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The Julian Moti Affair and double jeopardy

The casual observer could be forgiven for thinking that the Australian Government has shown more vigour and determination in pursuing the extradition of Julian Moti for alleged offences under the *Crimes (Child Sex Tourism) Act* than it has shown in pursuing the apprehension of Osama Bin Laden for terrorist acts against humanity.

Why is the Australian Government running so hard in the Julian Moti affair? Is there a political dimension to this matter? The Commissioner for the AFP has stated that the AFP commenced investigation into this matter in 2005. It was in 2005 that Julian Moti was first asked to be Attorney General. He declined that first offer but accepted the 2006 offer. Why has the AFP sought new witnesses and re-interviewed the complainant. Does the Australian Government want to see a regime change in the Solomons?

Mr Moti was tasked to set up an inquiry into the recent devastating riots in the Solomons which saw the tragic destruction of China Town and other parts of Honiara. Mr Moti had initially engaged retired Federal Court Judge Marcus Einfeld to lead that inquiry. Justice Einfeld was well recognised for his achievements in the field of human rights. However, with the drama of the Einfeld driving fiasco, that appointment lapsed. Mr Moti was seeking the services of another Australian judge or retired judge to lead this inquiry when the current furore erupted.

Why did the Commissioner for the AFP cancel Mr Moti's Australian passport and place him under covert surveillance when he was giving law lectures in India? Perhaps we will never know the answers to these questions.

We do know however that Mr Moti commenced a private prosecution against the father of the complainant claiming the father made threats that if Mr Moti did not pay the father US$35,000 and withdraw from a business of Noni Fruit in Vanuatu then the father's daughter would accuse Mr Moti of sexual offences. The magistrate found a prima facie case but at the conclusion found the father not guilty because as the magistrate stated: "*The essential reasons for this conclusion are that there was a direct conflict of evidence. There is no evidence that corroborates one version or the other.*"

What then happened to the prosecution of Mr Moti? There was an initial committal proceeding that committed Mr Moti to the Supreme Court for trial. That decision went to the Court of Appeal that was presided over by Justice Von Doussa – a then Australian Federal Court Judge of the highest reputation – and two other judges, one a New Zealander, the other a Fijian. The Court of Appeal quashed the committal and ordered that the matter be considered afresh by a different magistrate. At the second committal the prosecutor was an Australian barrister Mr Terry Gardner and Mr Moti was represented by Australian barristers also, namely Mr Ian Barker QC and Dr David Chaiken.

At the end of the second committal it emerged that the complainant had "produced" six statements. Unsurprisingly defence counsel made extensive criticisms of those six statements. On 23 August 1999 the Magistrate Mr Bruce Kalotiti Kalotrip found there was no prima facie case and that the prosecution was unjustified or oppressive and ordered the prosecution to pay the costs of Mr Moti. No appeal or review was sought on the finding of no prima facie case – however, an appeal was launched in relation to the costs order. The acts complained of were allegedly committed in 1997.

There was a civil suit brought by the complainant after the failed committal. That civil suit ended with a verdict for Moti on terms not to be disclosed.

I have set out those details as it is important for readers to have an understanding of the facts when looking at what is now occurring.

Does the attempt by the Australian Government to extradite and try again these 1997 matters breach the common law principle of double jeopardy? The principle of double jeopardy is a principle of common law and dates back to the 12th century. The principle is clear and simple namely, no person shall be convicted of or punished twice for the same offence. A court has the inherent power to stay a prosecution that breaches the double jeopardy principle as an abuse of process.

In Australia that power was dramatically exercised by the High Court in 2002 in the case of *R v Carroll*. The United States of America recognises the principle of Double jeopardy in the 5th Amendment of the Constitution. The Supreme Court of the United States in the case of *Green v United States* per Black J stated:

> "*The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.*"

In *Pearce v The Queen* in 1998 the High Court acknowledged the principle of Double jeopardy with Gummow J observing "*The principles involved in the notion of "double jeopardy"* also apply at the stage of sentencing. They find expression in the rule of practice *"if not a rule of law*" against duplication of penalty for what is substantially the same act.

In Australia an attempt was made to circumvent the principles of double jeopardy wherein Carroll had been acquitted of murder and was later charged with perjury. The prosecution alleged that Carroll gave false evidence at the murder trial by testifying that he did not kill the deceased. The High Court held this was an abuse of process with Justice McHugh stating:

> "*It is an abuse of process for the Crown to charge a person with an offence of perjury when proof of the charge necessarily contradicts or tends to undermine an acquittal of the accused in respect of another criminal charge.*"

What then of the reliance by the Australian authorities of the *Crimes (Child Sex Tourism) Act* to extradite Mr Moti. Well s.50FC of that Act specifically refers to double jeopardy in these terms:

> "*If a person has been convicted or acquitted in a country outside Australia of an offence against the law of that country in respect of any conduct, the person cannot be convicted of an offence against this part in respect of that conduct.*"

Clearly in the correct technical sense Mr Moti was not "acquitted" of these charges as the magistrate found the case against him to be so pathetic as not to found a *prima facie* case and to be unjustified or oppressive. Does this mean then that in this factual matrix a valid extradition can take place? On a strict technical interpretation of s.50FC a responsible argument can be made for extradition but is this the real purpose of the legislation? Does this mean that the reality is that Mr Moti is again being tried in respect of conduct that a fair-minded person would regard he has previously faced and successfully challenged and ought not face again?

Finally was the *Crimes (Child Sex Tourism) Act* passed with the intention of enabling the Australian prosecution authorities to launch a prosecution against a person who resided in Vanuatu and the Solomons and who happened to take out Australian citizenship but had not lived in Australia since student days and is currently living in the Solomons, to be tried in Australia for offences allegedly committed when he was a citizen of Vanuatu? You be the judge.

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