the RAMSI-modelled Papua New Guinean Enhanced Cooperation Program that resulted in more than one hundred AFP agents being withdrawn from the former Australian colony.

The Australian government feared a similar challenge in the Solomon Islands, particularly to the immunity from the country's laws enjoyed by its RAMSI personnel. In mid-2006, before the Sogavare government appointed him attorney general, Moti was centrally involved in preparing a Commission of Inquiry to examine the two days of rioting in April 2006 that followed the first national election held under RAMSI. In addition to threatening to publicise the substantial evidence indicating that Australian soldiers and police had been deliberately stood down to allow the destruction to unfold, the official inquiry threatened to add significant weight to demands for the revocation of RAMSI's immunity. The Commission, when it finally completed its work in mid-2008 in the face of trenchant Australian opposition, recommended that the Australian government pay compensation to the riot victims and that RAMSI's legal immunity be revoked.

Moti's role was no small question. Canberra has invested about $1 billion in RAMSI since 2003, and regards the mission as a lynchpin of its operations across the South Pacific. The intervention represents a response to heightened great power rivalry in the region, driven above all by the emergence of China as a significant aid donor and investor. A RAMSI collapse or forced withdrawal of Australian personnel would mark, in this context, a major blow to Australian hegemony in its self-declared geo-strategic "sphere of influence".

Despite this, Justice Mullins appeared to indicate her agreement with Agius on the issue of sovereignty when she interrupted his submission to say that she was "not troubled" by the issuing of travel documents for Moti and the two Solomons' officials prior to the deportation. She described these as being issued in "the normal course of the Australian High Commission's business".

It appears that the court's decision on the stay application may hinge on the question of the AFP's witness payments.

Most of Agius's submission focussed on this question. After telling the judge, "I'm not putting submissions to excuse these payments or to justify them—I haven't come here to start at that position", Agius sought to

provide a number of potential “mechanisms for dealing with this problem beyond the granting of a permanent stay”.

The prosecutor first sought to stress the gravity of a decision in favour of a stay. He tried to tender as evidence the alleged victim’s statements to the AFP as well as a photograph and video footage of Moti with her family. The purpose of this extraordinary and legally improper diversion was to attempt to raise in the judge’s mind the seriousness of the alleged offences as well as to insinuate that there was little doubt about Moti’s guilt—a charge Moti has always strenuously denied. Agius’s attempted tender of this evidence flew in the face of standard legal procedure regarding submission of evidence. Matters relating to Moti’s guilt or innocence on the sexual assault charges are the subject for consideration at a committal hearing and the trial proper—not as part of a stay application, which involves determination of whether an abuse of judicial process has occurred because of the conduct of the police and prosecutors.

A visibly angry Justice Mullins told Agius: “I am not going to trawl through a prosecution brief in order to look at the strength of the prosecution case.” She said she would allow the alleged victim’s statements to be tendered only for the “limited purpose” of establishing, in the context of the defence’s challenge to the bone fides of the AFP investigation, that the alleged victim did, at various times, commit to being a complainant.

Agius went on to warn that by permanently ruling out a trial, a stay could be improperly “extreme” and “absolute”. He claimed the court needed to “look at the nature of these charges and the circumstances of them and to look at the consequences of the grant of a stay in this case; in our respectful submission that balance tips against the grant of a stay”.

The prosecutor suggested to Justice Mullins that she had alternatives to a permanent stay: to rule that the prosecution could only continue if the AFP payments were immediately halted; or to direct that the role of the payments in tainting the witnesses’ testimony be addressed in the trial, where the trial judge could rule as inadmissible the entire family’s claims. Justice Mullins responded: “The reality in this case is if the evidence of the complainant and her family members couldn’t be adduced that’s the end of the prosecution.” Agius agreed.

The prosecution finally tried to argue that the circumstances of the Moti case were unique—a “very rare species of bird”, a “dodo”, according to Agius—and there was therefore no fear of creating a precedent for such witness payments in the future, if the case were allowed to go to trial. This position was equally untenable—whenever Australia’s extra-territorial child sex laws are invoked, the victims are invariably residents of impoverished countries in the Asia-Pacific or other regions. If Moti’s stay application were to be declined, a definite precedent would most certainly be established: to encourage families in desperate circumstances to make false accusations against Australian nationals visiting their countries—especially those known to oppose the Australian government’s agenda—in order to receive substantial and ongoing AFP cash payments that cover their living expenses, potentially for several years.

Defence and the prosecution have a fortnight to issue further submissions after the release of the remaining, but as yet undisclosed, subpoenaed documents.

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