IN THE COURT OF APPEAL, FIJI
On appeal from the High Court of Fiji

CRIMINAL APPEAL AAU 28 OF 2011
(High Court HAC 5 of 2004)

BETWEEN : **RATU INOKE TAKIVEIKATA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr A Naco for the Appellant**
Mr M Korovou for the Respondent

Date of Hearing : **19 December 2016**

Date of Ruling : **27 January 2017**

RULING

[1] This is a timely application for leave to appeal against conviction and sentence. The application is made under section 21(1)(b) and (c) of the Court of Appeal Act Cap 12 (the Act). Pursuant to section 35(1) of the Act the power of the Court of Appeal to hear and

determine an application for leave to appeal may be exercised by a judge of the Court. The test to be applied in an application for leave to appeal against conviction is whether the appeal raises an arguable point that requires the consideration of the Court of Appeal. The test for leave to appeal against sentence is whether the Appellant has established an arguable error in the exercise of the sentencing discretion (**Naisua –v- The State** CAV 10 of 2013; 20 November 2013).

[2] It is at this point convenient to set out briefly the history of the present proceedings. The Appellant was initially tried in November 2004 in the High Court at Suva. He faced five counts. The first count was incite to mutiny contrary to section 55(b) of the Penal Code Cap 17 (the Code). The particulars of that offence were that the Appellant on 6 August 2000 at Deuba advisedly attempted to incite a person serving in the Military Forces of Fiji, namely Corporal Peni Naduaniwai, to commit a mutinous act, namely to join in combination with other persons subject to service law, in executing a takeover of Queen Elizabeth Barracks in Suva.

[3] The second count was incite to mutiny contrary to section 55(b) of the Code. The particulars were that the Appellant on or about 17 August 2000 at Suva advisedly attempted to incite persons serving in the Military Forces of Fiji, namely Captain Shane Stevens, Sergeant Manoa Bonafasio and Corporal Alikisio Alava to commit a mutinous act, namely to join in combination with other persons subject to service law in executing a takeover of the Queen Elizabeth Barracks in Suva.

[4] The third count was incite to mutiny contrary to section 55(b) of the Code. The particulars were that the Appellant on or about 27 August 2000 at Nausori advisedly attempted to incite persons serving in the Military Forces of Fiji, namely Captain Shane Stevens and Sergeant Manoa Bonafasio, to commit a mutinous act, namely to join in combination with other persons subject to service law in executing a takeover of the Queen Elizabeth Barracks in Suva.

[5] The fourth count was aiding soldiers in an act of mutiny contrary to section 56(a) of the Code. The particulars were that the Appellant between 26 August and 25 September 2000 at Suva aided a non-commissioned officer of the Fiji Military Forces namely Sergeant Manoa Bonafasio in an act of mutiny, namely his attempt on 2 November 2000 in combination with other persons subject to service law to takeover the Queen Elizabeth Barracks in Suva by providing him with mobile phone equipment for coordination of the said attempted takeover.

[6] The fifth count was incite to mutiny contrary to section 55(b) of the Code. The particulars were that the Appellant on or about 17 September 2000 or 24 September 2000 at Suva advisedly attempted to incite persons serving in the Military Forces of Fiji, namely Captain Shane Stevens and Sergeant Manoa Bonafasio to commit a mutinous act, namely to join in combination with other persons subject to service law in executing a takeover of the Queen Elizabeth Barracks in Suva.

[7] Following a lengthy trial the five assessors returned majority opinions of not guilty on count 1, majority opinions of not guilty on count 2, majority opinions of guilty on count 3, unanimous opinions of not guilty on count 4 and unanimous opinions of not guilty of count 5. In a reasoned judgment delivered on 24 November 2004 the learned trial judge disagreed with the opinions of the assessors in respect of counts 1, 2 and 4. The Judge agreed with the opinions of the assessors in respect of counts 3 and 5. As a result the Appellant was convicted on counts 1 to 4 and acquitted on count 5. The Appellant was sentenced to concurrent terms of life imprisonment on counts 1 to 3 and a concurrent sentence of 18 months imprisonment on count 4. Being dissatisfied with his conviction the Appellant filed a timely appeal in the Court of Appeal against conviction and sentence. For reasons that are not directly relevant to the present appeal the Court of Appeal allowed the appeal, quashed the convictions on counts 1, 2, 3 and 4 and ordered a new trial on those four counts. (**Takiveikata –v- The State** AAU 65 of 2004; 25 June 2007).

[8] There were subsequently appeal proceedings in the Supreme Court on issues that are unrelated to the present appeal (**State –v- Takiveikata** CAV 16 of 2007; 24 July 2008).

[9] The new trial that had been ordered by this Court took place between 16 and 28 February 2011. The new trial proceeded on one consolidated count only. The offence was incite to mutiny contrary to section 55(b) of the Code. Although a copy of the indictment for the new trial has not been included in the material filed by the parties, a reference to the particulars can be found on page 3 of the Appellant's supplementary submissions filed on 29 November 2016.

[10] It is stated there that the particulars of the new charge are:

> *"Ratu Inoke Takiveikata between 6 August 2000 and 24 September 2000 at Suva advisedly attempted to incite Captain Stevens and Sergeant Bonafasio knowing that they were serving in the Fiji Military Forces to commit to the mutinous act of joining in combination with the other members of the Fiji Military Forces to execute a takeover of the Queen Elizabeth Barracks in Suva."*

[11] Following the trial in the High Court at Suva, the five assessors returned majority (4-1) opinions of guilty. The learned trial Judge agreed with the majority opinions of the assessors and in a reasoned judgment delivered on 2 March 2011 convicted the Appellant. On 4 March 2011 the Appellant was sentenced to life imprisonment with a non-parole term of 8 years to be served concurrently with any existing sentence.

[12] In his notice of appeal the Appellant has relied upon 6 grounds of appeal against conviction and 1 against sentence. They are:

> *"(I) **THAT** the learned judge erred in law when he failed to properly direct the assessors on the law of accomplice evidence and the necessity of corroborative evidence to accomplice, the absence of which would result in a non direction and or misdirection, which is fatal to the majority opinion of the assessors and the decision of the court being unsafe and unsatisfactory; and*

(II) ***THAT*** *the learned judge erred in law when he failed to properly direct the assessors on the law regarding accomplices and or immunized witnesses, the absence of such direction is fatal to the majority opinion of the assessors and the decision of the court being unsafe and unsatisfactory; and*

(III) ***THAT*** *the conviction was unsafe and unsatisfactory having regard to the entire sum of the evidence at trial, in particular, to the following:*

(a) When no evidence was presented that Shane Stevens was incited by the Appellant; and

(b) When no evidence was presented that Manoa Bonafasio was incited by the Appellant; and

(c) When the State's whole evidence presentation was and or substantially conflicting that would render the decision of the court unsafe; and

(d) When the evidence of Maciu Turagacati was so discredited that it is unsafe to depend on it either independently or in concert with the evidence of Manoa Bonafasio; and

(e) When the phone records were given undue weight by the trial judge in the summing up to the assessors.

(IV) ***THAT*** *the learned judge failed to properly and fairly summarize the evidence at trial, such failure generally rendered the conviction and sentence of the court unsafe; and*

(V) ***THAT*** *the learned trial judge failed to properly address the assessors on the weight of Shane Steven's evidence in the absence of any application at trial by the State for a declaration of hostility, the absence of such directive gave rise to a miscarriage of justice and renders the conviction unsafe and unsatisfactorily; and*

(VI) ***THAT*** *the learned judge misdirected the assessors on the weight that they could draw out of Shane Steven's evidence without the declaration of hostility, the misdirection of which is substantial and gave rise to a miscarry of justice*

(VII) ***THAT*** *the sentence, in all the circumstances of the case, imposed on the Appellant is manifestly harsh and excessive."*

[13] On 15 November 2016 the Appellant filed a Notice of Additional Grounds of Appeal setting out 4 additional grounds of appeal against conviction:

> *"1. That the High Court erred in law and in fact when it didn't comply with the Fiji Court of Appeal Order on retrial dated 25th July, 2007 where the orders were to have a retrial on Counts 1, 2, 3 and 4 of the original charges against the Appellant.*
>
> *2. That the High Court erred in law and in fact when it failed to comply with the orders of the Court of Appeal and proceeded with the Trial resulting on a Mistrial.*
>
> *3. That the learned Trial Judge erred in law and in fact when he proceeded to the trial of the Appellant where the consolidated charge included the essence of the 5th Count for which the Accused had been acquitted of.*
>
> *4. That the Learned Trial Judge erred in law and in fact when he convicted the Appellant on the same evidence of the one key witness when in the earlier trial his evidence was rejected by the Court and had resulted in the acquittal of the Appellant on the 5th count of his original charge."*

[14] The parties appeared before the Court for the hearing of the application on 19 December 2016. The Appellant had filed written submissions on 5 August 2016 and on 29 November 2016. The Respondent filed written submissions on 18 August 2016 and on 6 December 2016.

[15] The only issue that has been pursued with any force by the Appellant in both the written submissions and before the Court was that which relates to the particulars of the one consolidated charge upon which the Appellant was before the Court for the new trial. It was submitted that the particulars of the consolidated charge referred to the Appellant's conduct between 6 August 2000 and 24 September 2000 under the offence of incite to mutiny contrary to section 55(b) of the Code. The dates referred to in the consolidated charge include the two dates that were particularised in the firth count in the first trial. In the fifth count it was alleged that the Appellant had acted contrary to section 55(b) on or about 17 September 2000 or 24 September 2000. At the trial the Appellant had been

acquitted on the fifth count. Although not raised at the new trial it is arguable that the defence of *"autrefois acquit"* was in part available to the Appellant. It is also arguable that if it had been raised it would have been necessary for the Respondent to amend the indictment and that in turn would have determined the scope of admissible evidence that the Respondent would have been permitted to lead against the Appellant. Leave is granted on this ground.

[16] It is not at his stage necessary to comment in detail on the remaining grounds other than those in the initial notice of appeal. The reference in those grounds to the conviction being unsafe and unsatisfactory are not grounds upon which the Court of Appeal is permitted to allow an appeal under section 23(1) of the Court of Appeal Act. Those grounds are dismissed under section 35(2) of the Act on the basis that there is no right to appeal on such grounds. Otherwise the Appellant should be allowed the opportunity to argue the remaining grounds against conviction and the one ground against sentence should he choose to do so after the appeal record has been prepared.

[17] Finally it is necessary to make some comment about the delay in bring this appeal to the stage where an application for leave to appeal was heard some 4½ years after the notice of appeal was filed. For reasons that are not apparent from a perusal of the file the appeal was not listed for mention until 28 November 2014. Thereafter further delay was brought about by either the non-attendance of Counsel for the Appellant on subsequent mention dates or as a result of requests by Counsel for the Appellant for further time to clarify instructions from the Appellant. The delay is most unfortunate and is unacceptable.

Orders:

1. *Leave to appeal against conviction is granted.*
2. *Leave to appeal against sentence is granted.*

W. D. Calanchini
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Hon. Mr. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL