IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 152 of 2017
[In the High Court at Lautoka Case No. HAC 129 of 2015]

BETWEEN	:	**ISIKELI WAISEGA KABAKORO** **APOLOSI QALILAWA**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Kunatuba for the Appellants**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**12 February 2021**
Date of Ruling	:	**15 February 2021**

RULING

[1] The appellants had been charged in the High Court of Suva on two counts each of sedition contrary to section 67(1)(a) of the Crimes Act, 2009 committed with 13 others on 03 November 2014 at Rakiraki in the Western Division. They were the 11th and 15th accused respectively in the High Court.

[2] The charges against each of the appellants read as follows.

'TWENTY FIFTH COUNT

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

ISIKELI WAISEGA KABAKORO, *on the 03rd day of November 2014 at Rakiraki, in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "Ra Sovereign Christian State" with the seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.*

TWENTY SIXTH COUNT

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

ISIKELI WAISEGA KABAKORO *on the 03rd day of November 2014 at Rakiraki, in the Western Division, did sign a document headed "Ra Sovereign Christian State" with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.*

THIRTY THIRD COUNT

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009*

Particulars of Offence

APOLOSI QALILAWA, *on the 03rd day of November 2014 at Rakiraki, in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "Ra Sovereign Christian State" with the seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.*

THIRTY FOURTH COUNT

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009*

Particulars of Offence

APOLOSI QALILAWA, *on the 03rd day of November 2014 at Rakiraki, in the Western Division, did sign a document headed "Ra Sovereign Christian State" with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.*

[3] After the summing-up on 15 September 2017, the assessors had by a majority of three to two had opined that the appellants were not guilty of all counts as charged. The trial judge had disagreed with the assessors, convicted ***ISIKELI WAISEGA KABAKORO*** (11th accused-appellant) on both counts and ***APOLOSI QALILAWA*** (15th accused-appellant) on the 34th count and acquitted him of the 33rd count. The trial judge on 29 September 2017 imposed on the 11th appellant an aggregate sentence of 02 years of imprisonment 06 months of which was suspended for two years. Thus, he had to serve only 18 months in prison. The 15th appellant received a sentence of 18 months of imprisonment, 6 months of which was suspended for two years. Thus, he had to serve only 12 months in prison.

[4] The prosecution case is summarized in the sentencing order as follows.

> *6. The Uluda Declaration is a Unilateral Declaration of Independence (UDI) by the entity "Ra Sovereign Christian State" within the territorial boundaries of the Republic of Fiji. The purported effect of this document is to undermine the authority of the legally established government of Fiji in the Province of Ra. The act of signing this document had a tendency to bring into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.*
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> *7. The Ra Petition to the ICJ is a document intended to be sent to the International Court of Justice, the Queen of England and the Secretary General of the United Nations. It contains statements which had the tendency to promote discontent and disaffection amongst the inhabitants of Fiji.'*
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> *8. Each of 4th to 15th Accused was convicted for having signed the document titled Ra Christian State. 4th to 15th Accused admitted voluntarily signing this document. Act of signing this document had a tendency to raise discontent or disaffection amongst the inhabitants of Fiji.*
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> *9. Each of 4th to 14th Accused was convicted for having taken an oath to serve as a Cabinet Minister in the entity called Ra Christian State Government. This act had an effect of undermining the authority of the legally elected Government of Fiji and its Ministers with a tendency to bring into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.*

[5] The judgment sheds more light on the factual context in which the appellant had been convicted.

48. 4th to 15th Accused admit voluntarily signing the document titled Ra Christian State. Except for 15th Accused, each 4th to 14th Accused admit taking an oath to serve as a Minister of the Cabinet of Ra Christian State. Therefore, there is no dispute about them having done the physical part or actus reus of the offence of Sedition.

49. The document titled Ra Christian State describes its signatories as democratically elected (by consensus) leaders and declares the province of Ra to be an independent and Sovereign State known as the 'Ra Sovereign Christian State'. It manifests the intention to 'put immediate end to all self-serving governments of all persuasions in Fiji as from the date of this Declaration'. It 'rejects outright the mainstreaming Constitution of the current Government, assented to on 6th September, 2013' and laws promulgated under it as having the effect of removing protection against genocide. It rejects the multicultural rule since independence as an imposition of values repugnant to Christian way of life. It rejects the policies of the Attorney-General as having the effect of extermination of the native Fijian race from the landscape of Fiji.

50. This document stems from and makes reference to Uluda Declaration (UDI) where it is stated at paragraph 8. "We, people of the Ra Sovereign Christian State in exercise of our right to self-determination, believe that our subsisting common law applies unilaterally to all residents on the Ra lands and seas, and non Ra people are prohibited from performing ceremonial duties such as the worship of false gods on our lands".

[6] A timely notice of appeal against conviction and sentence had been filed on behalf of the appellants on 27 October 2017 by Aman Ravindra-Singh Lawyers. After change of solicitors on 03 July 2020, written submissions on their behalf had been filed on 23 October 2020 by Law Solutions. The State had tendered its written submissions on 04 November 2020.

[7] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellants could appeal against conviction and sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144: AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA

106: AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[8] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013; 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[9] Grounds of appeal urged by the appellants are as follows

Conviction

Ground 1

THAT the Learned Trial Judge erred in law when he dismissed the first (1st) application for a Voir Dire on the issue of admissibility of photocopied documents

Ground 2

THAT the Learned Trial Judge erred in law when he dismissed the second (2nd) application for a Voir Dire ont eh issue of admissibility of photocopied documents.

Ground 3

THAT the Learned Trial Judge erred in law when he dismissed the third (3rd) application for a Voir Dire on the issue of admissibility of photocopied documents.

Ground 4

THAT the Learned Trial Judge erred in law as outlined for a voir dire under section 288 of the Criminal Procedure Decree 2009.

Ground 5

THAT the Learned Trial Judge erred in law when he dismissed the first (1st) application for a Mistrial on the issue of non-disclosure.

Ground 6

THAT the Learned Trial Judge erred in law when he dismissed the second (2nd) application for a mistrial on the issue of non-disclosure.

Ground 7

THAT the Learned Trial Judge erred in law when he dismissed the third (3rd) application for a Mistrial even before this application was filed and heard by his Lordship on the issue of non-disclosure.

Ground 8

THAT the Learned Trial Judge erred in law as outlined under Section 14(2)(L) of the Constitution of Fiji 2013 when His Lordship denied a defence witness from giving evidence on behalf of the Accused persons.

Ground 9

THAT the Learned Trial Judge erred in law as outlined under Section 232(2)(a) of Criminal Procedure Decree 2009 when His Lordship denied a defence witness from giving evidence on behalf of the Accused persons.

Ground 10

THAT the Learned Trial Judge erred in law as outlined under Section 233(1) of the Criminal Procedure Decree 2009 when His Lordship denied a defence witness from giving evidence on behalf of the Accused persons.

Sentence

Ground 11

THAT the Appelant appeals against sentence on the ground that it is manifestly harsh, excessive and wrong in principle under the corcumstances of the case.

Ground 12

THAT the Learned Trial Judge erred when his Lordship failed to take into account relavent account all the Appelants' age, prro health condiction and previous good character while considering the mitigating prior to sentencing."

[10] Both parties have grouped the appeal grounds together, for several grounds are repetitive in their substance.

01st 02nd , 03rd and 04th grounds of appeal

[11] The appellants complain that the trial judge refused to hold a *voir dire* inquiry into the production of the photocopies of the two documents named Uluda Declaration purporting to be a unilateral declaration of independence (UDI) by the entity "Ra Sovereign Christian State" and the Ra Petition to the ICJ. The appellants submit as a matter of law that the judge had failed to apply the test formulated in **R v Lobendahn** [1972] FJLawRp1: [1972] 18 FLR 1 (18 January 1972) regarding the admissibility of copies of documents.

[12] The respondent argues that the appellants never disputed the photocopies of the above documents as exhibits at the trial and they in fact admitted having signed "Ra Sovereign Christian State". According to the respondent, the only issue at the trial was whether the appellants had signed it with a seditious intention. Therefore, the state argues that ***Lobendahn*** test had no application in the circumstances of the case.

[13] I find that in his ruling dated 15 August 2017 the trial judge had given his mind to the application by the defense for the court to conduct a Lobendahn test regarding those documents but the judge had refused to have a Lobendahn hearing primarily because the factual scenario and the basis upon which the photocopies were intended to be tendered in the case were different. The state had not sought to produce photostat copies of documents on the basis that the originals of which had been irretrievably lost but as the best evidence available to them because those copies were the only documents seized during police investigations.

[14] In any event, in the light of the fact that the real issue in the case had turned out to be whether the appellants had entertained seditious intention when they admittedly signed the relevant documents, I do not think that there is a reasonable prospect of success of the appellants' complaint under these grounds of appeal.

05th, 06th and 07th grounds of appeal

[15] The appellants argue that the trial judge erred in law when he dismissed the first application for a mistrial on the issue of non-disclosure of the document titled 'Ra Sovereign Christian State". The defence counsel had argued that non-disclosure or late disclosure of this document has done an irreparable damage to the defence case and the prejudice thereby caused could not be remedied without ordering mistrial. State counsel had submitted that, although that document was not disclosed to the defence for the purpose of this trial, it was disclosed during the *voir dire* inquiry.

[16] The trial judge had dealt with the said application for a mistrial in his ruling on 22 August 2017 and stated as follows

> *5. I perused the proceedings of voir dire to verify the truthfulness of submission of the State. It appears that this document has been tendered in evidence marked as VD1 B through IP Sevuloni. No objection had been taken by Mr. Sing on the basis of non-disclosure. This document is referred to in both caution statements of the 4th Accused that were disclosed to the Defence. Therefore, if this document is crucial to the prosecution of the Defence case, Mr. Singh, who is well aware of this document, could have made an application to this Court.*
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> *6. Furthermore, I perused this document carefully. There is no material difference in the content between the 'RA SOVEREIGN CHRISTIAN STATE Provisional Institutions of Self Government' that has already been marked and this document except for line-up of names and portfolios of so called members of Cabinet. Therefore, no prejudice will be caused to the Defence due to non or late disclosure of this document. Application made for mistrial is dismissed.'*

[17] In the circumstances, there is no reasonable prospect of success of these appeal grounds in appeal.

08th, 09th and 10th grounds of appeal

[18] The appellant challenges the trial judge's decision not to allow an expert defense witness to give evidence. They rely on section 14(2)(L) of the Constitution and section 232 (2) (a) of the Criminal Procedure Code.

[19] The trial judge had given a ruling on this issue as well on 08 September 2017. The issue had arisen when the counsel for the appellants and all other accused (other than the 01st accused) had indicated to court that his clients wished to remain silent and that he would be calling an expert witness on international law. The counsel had said in his application for expert evidence that the Information and the documents tendered by the prosecution which were at the heart of the prosecution case referred to the ICJ and United Nations Declaration on Rights of Indigenous Peoples (UNDRIP), and the International Labour Law Conventions and, since the prosecution witnesses failed to give evidence on those instruments in the context of international law, he should be allowed to call an expert witness on International Law.

[20] The trial judge had examined the relevant law on the appellants' application to call expert evidence in his ruling as follows.

> *18. The legality or otherwise of the documents signed by the Accused is entirely a matter for domestic courts and has to be decided within the legal framework of this jurisdiction. An expert can express an opinion only on foreign law if his or her opinion is relevant to trial issues. Even though Section 7 of the Constitution of the Republic of Fiji allows domestic courts of Fiji, if relevant, to have regard to international law for the limited purpose of interpreting the Bill of Rights, that provision can never be used to interpret a contested document filed in this Court. Therefore, any interpretation given by an expert witness on the legality of impugned documents is totally irrelevant and of no assistance to this court to resolve the issues at hand. It must be remembered that opinion evidence, like any other, is subject to the principle of relevance. Thus comes a point where an inference, although expressed by a qualified person, if it enters upon the field of mere speculation should therefore rejected.* ***Starker v R Straker v R*** *(1977) ALR 103 (High Court of Australia).*
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> *19. The proposed expert witness cannot express any opinion on the intention of the Accused and not qualified to give an opinion as to the state of mind of the Accused at the time of signing of those documents. "The expert will not be permitted to point out to the jury matters which the jury could determine for themselves or to formulate his empirical knowledge as a universal law:* ***Clark v Ryan*** *[1960] HCA 42; (1960) 103 CLR 486 at 491 Matioli v Parker [1973] Qd R 499. Turner (1974) 60 Crim Appn R 80, per Lawton LJ.*
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> *20. The decision of the High Court in* ***Clark v Ryan*** *(1960) 130 CLR 486 has become a touchstone for the principles in this area of the law. In that case Dixon, CJ (with whom Fullager, J agreed) said:*

> *"The rule of evidence relating to the admissibility of expert testimony as it effects the case cannot be put better than it was by J. W. Smith in the notes to Carter v Boehm, 1 Smith L.C., 7th ed. (1876) p 577. "On the one hand" that author wrote, "it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it." Then after the citation of authority the author proceeds: "While on the other hand, it does not seem to be contended that the opinion of witnesses can be received when the enquiry is into a subject matter the nature of which it is not such as to require any peculiar habits or study in order to qualify a man to understand it." Adapted by Harding A.C.J. in R v Camm (1883) 1 Q.L.J. 136"(emphasis added).*

21. Assessors and the trial judge in this case are properly equipped to draw the proper inferences as to the state of mind of the Accused from facts placed before this Court. An expert witness should not be allowed to speculate about each accused's intention (as opposed to their motive which is irrelevant to the issues at hand) when they signed those documents.

22. General rules of admissibility also apply. For example, the expert's opinion must be relevant to a matter in issue. If the prejudicial effect outweighs the probative value the judge has a discretion to exclude the evidence: R v Elliott (unreported NSW SC 6 April 1990, Hunt, J); R v Tran (1990) 50 A Crim.R. 233. If the expert, in drawing inferences, enters into the field of mere speculation the opinion evidence would be rejected: Straker v R (1977) ALR 103 (High Court of Australia).

[21] The appellants' counsel had tendered a copy of the CV of the intended expert witness to Court and the prosecution. The state had vehemently objected to calling the said witness and called the CV produced in Court as one that was used to apply for a job and submitted that it did not necessarily make the witness an expert witness. The prosecution had further submitted that the CV had no proof that the proposed defence witness was an expert witness in court proceedings but only a legal practitioner. To avoid further embarrassment to the witness, the trial judge had decided to hold in the absence of the assessors a *voir dire* to test her expertise in international law.

[22] Having examined the application to lead expert evidence thoroughly the trial judge had decided that the request for defence expert witness was vexatious, not sufficiently reasoned, and relevant to the subject-matter and could not arguably have strengthened the defence position.

[23] The appellants have not convinced me in their submissions that the trial judge had erred in law or in his reasoning in rejecting the appellants' application to call the expert witness.

[24] Therefore, there is no reasonable prospect of success of these grounds of appeal.

11th and 12th grounds of appeal (sentence)

[25] The trial judge in his sentencing order had stated as follows regarding the 11th and 15th appellants respectively.

> *[27] He is a 31-year-old former lecturer at APTC. He is a father of 2 children. He has no previous convictions. Having considered all mitigating circumstances, I deduct 6 months for each count to arrive at an aggregate sentence of 2 years' imprisonment. Having considered his good character and possibility of rehabilitation, I order a part suspension of his sentence in order to balance deterrence with rehabilitation. Accordingly, 11th Accused has to serve only 18 months in prison and rest of the sentence (6 months) is suspended for a period of 2 years.*
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> *[59] He is a 66-year-old pester. He is a father of 7 children. He is suffering from poor eye sight. He has maintained a clear record. Having considered all mitigating circumstances, I deduct 6 months to arrive at a sentence of 18 months' imprisonment. Having considered his good character health condition and possibility of rehabilitation, I order a part suspension of his sentence in order to balance deterrence with rehabilitation. Accordingly, 15th Accused has to serve only 12 months in prison and rest of the sentence (6 months) is suspended for a period of 2 years*

[26] Therefore, there are no merits of the appellant's complaint on the sentence.

[27] The appellants have not been able to point out any other sentencing errors on the part of the trial judge.

[28] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach

taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[29] The trial judge did not have the benefit of a guideline judgment regarding the sentence for the offence of sedition. Nevertheless, given the difficult task of meeting out appropriate sentences, I think the judge had delivered very reasonable sentences on both appellants. For the sake of argument, one might even say that if at all, the trial judge might have erred on the side of leniency.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL