RATU JOPE NAUCABALAVU SENILOLI and 4 Ors v STATE (AAU0041 of 2004S)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, PENLINGTON and WOOD JJA

2, 3, 11 November 2004

Criminal law — appeals — miscarriage of justice — whether assessor's inclusion posed real danger of bias — whether there was abuse of process for unwarranted and excessive delay in charging Accused — whether sentence harsh and excessive — Constitution of the Republic of Fiji ss 28, 28(1)(d) — Court of Appeal Act s 23(1), 23(1)(b) — Penal Code (Amendment) Act 2002 — Penal Code (Cap 17) ss 50, 54 — Public Order Act (Cap 20) ss 5, 5(b), 6.

On 19 May 2000, George Speight and his supporters held as hostage the Prime Minister and other members of the parliament. On the same day, a press conference was held and George Speight made an announcement that there would be an alternative government. The first Appellant Ratu Jope Naucabalavu Seniloli was offered the position of president and the other Appellants were offered various ministerial posts in the Speight government.

On 20 May 2000, the Appellants took an oath of the positions they have accepted. As a consequence, each of the Appellants and Isireli Lewenqila was charged with the offence of taking an engagement in the nature of an oath to commit a capital offence. The oath taking was made under the circumstance where the President Ratu Mata still maintained his position as president and claimed that the government in which the Appellants' position was to be held was unlawful. They pleaded not guilty during the trial in the High Court and were convicted of the offence charged save for Lewenqila who was acquitted.

The prosecution submitted that the oaths made by the Appellants purported to bind the person who took the oath to do actions that if performed will give rise to the crime of treason. The prosecution likewise claimed that the fact that there was intentional taking of an oath showed that the Appellants bound themselves to commit treason and was already a completed offence. The action, taken in the manner in which it was done showed support and lent credibility to the criminal activities of the group of people who staged the coup in the parliament.

The issues raised were: (a) that during the trial of the Appellants, there was a material irregularity that gave rise to a substantial miscarriage of justice because one of the assessors had been the client of counsel for Lewenqila for the said assessor's pending matrimonial proceedings, that the relationship between the assessor and Lewenqila's counsel was not made known to the court nor to the Appellants' counsel and that Lewenqila was acquitted; (b) whether the assessor's inclusion resulted in a real danger of bias because of the influence the assessor may have in consideration not just of Lewenqila's case but of the other accused; (c) that there was an abuse of process for the unwarranted and excessive delay in charging the Appellants in order for the prosecution to avoid the time limit under s 54 of the Penal Code (Cap 17); (d) that the learned trial judge erred when he declined to adjourn the proceedings in the trial for adequate time to allow the second Appellant's new counsel to prepare for trial; and (e) and that the sentence was harsh and excessive.

Held — (1) It has been a practice in Fiji that assessors are treated as a jury and the court cannot examine or investigate their opinions or their reasons in arriving at their opinions. Further, there is considerable weight of authority that the deliberations of a jury cannot be subject to investigation by the court after trial. Moreover, a professional solicitor-client relationship, as in the case of the assessor in this case, must fall at the other end of the scale. While the assessor was included on the panel of assessors resulting to a potential irregularity, the same did not give rise to a miscarriage of justice.

(2) Counsel for the Appellants submitted that there was bias on the acquittal of Lewenqila as there was no difference in the case against him with that of the other accused. However, there was evidence to show the reasons why the assessors unanimously arrived at a different opinion as to Lewenqila. Thus, the solicitor-client relationship did not give rise to a possibility or danger of bias and that there was no miscarriage of justice.

(3) Treason is an offence provided under s 50 of the Penal Code but there is no time limit imposed on prosecutions under s 5 of the Pubic Order Act (the Act). The Appellants averred that they were charged almost 3 years after the commission of the offence as a result of which, the filing of treason was no longer available because of the time-bar under s 54 of the Penal Code. They likewise submitted that they should have been charged of treason as the taking of an oath was an act of treason and formed part of, or involved the same elements as that of treason, which was time-barred under s 54. However, the offence under s 5 was totally different from treason both in terms of the actus reus and the mens rea. The mens rea was the intention to take the oath. It is not required that to be part of the offence of treason, the oath taker intended to commit treason referred to in the oath. It does not matter whether the accused intended to commit treason. Thus, since the offence charged is a separate offence from treason, the time limit on prosecution was not applicable.

(4) In the present case, the absence of legal representation was due not only to the conduct of counsel but also to the failure of the Appellant. At the time of the pre-trial conference, the Appellant was not represented by counsel. The court made considerable efforts for the Appellant to have a counsel but the Appellant did not take effort to secure one and was later granted an extension of time to find a counsel to represent him. During the trial, he believed that a counsel would represent him but needed some time to prepare for trial. As a consequence, trial was delayed for 2 weeks only for the Appellant's concern. Thus, the absence of a counsel to represent the Appellant due to his failure to make an attempt to find a lawyer for the first 3 days of the trial did not amount to miscarriage of justice.

(5) When the Appellants committed the offence, treason under s 50 of the Penal Code was punishable by death. However, before trial, the Penal Code (Amendment) Act 2002 (the Amendment Act) changed s 50 making the sentence for treason life imprisonment and not death. However, it appeared that the drafters of the Amendment Act did not intend to amend the Act at the same time. While the Appellant's case were properly tried under s 5, parliament still intended, at the time of the trial, not to apply death penalty. Thus, the imposition of life imprisonment by the learned judge as a maximum penalty was proper.

Appeals dismissed.

Cases referred to

Jago v District Court of New South Wales (1989) 168 CLR 23; 87 ALR 577, applied.

Amina Koya v State [1998] FJSC 2; *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630; [1992] 3 All ER 169; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142; *Connelly v Director of Public Prosecutions* [1964] AC 1254; [1964] 2 All ER 401; *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700; *R v Comerford* [1998] 1 WLR 191; [1998] 1 All ER 823; *R v J* [2003] 1 WLR 1590; [2003] 1 All ER 518; *R v Latif* [1996] 2 Crim App Rep 92; *Robinson v R* [1985] AC 956, considered.

Hembury v Chief of the General Staff (1998) 193 CLR 641; 155 ALR 514; [1998] HCA 47; *Martin v Tauranga District Court* [1995] 2 NZLR 419; *R v Skaf* (2004) 60 NSWLR 86; [2004] NSWCCA 37; *R v Blight* (1903) 22 NZLR 837; *R v Drury* (2000/01310Z3); *R v Gough* [1993] AC 646; [1993] 2 All ER 724; *R v Hibberd* [2001] 2 NZLR 211; *R v Saraswati* (1989) 18 NSWLR 143; *R v Sawyer* [1980] 71 Cr App Rep 283; *R v Spencer* [1987] AC 128; [1986] 2 All ER 928; *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256; [1923] All ER Rep 233; *Saraswati v R* (1991) 172 CLR 1; 100 ALR 193; *Apaitia Seru v State* [2003] FJCA 26; *Webb v R* (1994) 181 CLR 41; 122 ALR 41, cited.

P. A. Willee QC, *M. Raza* and *A. K. Singh* for the Appellants

Mark Tedeschi QC and *A. Prasad* for the Respondents

Ward P, Penlington and Wood JJA. This case arose from the now notorious events of May 2000 when a number of armed men, led by one George Speight, entered the Parliament Chamber in the morning of 19 May and seized the Prime Minister, many of his cabinet and a number of other members of parliament. Those seized were kept under armed guard and many were subsequently held for weeks as hostages.

Early that same afternoon Speight held a press conference in which he stated his reasons for the coup and later, at a second press conference, announced that he was going to appoint an alternative government.

Following the takeover of parliament, the President, Ratu Mara, made a statement to the country calling on the people to remain calm and expressing a determination to continue in office and retain the powers of executive government during the time the legitimate government was unable to do so.

During 19 May and the following day, the first Appellant, Ratu Jope Seniloli was offered the position of President and the other Appellants various ministerial posts in the Speight government. On 20 May, in a televised ceremony before a large audience in the conference room in parliament, they each took an oath the terms of which clearly purported to bind them to carry out the duties of the offices they had accepted. This was done against the background that Ratu Mara still maintained his position as President and that the government in which each Appellant's position was to be held was unlawful.

The five Appellants together with one other, Isireli Lewenqila, was each charged with the following offence:

> Statement of Offence
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> Taking an Engagement in the Nature of an Oath to Commit a Capital Offence: Contrary to section 5 (b) of the Public Order Act, Cap 20, read with section 50 of the Penal Code, Cap 17 (as it was at 20 May 2000).
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> [The accused] on the 20th day of May 2000 at Veiuto, Suva in the Central Division, not being a person compelled to do so, took an engagement in the nature of an oath purporting to bind the said [accused] to commit an offence then punishable by death, namely treason.

All the accused pleaded not guilty and, following a trial in the High Court, the appellants were convicted and Mr Leweniqila acquitted.

The prosecution case was that these oaths, in the circumstances in which they were taken, purported to bind the person taking the oath to actions which, if performed, would be treason; an offence which at that time was punishable by death.

It was never part of the State's case that any Appellant took any active step to carry out the duties for which he had taken the oath. The prosecution case was that the intentional taking of an oath which, as here, appeared to bind them to commit a treasonable act, completed the offence. Its seriousness was that it was an action which, taken in the manner in which it was done, gave support and credibility to the criminal activities of the people who had invaded parliament and to their aim to create an alternative and unlawful government.

Many grounds of appeal against conviction were filed but the Appellants now pursue only grounds 1, 4, 7 and 8 of the amended grounds:

(1) That the learned trial judge erred in law in declining to adjourn the proceedings in the trial for adequate time to allow the second Appellant's (A2) new counsel to prepare A2 case for trial;

(4) That the learned trial judge erred in law when she declined to stay the proceeding as an abuse of process when the appellants were charged:

(a) pursuant to the provisions of the Public Order Act read in conjunction with s 50 of the Penal Code as it was at the relevant time,

(b) for substantially the same or a similar conduct as contravened the provisions of s 50 of the Penal Code but for which;

(c) section 54 of the Penal Code provided a statutory prohibition of prosecution at the time of the charges being preferred;

in respect of which proceedings, inordinate and unjustified delay in preferring such charges occurred.

(7) That during the trial of the Appellants:

(a) one of the assessors had previously been and was then the client of counsel for one of the accused in respect of that assessor's pending matrimonial proceedings,

(b) the solicitor-client relationship between the assessor and the Appellant's counsel was not disclosed to the court or other counsel for the appellants,

(c) the said accused was acquitted;

by reason of which circumstances there was a material irregularity in the course of the proceedings before the court such that a substantial miscarriage of justice occurred.

(8) That by reason of the circumstances a reasonable apprehension of bias or other impropriety exists concerning the conduct of the assessor in the execution of her duties and functions during the trial of the appellants such that a substantial miscarriage of justice occurred.

Ground 1 applies solely to A2 while the remainder apply to all five Appellants and, at the hearing, were addressed first. We shall follow the same order as did counsel; namely the interrelated grounds 7 and 8 first, followed by ground 4 and ground 1.

Grounds 7 and 8

These grounds were accompanied by an application to adduce fresh evidence about the relationship between the assessor and Mr Leweniqila's counsel, Mr Sharma, and what, if any, disclosure was made of that fact. However, counsel have agreed the following facts which are sufficient for the determination of the issues raised in these grounds:

(1) Mr Devanesh Sharma's firm acted for the assessor in matrimonial proceedings prior to the trial and after the trial.

(2) Mr Sharma did not disclose this relationship to the court or to the prosecution.

(3) Mr Sharma appeared in court representing the assessor on the following dates:

18.3.2003 mention
13.6.2003 mention
15.8 2003 hearing (uncontested)

2.4.2004 discussion about property
8.9.2004 re property issues

(4) This trial took place between 28.6.2004 and 5.8.2004.

It should be added that there were sharp differences between counsel about how much or what disclosure was made by Mr Sharma to counsel for his co-accused but it is not necessary for the court to resolve them in the light of the agreed facts.

The undisputed fact is that the assessor was not challenged and served throughout the trial. At the conclusion, the opinions of the first four assessors, including the assessor in whose divorce Mr Sharma acted, was that each of the first three Appellants, Ratu Seniloli, Ratu Vakalabure and Ratu Volavola were guilty while that of the fifth assessor was that they were not guilty. All five assessors held the unanimous opinion that Mr Leweniqila was not guilty and that the fourth and fifth appellants, Messrs Rinakama and Savu were guilty. The learned judge concurred with those opinions, acquitted Mr Leweniqila and convicted the Appellants.

Counsel for the Appellants suggests that these circumstances led to the position set out in grounds 7 and 8, namely that there was a material irregularity or that there was a real risk or likelihood of bias such that a miscarriage of justice occurred.

There is considerable weight of authority in many jurisdictions that the deliberations of a jury will not be investigated by the court after the trial. In Fiji the practice has been to treat the assessors as a jury in this and many other respects and both counsel accept that this court cannot and should not attempt to examine, by investigation or analysis of the opinions in relation to the evidence adduced or in any other way, the manner in which the assessors reached their opinions: see the excellent review of authority on this in *R v Skaf* (2004) 60 NSWLR 86; [2004] NSWCCA 37.

The question the court must decide in relation to ground 7 is whether the relationship between the assessor and counsel for one of the accused was such as to make her inclusion as an assessor in the case a material irregularity and, if so, whether it gave rise to a miscarriage of justice.

Mr Willee, for the Appellants, referred the court to the comments of Lord Bingham CJ in the English case of *R v Comerford* [1998] 1 WLR 191; [1998] 1 All ER 823, in which there had been an attempt to interfere with the members of the jury:

> It is a truism that the jury is the lynch-pin of trial on indictment. The proper functioning of the jury is crucial to the fair and effective conduct of the trial. To that end statute regulates the composition of juries, the selection of jurors and the challenging of jurors. To that end also, almost infinite care is taken in directing the jury on the proper approach to their task, on the relevant law and on the facts. But all these rules and procedures are rendered of little effect if the integrity of an individual juror, and thus of the jury as a whole, is compromised. Such a compromise occurs when any juror, whether because of intimidation, bribery or any other reason, dishonours or becomes liable to dishonour his or her oath as a juror by allowing anything to undermine or qualify the juror's duty to give a true verdict according to the evidence.

Those comments apply with equal force in relation to the assessors in trials in Fiji. In the present case there is no doubt that counsel should have advised the judge and all other counsel, including the prosecution. Had that been done at the outset, the learned judge could have made a considered decision. The result of counsel's failure is that, through no fault of the judge, there has been a

potential irregularity in the manner the trial was actually conducted and we must determine whether it has led to a miscarriage of justice. We must consider, in the words of Lord Bingham, whether the situation was such that the integrity of the assessor was compromised to the extent that it would undermine or qualify the assessor's duty to give a true verdict according to the evidence.

Clearly all such cases are a question of degree. Had the relationship been a close family one either by blood or marriage, the court would have little difficulty in finding there was a real and obvious risk of such a situation. However, a professional solicitor client relationship arising from a single case of an uncontested divorce must fall at the other end of the scale. The Appellants have cited *Hembury v Chief of the General Staff* (1998) 193 CLR 641; 155 ALR 514; [1998] HCA 47 where a failure to follow procedure established by statute was considered to have amounted to a material irregularity. In the present case, the situation with regard to the assessor was not known to the court and we must therefore decide whether it was such that it may have led to a miscarriage of justice. While the inclusion of this assessor on the panel of assessors was a potential irregularity, we do not consider that, in itself, gave rise to a miscarriage of justice.

We move then to the second limb of this part of the appeal, whether the assessor's inclusion resulted in a real danger of bias. The Appellants' case is that the relationship was such that it would influence the assessor in her consideration not just of Mr Leweniqila's case but of the other accused who were represented by other counsel.

In the case of *Amina Koya v State* [1998] FJSC 2 where a suggestion had been raised of bias on the part of the trial judge, the Supreme Court discussed the appropriate test by comparison to other jurisdictions at 12:

> There is some controversy about the formulation of the principle to be applied in cases in which it is alleged that a judge is or might be actuated by bias. In Australia, the test is whether a fair-minded but informed observer might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case. In England however, the House of Lords, in *R v Gough* [1933] AC 646, decided that the test to be applied in all cases of apparent bias involving Justices, tribunal members, arbitrators or jurors is whether in all the circumstances of the case there is a real danger or real likelihood, in the sense of possibility, of bias. In the later case, *Webb v R* [1994] 181 CLR 41; [1994] HCA 30, which concerned a juror, the High Court of Australia, despite *Gough*, decided that it would continue to apply the reasonable apprehension or suspicion of bias test…
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> Subsequently the New Zealand Court of Appeal, in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 held that it would apply the Gough test. In reaching that conclusion the Court of Appeal considered there was little if any practical difference between the two tests, a view with which we agree, at least in their application to the vast majority of cases of apparent bias. That is because there is little if any difference between asking whether a reasonable and informed person would consider there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect bias.

The court went on, at 14, to confirm its agreement with the view stated in the Auckland Casino case that both tests were, in effect, the same:

> Here we are concerned with a trial which has actually taken place and with the question whether there has been a miscarriage of justice on the ground that there was a real danger of bias or a reasonable apprehension or suspicion of bias.

The Supreme Court had earlier reminded itself that the test was whether there was bias or likelihood of bias in any particular case and whether it had led to a miscarriage of justice:

> The Court of Appeal in its reasons and the parties in their submissions to this Court approached the issue of bias as if it were a question of law, an affirmative answer to which would result in the petitioner's conviction being set aside. That approach overlooks s 23(1) (b) of the Court of Appeal Act which provides that the Court of Appeal, on an appeal against conviction,
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> shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal

It is necessary therefore for the petitioner to establish that the existence of bias or the appearance of bias resulted in a miscarriage of justice within the meaning of s 23(1)(b).

Any allegation of bias is of fundamental importance because it is in the public interest that there should be total confidence in the integrity of the system of administration of justice. If there was a real danger or likelihood of bias, it must follow that there has been a miscarriage of justice and the conviction cannot stand. No court can disregard the famous reference by Lord Hewart CJ in *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256; [1923] All ER Rep 233 to the "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". Where there is evidence of actual bias, the position is clear but what is the test where there is some evidence only of the possibility of bias?

In *Gough's case* it was pointed out that "the approach of the law has been (save on the very rare occasion where actual bias is proved) to look at the relevant circumstances and to consider whether there is such a degree of possibility of bias that the decision in question should not be allowed to stand". The decision in that case was a confirmation of the decision of the House of Lords in the earlier case of *R v Spencer* [1987] AC 128; [1986] 2 All ER 928 which in turn confirmed that the correct test was as stated by the Court of Appeal in *R v Sawyer* [1980] 71 Cr App Rep 283 namely, whether there was a real danger that the Appellant's position had been prejudiced in the circumstances.

The adoption of a test which effectively combines both the English and Australian approaches, as was done by the Supreme Court in *Koya's case*, has also been confirmed more recently in England in *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700; a case of alleged bias by a lay member of the Restrictive Practices Court. At 726, the Master of the Rolls after an exhaustive review of the authorities, suggested:

> … that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was real possibility, or a real danger, the two being the same, that the tribunal was biased.

Applying that to the present case, if we reach such a conclusion in relation to the presence of this assessor, then we must accept that there has been a miscarriage of justice as required by s 23(1)(b). It is not necessary to find actual

bias nor is it relevant to consider whether the bias was for or against the Appellants but it is necessary to find that the likelihood of bias did involve the assessor's consideration of the case against the Appellants.

Counsel for the Appellants has suggested that the acquittal of Mr Sharma's client points to bias in his favour because there was no difference in the case against him and that of some of his co-accused. However, the record shows that there were a number of reasons why the assessors properly directed, as they were in this case, could have come unanimously to a different opinion in relation to him. Should the court go further, it would be attempting to inquire into the deliberations of the assessors and that it is not permitted to do.

As we have stated the likelihood of bias depends on the closeness of the relationship between the assessor and the solicitor for Mr Leweniqila and the likelihood that that relationship would result in the assessor's integrity being compromised to the extent that she would dishonour her oath to give an opinion based only on the evidence.

This was a most unfortunate situation and would have been avoided if counsel had made a full disclosure of the position. However, we do not consider that a solicitor client relationship as occurred in this case would be seen by any fair-minded and informed observer as giving rise to a possibility or danger of bias and we do not find, therefore, that any miscarriage of justice occurred in relation to any of the accused in the trial.

This ground of appeal fails.

Ground 4

This ground is limited, as counsel for the appellants confirmed at the hearing, to abuse of process. It raises two interrelated lines of complaint; that there had been an unwarranted and excessive delay in the laying of charges and that the laying of charges under s 5 of the Public Order Act was done by the prosecution to avoid the time limit in s 54 of the Penal Code and that, in either case, there was an abuse of process.

The offence of treason is found in s 50 of the Penal Code together with a number of related offences under ss 51, 52 and 53. Section 54 provides:

> 54. A person cannot be tried for treason, or for any of the felonies defined in section 51, 52 or 53, unless the prosecution is commenced within two years after the offence is committed.

No time limit is imposed on prosecutions under s 5 of the Public Order Act.

Both matters were included in a number of submissions before the commencement of the trial in the High Court and were dealt with in a ruling by the learned trial judge delivered on 2 June 2004. At the hearing of the submission, an affidavit by Josaia Naigulevu, the Director of Public Prosecutions, was considered by the court in which he explained the delay in charging the accused.

The learned judge in a carefully reasoned and detailed ruling on the effect of delay reviewed the authorities and the requirement that the delay must be exceptional and will only result in a stay where the defence can establish serious prejudice to its case caused by the delay. She pointed out that the right to trial within a reasonable time was not an absolute right and must be weighed against the public interest in the attainment of justice and concluded:

> I do not consider that this case falls into the "exceptional" category. The delay of three years before charge, at a time when Fiji was experiencing a most turbulent time politically and legally, is not excessive. I have read the affidavit of Josaia Naigulevu, detailing the difficulties experienced by the police and the DPP's office in that period of

> time, and I consider that the affidavit explains much of the delay. Although I see no reason why charges could not have been laid notwithstanding any ruling on the validity of the Immunity Decree (because the matter would have been ruled on by whichever judge was hearing the case), I accept that the laying of charges in a period of intense political uncertainty brings with it inevitable difficulties and delay. Lastly I note that any office of the DPP depends on effective staffing and resources to prosecute. I accept on the basis of the affidavit filed that the delay in laying charges has been at least partly a result of inadequate resources and insufficient and inexperienced staff at a time when there were considerable demands on both resources and staff.
>
> The defence has not shown any prejudice in the preparation of the defence for trial

The defence application had related only to delay before the charging of the accused. There was no complaint about the length of time the case had taken to reach trial after charge and the learned judge clearly and properly distinguished between the effects of delay before and after charge. In the former, as occurred in this case, she correctly identified and applied the test that a stay will only be granted where the delay has resulted in serious prejudice to any accused such as would prevent him from being able to have a fair trial and that such a stay would be exceptional.

She accepted the principles to be applied when considering delay were as explained in *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630; [1992] 3 All ER 169. In that case, Lord Lane CJ suggested at QB 643; All ER 176:

> We remind ourselves … of the observations of Lord Morris of Borth-y-Gest in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1304; [1964] 2 All ER 401 at 411, that:
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> > "generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment, and where either demands a verdict a judge has no jurisdiction to stand in the way of it."

Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would only be a short time before the public, understandably, viewed the process with suspicion and mistrust. We respectfully adopt the reasoning of Brennan J in *Jago v District Court of New South Wales* (1989) 168 CLR 23; 87 ALR 577.

In principle, therefore, even where delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be the case where a stay can properly be imposed in the absence of any fault on the part on the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay.

> … no stay should be imposed unless the defendant shows on the balance of probabilities that, owing to the delay, he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuation of the prosecution amounts to a misuse of the process of the court.

In the case of *Apaitia Seru v State* [2003] FJCA 26 AAU41 and 42/99, this court adopted the authority of the case of *Martin v Tauranga District Court* [1995] 2 NZLR 419. Although Seru and Stephens was concerned with the effect of delay after charge, the court also referred to the many cases in New Zealand where charges have been brought years after the event and continued:

> In many such instances applications to stay on grounds of breach of the fair trial right have been dismissed, notwithstanding delays of an order which, if occurring after the charge, undoubtedly would have led to the case being stayed.

It is clear that the trial judge applied the correct test and, after a careful examination of the circumstances of the case including the explanation in the affidavit of the DPP, she found that this was not an exceptional case and the defence had shown no prejudice in the preparation of the defence for trial and, in the exercise of her discretion, refused the application for a stay. We see no reason to interfere with her decision not to stay the proceedings on the ground solely of delay.

However, the second aspect of this ground also relates to the delay that occurred before the accused were charged. The accused were first charged in March 2003, nearly three years after the commission of the offences. As a result of the delay, the charge of treason was no longer available to the prosecution because of the provisions of s 54. The Appellants' case is that the decision to prefer the charge under the Public Order Act was solely to try and circumvent the protection given to the accused by s 54 and was therefore an abuse of process.

Mr Willee bases his submission, as we understand it, on the proposition that the acts which formed the basis of the charge under s 5 were also acts of treason either because the accused were involved as aiders and abettors in treasonable acts which were already being carried out by others or because it was a treasonable act in itself. Similarly if the oaths were taken as one step in a continuing series of treasonable actions, it would simply become one of those actions.

He cites the authorities of *R v Blight* (1903) 22 NZLR 837 (*Blight*) followed in the more recent case of *R v Hibberd* [2001] 2 NZLR 211 (*Hibberd*) and of *Saraswati v R* (1991) 172 CLR 1; 100 ALR 193 (*Saraswati*), which deal with the position where a more serious offence had been committed but, because prosecution of that offence was time barred by statute, the offender had been charged with a lesser offence proved by the evidence of the barred offence. That, counsel contends, is the position here. It was done simply to avoid the time bar and amounted to a clear abuse of process. Further, if in fact the taking of the oath was itself an act of treason, the laying of a lesser charge based on the same acts to avoid the time limit for the wider offence would be an abuse of process.

The Appellants submit that is the case here; that the taking of the oath was, in itself, an act of treason and should have been charged as such.

In dealing with this aspect of the case in her ruling before any evidence had been led, the learned judge stated:

> In this case, it is not established that the evidence in the case will in fact prove the offence of treason. As I see it, an offence under sections 5 or 6 of the Public Order Act is not necessarily a lesser offence in relation to section 50 of the Penal Code. … the affidavit of Josaia Naigulevu does not explicitly concede the evidential possibility of laying the more serious offence. If that situation arises, then in accordance with the practice of the Fiji courts and with section 3 of the Penal Code, I adopt the reasoning of the English Court of Appeal in *R v J* [2003] 1 WLR 1590; [2003] 1 All ER 518, and consider that it is not an abuse of process per se, to lay a less serious charge when the time limitation on the more serious charge has expired. Further, I do not consider that the defence has shown, on a balance of probabilities that it would be impossible for the accused to be given a fair trial because a lesser charge had to be preferred.

The learned judge also relied on the decision of the New South Wales Court of Criminal Appeal in *R v Saraswati* (1989) 18 NSWLR 143, in which the court, while deprecating any attempt by the Crown to divide one incident into a number of separate charges, held that the prosecution is entitled to charge an accused with a less serious charge notwithstanding that the facts which it intends to prove would, if accepted, establish the commission of a more serious crime which includes all the elements of the lesser crime even if the more serious offence could no longer be prosecuted because of a statutory time limit. We find the reasoning in the New South Wales case persuasive and in conformity with Jones which ruled that the decision as to the appropriate charge is one of prosecutorial discretion and responsibility and that a stay will only be granted for abuse of process if the court finds that the circumstances would prevent the accused from receiving a fair trial or that it would be unfair for him to be tried at all.

As with so many of these cases, *Jones* involved sexual allegations and the effect of the time limit on prosecutions for unlawful carnal knowledge. At 39, Lord Potter held:

> The question is therefore whether, as a general proposition, so to proceed *[that is, with the alternative offence which is not time barred]* involves an affront to the public conscience, is necessarily contrary to the public interest or undermines the integrity of the criminal justice system. In our view the answer to that question is "No"; it all depends on the circumstances of the individual case. … The fact that Parliament may have thought fit to provide for a general limitation period based, it must be assumed, on the principle that stale complaints are inherently likely to give rise to evidentiary difficulty, does not in our view preclude a responsible prosecutor from taking the view that, in the particular circumstances, a fair trial is possible and that it is conducive, and not inimical, to justice to bring a different charge not subject to such a period of limitation.

In the same case Lord Potter, at 35 and 36, cited with approval passages from two earlier authorities on the question of abuse of process in such cases.

> The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed. …General guidance as to how the discretion should be exercised in particular cases will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crime should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.

Lord Potter then passed to the second case:

> As observed by this court in *R v Drury* (unreported, case No: 2000/01310Z3):
>
> "while the remarks in *Latif* were made in the context of a case where the appellant had been lured to this country for the purposes of prosecution, they demonstrate the nature of the discretion and that its touchstone is the public interest in the integrity and proper operation of the criminal justice system, and the need to avoid any affront to the public conscience in that respect. It has elsewhere been said that an abuse of process is "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a fair proceeding."

The submission of the appellants with which we have just dealt depends on the supposition that the offence charged forms a part of, or involves the same, elements as that which was time barred. However, we do not accept that is the case here and those matters are not, therefore, applicable in the present case.

It is clear to us that the offence under s 5 is a totally different offence from treason both in terms of the actus reus and the mens rea. The act which the prosecution has to prove was performed by the accused is the taking of an engagement in the nature of an oath. The oath taken must be one which by its words and, possibly the circumstances in which it is taken, appears to bind the person taking it to commit treason. The mens rea is that he should have the intention to take the oath. It goes no further. It is not a part of the offence, as the appellants appear to contend, that the oath taker intends to commit treason either generally or in terms of any specific actions referred to in the oath.

The mens rea which the prosecution must prove is not an intent by the oath taker to be bound to commit any treasonable act referred to in the oath but simply to take an oath which purports, that is, which appears, so to bind him. Once he intentionally (the section specifically absolves any oath taken under compulsion) takes an oath which appears to bind him in that way, the offence is complete. It is complete even if, when he takes the oath without compulsion, he specifically intends not to take any step to carry out the acts described in the oath. It is not, therefore, necessary either to prove an intention to be bound in any way by the oath; simply that he intended to take an oath in that form. Any other motive or aim is irrelevant to proof of the offence under the section.

Equally, it does not matter whether he goes on to commit treason but we would accept that, if it was proved that when he took the oath he intended to commit the treasonable acts referred to in it, that may amount to an offence of treason but that is not this case and prosecuting counsel made it clear that his case throughout was specifically to resile from any such allegation.

Clearly the cases of *Blight*, *Hibberd* and the High Court decision in *Saraswati* are distinguishable. This was not an offence made up of part of the elements of treason. It was a separate offence which stood on its own. In any case where charges of treason are brought within the two-year period, it will still be possible to charge an offence under s 5 as an additional, not an alternative, count. Whether or not the accused was then convicted of treason, he could still be convicted of the offence under s 5.

Counsel for the Appellants suggests that the defence was hampered in the conduct of its defence by the exclusion of evidence of treasonable acts performed by the Appellants. He appears to be suggesting that, had evidence been adduced and the Appellants been shown to have committed such acts, the taking of the oath would simply have been one of those actions and would therefore have been time barred also.

We consider the learned trial judge was correct to exclude such evidence. Had she done otherwise, the assessors would effectively have been required to try an offence which, by the mandatory provisions of s 54 of the Penal Code, cannot be tried. Had they done so and, at the conclusion of the trial, convicted the appellants of the offence charged under s 5, we have no doubt it would have been suggested most forcefully that the admission of that evidence was highly prejudicial — as it undoubtedly would have been. The learned judge was right to exclude it. If there was any such evidence, it had no bearing on the offence under s 5 and its inclusion would have been highly prejudicial to the defence especially as it would have run counter to the defences actually presented at the trial.

In her summing-up to the assessors the trial judge dealt with the taking and the nature of the oath:

> The next element of the offence is that each accused took an engagement in the nature of an oath. That is question of fact for you to decide on the facts of the case. However, I must direct you as a matter of law, that it matters not whether the oaths taken were oaths in law or not. What you must ask yourself is whether the accused persons intentionally took an engagement in the form of what appeared to be an oath. If you are satisfied of this element, you need not ask if the oaths taken were lawful or satisfied the legal definition of an oath. However, you must ask yourselves whether the accused voluntarily and intentionally took an engagement in the nature of an oath. …
>
> In order to decide whether there was an intention to take an oath, you need to look at the context of the oath-taking ceremony. … However, it was suggested by one counsel in his address to you that the prosecution had to prove that the accused intended to commit treason. That is not correct. Whether or not the accused intended to commit treason is irrelevant. It is not an element of the offence. Nor is it an element of the offence that the accused intended to be bound by their oaths.
>
> The next element of the offence is that the oaths taken by the accused purported to bind them to commit treason. … So the question for you is whether on the ordinary meaning of the oaths the accused appeared to be bound to commit the offence of treason. You are not asked to consider whether the accused did in fact commit treason. They might for instance have walked away after the swearing-in ceremony and thereafter had nothing to do with the events in Parliament or with the interim Speight government. That does not matter. What is relevant is whether at the time of the swearing-in ceremony, the accused persons appeared to a reasonable person to be swearing to do things which if done would have been treason.

Having defined treason Her Ladyship continued:

> If you are satisfied beyond reasonable doubt than the accused were apparently binding themselves, or promising to take positions in the unlawful Speight government set up to replace the Chaudhary Government and the head of State Ratu Mara then you can accept the oaths taken purport to bind the accused person to commit treason.
>
> In this case you do not need to ask yourselves whether these accused persons committed treason nor whether they were part of any armed takeover. Nor do you need to ask if they intended to commit treason. You need to ask yourselves whether the oaths they took appeared to a reasonable onlooker to bind them to acts which prevent the government from exercising its lawful powers and which replace the government of the day then in custody. You need further to ask yourselves whether the engagements they undertook or swore to take appeared to prevent or hinder the Head of State from assuming executive authority or from exercising his lawful powers.

There has been no challenge to that direction to the assessors and we confirm that it was a correct statement of the law.

As we have stated, the offence charged is separate and distinct from treason and, if it is ever charged on an indictment which also charges treason, it will, per se, not be duplicitous. As a consequence, it is not affected by the time limit on prosecutions for the former.

This was a case where the judge had to exercise her discretion whether to stay the case on the ground of abuse of process. We are satisfied that she addressed her mind to the relevant issues and applied the correct test and we see no reason to interfere.

Ground 1

This ground applies only to A2, Ratu Vakalalabure. On the day the trial commenced he was not represented by counsel and applied for an adjournment to instruct counsel. The court was advised that counsel was available but that he

would need a week to familiarise himself with the case and take instructions sufficient to represent the accused. The trial judge declined to delay the trial for that period and A2 was not represented for the first three days of trial. During that time a number of witnesses relevant to the case against this Appellant were called by the prosecution.

When refusing the further adjournment, the judge had pointed out that she would allow the recall of any of those witnesses if counsel, once he was ready, requested it. Such a request was only made in respect of one witness.

In order to put this matter into context, it is necessary to look back over the history of the proceedings prior to the trial. The information was filed in the High Court on 11 December 2003 and, on 6 February 2004, the trial date was set as 15 June 2004 with a pre-trial conference on 24 May 2004.

At the time of the pre-trial conference this Appellant was represented by counsel, Mr Vuataki, although he did not appear that day. It became apparent that Mr Vuataki was to be a witness in the case, a situation which had occurred in an earlier case, and the judge ruled, on 26 May, that it would not, therefore, be proper for him to represent the Appellant. The Appellant was advised by the court urgently to arrange for alternative counsel.

The case was listed for 2 June to check the position and, on that date, the Appellant told the court that he had not taken any steps to instruct alternative counsel. The following day he advised the court that he was trying to obtain counsel and that Mr Valenitabua might represent him.

On 4 June, Mr Valenitabua advised the court he was not instructed and the case was adjourned to Monday, 7 June, for mention. Mr Seru advised the court that, although he could not appear that day, he represented this Appellant but the Appellant indicated he wished to be represented by Mr Valenitabua.

Again the case was adjourned for mention to 8 June. Mr Valenitabua, together with counsel for the other accused, was present. An application was made for the case to be put over to September when Mr Valenitabua would be free but it was clear that both the judge and other counsel would not be available then.

The judge delivered her ruling on 10 June. She cited a number of authorities and drew from them the distinction between those cases where the lack of representation was the result of some action or default on the part of the accused and those in which his lack of representation was no fault of his own. She found that the Appellant's lack of representation was not entirely his fault and granted him a further 18 days until 28 June to instruct counsel.

The Appellant was advised on the day of the ruling that, if Mr Valenitabua was not able to represent him on 28 June, he must find another counsel or be prepared to represent himself.

When the day set for the trial arrived, this Appellant was still unrepresented. He renewed his application for an adjournment until the end of August. However, Mr Raza, who was appearing for one of the co-accused, advised the court that Mr Singh may be available and the case was stood down until noon when Mr Singh attended and indicated that he was willing to accept instructions but needed an adjournment until the following Monday. The judge ruled at 2.55 pm that there would be no further adjournment and that the trial should proceed the following day. It did, with the Appellant unrepresented.

Towards the end of the third day, following a viewing of video tapes in the absence of the assessors, the Appellant advised the court that he was to be represented by Mr Singh and requested that his submissions on the admissibility of the video evidence be heard the following day so they could be advanced by

counsel. That request was granted and Mr Singh appeared the next morning, 1 July 2004. He represented the Appellant for the remainder of the trial.

The right to be represented is enshrined in s 28(1)(d) of the Constitution:

> 28.-(1) every person charged with an offence has the right:
> (d) To defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice…

However, in the case of *Robinson v R* [1985] AC 956 at 966 in reference to a similar right under the Jamaican Constitution, the majority of the privy council ruled:

> Their lordships do not for one moment underrate the crucial importance of legal representation for those who require it. But their lordships cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse.
>
> In the present case the absence of legal representation was due not only to the conduct of counsel but to the failure of the defendant … If a defendant faced with a trial for murder, of the date of which the defendant has ample notice, does not take reasonable steps to ensure that he is represented at the trial, whether on legal aid or otherwise, he cannot reasonably claim that the lack of legal representation resulted from a deprivation of his constitutional rights.

In the same case the court made it plain that the judge must take into account the competing claims of the other accused and their counsel. In carrying out this balancing act it was apparent that any further adjournment would have inevitably delayed the case for many months and almost certainly taken it beyond the end of the year; a considerable additional delay in a case arising from events which occurred more than four years previously.

It is clearly important that anyone accused of a criminal offence who wishes to be represented by counsel should be able to be so represented. We do not necessarily feel that the test should be whether his failure to instruct counsel is his own fault although this would be a strong argument for refusing an application for time to instruct counsel especially where other accused are involved and are ready for trial. The court must consider their position and any other relevant matters.

However, it is clear that s 28 does not give an absolute right. The final decision must be based on the likelihood that the accused will be prejudiced by the lack of representation but, if that is the result of his own default, any competing factors will carry a correspondingly greater force.

In this case the learned judge was faced with a situation where the Appellant had found himself without a lawyer at the time of the pre-trial conference. The blame for that was clearly and correctly placed on the counsel involved and the court made considerable efforts to ensure the Appellant could obtain alternative representation. During that period, it would appear the Appellant did make some attempt to find a lawyer but those attempts came to nothing and he was granted an additional period to seek alternative representation.

On the date of the trial, the prosecution provided evidence to the court that they had made their own enquiries and identified counsel who indicated that, had they been instructed on 10 June, they would have been willing to represent this Appellant. We have reservations about that course. While an accused should not be able to delay his trial endlessly by the insistence on a particular counsel who will clearly not be available for a very long time, we do not accept that it was appropriate or proper for the prosecution to conduct such an enquiry. Neither do

we consider the result was of any value. Some counsel are more competent to conduct a particular type of case than others. An accused must feel confident that counsel understands his case and is competent to conduct it; the more so where he faces a charge as serious as this. The mere fact that some other counsel of unstated ability would have accepted the case should not have been considered to be relevant to the question of whether the Appellant had made a reasonable attempt to find alternative counsel.

The learned judge was faced in this case, however, with a number of accused and counsel all of whom had prepared for the trial at that time. On the day of the trial she was led to understand that Mr Singh would be available but needed a week to prepare. The trial had already been delayed for two weeks for the convenience of this Appellant. There was no guarantee that, on the following Monday, Mr Singh would have been present. In the light of the events prior to this, the judge had every reason to be doubtful that Mr Singh would, in fact, be instructed. He had not at that stage accepted instructions, only indicated he would be willing to do so and had no idea of the case the Appellant wished to be pursued.

In the face of those difficulties, the learned judge refused the adjournment but advised Mr Singh that, if he did appear for the Appellant, she would ensure that any witnesses he wished to cross-examine further would be recalled. It was suggested by counsel for the Appellant that he was forced by that to rely on his client's account of what had transpired in the case before he appeared in order to decide whether he needed to seek to recall a witness. We note, however, that the Appellant is himself a qualified lawyer and has held, among others, the position of counsel in the office of the DPP. It is also clear from the record that, in the many applications to the court prior to the actual trial, the lawyers appearing for the other accused were willing to intervene on this Appellant's behalf.

In the event, the Appellant was not represented for three days of evidence partly as a result of his own failure to act when advised by the court of the need to instruct counsel. Thereafter Mr Singh appeared. It was urged that counsel was in a difficult position because of the limited time he had available to familiarise himself with the case. We accept it is always difficult to take up a case late in the day and places a strain on counsel but, in the event, he had three days and, shortly afterwards, the weekend to do so. We consider that was more than adequate time to master a case such as this. The charges were undoubtedly serious but the issues were clear and the events giving rise to the case were notorious. Much of the initial evidence was directed to establishing those events. During the first three days, four witnesses were called although the fourth had barely started her evidence before she was stopped to allow the court to view the video tapes. We are advised that there was also a daily transcript of the proceedings provided the following morning. The court is grateful to Mr Singh for his efforts and there appears to be no suggestion that he failed to present his client's case vigorously and thoroughly.

This court must decide if the lack of representation for that period prejudiced the Appellant's chance of a fair trial. We are satisfied that it did not.

Even if we had found otherwise, we would have applied the proviso to s 23(1) of the Court of Appeal Act in the face of the evidence adduced at the trial of the part played by this Appellant in the taking of the oath by himself and by his co-accused. We are satisfied that the lack of representation for the first three days of the trial caused no substantial, or indeed any, miscarriage of justice and this ground of appeal also fails.

Sentence

There was a further ground of appeal against sentence, namely "that the sentence is harsh and excessive and the learned judge took irrelevant matters into consideration when sentencing the Appellants".

The initial submissions filed by counsel suggested that the learned judge should not have taken into account the sentences passed on others in similar trials and that she failed to take account either of matters advanced in mitigation or of the Appellants' remorse. However, at the hearing, counsel abandoned those and confined his appeal to one ground, namely that the judge was wrong to take life imprisonment as her starting point when deciding the proper sentence.

His submission can be summarised as follows. The penalty prescribed for taking an oath purporting to bind the person taking it to commit an offence punishable by death under s 5 of the Public Order Act is life imprisonment. Section 6 of the same Act makes it an offence, punishable with up to 7 years' imprisonment, to take a similar oath but purporting to bind the oath taker to an offence, other than murder, not punishable by death.

At the time these offences were committed, treason under s 50 of the Penal Code was punishable by death and therefore the offences were properly charged under s 5. However, after these events and before the trial of these Appellants commenced, the Penal Code (Amendment) Act 2002 altered s 50 by deleting the words "shall be sentenced to death" and substituting "is liable to imprisonment for life". Unfortunately, the drafters of the Act appear not to have considered it necessary to amend the Public Order Act at the same time.

The result is that, although this case was properly tried under s 5 because at the time of the offences the penalty for treason was still death, Parliament had made it clear that, by the time of the trial, it did not consider the death penalty should apply.

Mr Willee suggests that it is logical to assume that, had the amendment Act been passed before these offences were committed, the fact the Public Order Act was not amended would have demonstrated parliament's intention that these charges could only be brought under s 6 with its reduced penalty.

We cannot accept that is the proper approach. These Appellants were convicted under s 5 and the penalty prescribed by that section is life imprisonment. We are satisfied the learned judge was correct to take that as the maximum penalty.

However, it is clear that counsel's suggestion she took that as a starting point from which to determine the appropriate level of sentence is incorrect. When sentencing the Appellants she stated:

> The maximum penalty for this offence is life imprisonment. There have been, to my knowledge, no previous sentences in relation to section 5 of the Public Order Act in Fiji. Thus there is no established tariff for the offence. As such I will pick starting points for each accused depending, in each case, on differing levels of culpability and participation. In picking starting points in each case, I am conscious also of the seriousness of the offence itself. The taking of an oath purporting to bind person to acts of treason, is potentially an offence which caused great insecurity and fear amongst those who witness it. When it was widely publicised, as this ceremony was, it causes widespread insecurity and fear amongst the people of Fiji. In this case, in respect of all the defendants, there is an element also of betrayal; betrayal of traditional leadership and of oaths of office already taken under the law.
>
> The oaths taken in this case were a part and parcel of a number of events in Parliament after the 19th May which caused great instability in the country. Many lives were destroyed and disrupted. The President eventually stepped aside from office and a resulting period of legal uncertainty caused more chaos and anguish in Fiji.

She then went on to sentence each Appellant separately explaining her reason for the particular sentence in each case.

These were very serious offences. They took place at a time of profound disturbance and armed challenge of the legitimate government. The insurgents were holding a number of innocent people hostage and no one could be sure of their ultimate safety. In those early days there was no clear picture of where the events following the taking of the hostages in parliament were going to lead. On the one hand, the President, Ratu Mara, was trying to control the situation and preserve the rule of law in the country. On the other, the rebels in parliament were striving to persuade the people of Fiji that they were in control and had sufficient credible support to be able to form a viable government.

Speight all too clearly understood the strength of the public media as a tool in this endeavour. By using them he could transmit the impression throughout Fiji that he had a viable alternative government. What he needed was people of standing in the country. People who were recognised to have status and respect in the community at large. If he could demonstrate he had the support of such people in his government, his campaign was immeasurably strengthened.

It is clear that the background of many of the Appellants suggests that they would not have become involved unless they believed they were doing the right thing to support Speight and his followers. He was proclaiming an intention to improve the lot of indigenous Fijians. The Appellants may have felt sympathy for the position of those people and have been motivated to try and improve their lot. That is an understandable aspiration.

Everyone in a democratic society is entitled to question and challenge the way the government is carrying out its role and to take action to champion the rights of any part of the community which they consider to be deprived. As chiefs, some of the Appellants may have believed their duty to their communities was to take action to preserve or strengthen their rights but rights are given by the law and must be exercised within the law. The mistake of the Appellants was to allow their status and position in society to be used to give strength to people who had stepped outside the law.

The learned judge clearly understood and acknowledged these matters and, in particular, she acknowledged the Appellants' public status but it was that very status which was so valuable to the rebels and made their participation so much more effective and serious.

As the judge explained, their participation in the events that day allowed an impression of respectability and legality to be transmitted beyond the confined area where the rebels had control. It was a false impression but the effect of the participation of the appellants was to strengthen his position despite its clear illegality and must have contributed to the length of time the hostages were incarcerated and the country remained in turmoil.

She pointed out:

> Not all the events in Parliament can be laid at the defendants' door. Indeed I accept that none of the defendants was part of the takeover nor was responsible for it. Further, I also accept that in times of crisis and emergency, it is not always easy to act wisely. … Wisdom is easy in hindsight. … However, all defendants lent their weight, the weight of their social status, their traditional status and their official status to the coup.

Imprisonment is the only appropriate sentence for offences of this kind and the court had no alternative but to pass condign sentences. We have read the learned judge's comments and explanations of the different levels of sentence passed on each Appellant. We have considered her reasons and the penalties imposed and we see no reason to interfere.

The appeals against sentence are dismissed.

Orders

(1) Appeals by all Appellants against conviction are dismissed.

(2) Appeals by all Appellants against sentence are dismissed.

Appeals dismissed.