TIMOCI SILATOLU and Anor v STATE (AAU0024 of 2003S)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, TOMPKINS and WOOD JJA

28, 29 February, 10 March 2006

Criminal law — sentencing — treason — summing-up generally — directions on treason — corroboration of accomplices' evidence — selection of assessors — validity of immunity decree — conduct of defence counsel — Constitution of the Republic of Fiji 1990 s 28(1)(j) — Constitution of the Republic of Fiji 1997 ss 115, 196 — Court of Appeal Act s 23(1) — Criminal Procedure Code ss 270, 274, 279, 284(1), 284(2) — Immunity Decree 2000 ss 3(1), 3(2), 4(2) — Penal Code ss 50, 54, 253.

In May 2000, a group of armed men entered the parliament chamber and seized a number of hostages, including the Prime Minister and some of his cabinet. They attempted to take over the Fiji government. The coup was a failure although the government was disrupted and the elected government was never to govern again. Over the next 2 months, efforts were made to resolve it peacefully without further risk to the hostages. The Appellants were in a group of 13 men charged jointly with treason. They pleaded not guilty. The ostensible leader of the attempted coup, George Speight, pleaded guilty to treason and the prosecution accepted a plea of guilty from the remaining ten, to wrongfully keeping in confinement abducted persons. In 2002, the trial of the Appellants commenced.

The High Court convicted the Appellants of treason since the judge agreed with the unanimous opinions of the five assessors. On 27 June 2003, they were sentenced to life imprisonment and took the time they spent in custody prior to and during the trial. The learned judge fixed the minimum period each must serve at 9 years for the first Appellant (A1), and 7 years for the second Appellant (A2). The Appellants appealed against the conviction and sentence. The issues were whether the learned judge erred in: (1) the summing-up generally; (2) the directions on the law of treason; (3) the corroboration of the evidence of the accomplices; (4) selection of the assessors; (5) failing to hold that the Immunity Decree 2000 (the Decree) was valid; and (6) the conduct of the defence counsel.

Held — (1) There can be no doubt that the summing-up was lengthy. It took two-and-a-half days to deliver and the transcript ran to 148 pages of typescript. However, the length was seen against the fact that the hearing before the assessors took 42 days spanning 4 months and involved a large number of witnesses and complex issues.

There was certainly some substance in the Appellants' suggestion that the summing-up was not always clear. However, where there was any lack of clarity, it arose from the judge's tendency, repeated in many instances, of stating the same principle a number of times in different ways. It was done in an overabundance of caution and to satisfy him that he had explained it fully. Such a practice was not helpful in a trial by the assessors. The trial judge should carefully formulate his directions on law and where necessary, on the rules of evidence to ensure they were clear and succinct. If that was done, repetition or further examples were unnecessary and should be avoided. Assessors and jurors were not legally trained but they are, and should be treated as, reasonable members of the public with a normal ability to assimilate and understand straightforward explanations of legal principles. Repetition, over-explanation or repeated "simple examples" were unnecessary and may confuse what the assessors had, until then, seen in clear terms.

In the present case, the evidence was given over many days and the issues were complex and intertwined. Separate accounts of the prosecution and defence cases may not adequately present the issues that the assessors have to determine. In such a case, the assessors were more likely to be assisted and to have a clear understanding of the issues for determination if both the prosecution and defence cases were summarised in relation to each issue as it was raised.

(2) It was clear that s 50 of the Penal Code defines treason as the performance of various acts "which if done in England, would be deemed to be treason according to the law of England for the time being in force". What was needed was a concise and clear account of the law of treason in Fiji. It needed the judge to take those aspects of the law that were relevant to the case presented by the prosecution and to explain that to the assessors in terms of the law of Fiji. The history of the offence since the fourteenth century in England and the fact that our law depends on the position of the present law in England need not concern them.

The prosecution commenced when the first step was taken to bring the accused before a court for the alleged offence was satisfied. In this case, that was 18 February 2002, and the fact that subsequent enquiries or further consideration of the case resulted in an amendment to the initial information but not to the type of offence charged did not amount to a fresh commencement of the prosecution.

(3) It has long been a rule of practice in England, which has been followed in Fiji, that the evidence of an accomplice should be corroborated. The reason was clear and was based on the risk that he may have a strong reason to give false evidence against the accused. It was clear that Tuifagalele, who had been jointly charged with the same offence as Drole and the Appellants, and had pleaded guilty, albeit to a lesser charge, was an accomplice and could not be corroborative of the evidence of Drole.

Although the direction was wrong, the proviso to s 23(1) of the Court of Appeal Act was applied. The other evidence suggested by the judge to be capable of corroborating Drole was considered by the court. It provided stronger corroboration than did the evidence of Tuifagalele and no substantial miscarriage of justice arose as a consequence.

(4) It was clear from the transcript that the judge treated the sitting, on 27 June 2002, as a preliminary exercise that was confined to dealing with applications for exemption. It was also clear that he appropriately identified the circumstances in which those summoned could and should apply for an exemption, namely whether there were matters which would prevent them from carrying out their duty properly.

In the present case, counsel had the list of proposed assessors, they had been given the earlier opportunity of reading the transcripts of 27 June 2002, yet no objection was taken. In any event, there was one assessor of the same ethnicity as the Appellants and the panel was representative of the community.

(5) The commander had no power to grant immunity and his purported grant had no lawful validity in the terms of Lord Pearce's dictum. There were two other aspects of this issue:

(a) The decree was raised as a plea of autrefois acquit. It cannot be an issue for the assessors and must be heard and determined before arraignment. Once it is rejected and the pleas entered, the issue was not one for determination by the assessors.

(b) If the Appellants sought to avail themselves of the decree, it would have required an acknowledgment of their involvement in the overall treasonable acts in the parliamentary complex. It would sit uncomfortably with the pleas of not guilty and it was difficult to understand how the defence could have used that fact in the defence to the charge.

The decision of the judge was considered, his reasoning was accepted and his conclusions were agreed with. In those circumstances, his refusal to allow the evidence of the decree before the assessors was correct.

(6) The final passage was a confusing direction and one which might even be seen as suggesting the assessors might speculate on matters not given in evidence.

Clearly, the nature of Drole's evidence was such that it needed a careful examination. It was also apparent from the record that at least one important aspect of the defence was not put and the omission was the subject of comment later. At the same time, the risks of pursuing such a course before the assessors, needed to be carefully evaluated and there were good reasons why the counsel may have considered it preferable to avoid them. There was no reason to suggest that Vere's cross-examination was inadequate or incompetent.

Appeal against sentence allowed. Appeal against conviction dismissed.

Cases referred to

Samuels v Songaila (1977) 16 SASR 397, applied.

Auckland Casino Ltd v Casino Control Authority [1995] 1 NZLR 142; *Buckman v Button* [1943] KB 405; [1943] 2 All ER 82; *Davies v Director of Public Prosecutions* [1954] AC 378; [1954] 1 All ER 507; *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700; *Jai Ram v State* [2005] FJCA 29; *Maciu Koroicakau v State* [2005] FJCA 20; *Maxwell v Murphy* (1957) 96 CLR 261; *R v Clayton-Wright* [1948] 2 All ER 763; 33 Cr App Rep 22; *R v Fotu* [1995] 3 NZLR 129; *R v Gough* [1993] AC 646; [1993] 2 All ER 724; *R v Jenkins* [1980] 72 Cr App Rep 354; *R v Lawrence* [1982] AC 510; [1981] 1 All ER 974; *R v Oliver* [1943] 2 All ER 800; [1944] KB 68; (1944) 29 Cr App Rep 137; *R v Papadopoulos (No 2)* [1979] 1 NZLR 629; *R v Wilkes* [1965] VR 475; *Ratu Jope Naucabalavu Seniloli v State* [2004] FJCA 46; *R v Dinnick* (1909) 3 Cr App Rep 77; *Republic of Fiji and Attorney-General of Fiji v Chandrika Prasad* [2001] FJCA 2; *Webb & Hay v R* (1994) 181 CLR 41; 122 ALR 41, cited.

Amina Koya v State [1998] FJSC 2; *Director of Public Prosecutions v Lamb* [1941] 2 KB 8; [1941] 2 All ER 499; *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645; [1968] 3 All ER 561; *Nand v R* [1980] 26 FLR 137; *Re Raison; Ex parte Raison* (1891) 63 LT 709; *Re Athlumney; Ex parte Wilson* [1898] 2 QB 547, considered.

Director of Public Prosecutions v Hester [1973] AC 296; [1972] 3 All ER 1056; *Director of Public Prosecutions v Kilbourne* [1973] AC 729; [1973] 1 All ER 440; *Ensor v R* [1989] 89 Cr App Rep 139; *Wilisoni Dakunaivei Tamaibeka v State* [1999] FJCA 1, explained.

A. K. Singh and *M. Raza* for the Appellants

A. Prasad, *W. Kurisiqila* and *S. Puamau* for the Respondent

[1] Ward P, Tompkins and Wood JJA. On 21 March 2003, the Appellants were each convicted of treason in the High Court, the judge having agreed with the unanimous opinions of the five assessors. They were sentenced, on 27 June 2003, to life imprisonment and, having taken the time they had spent in custody prior to and during the trial, the learned judge fixed the minimum period each must serve at 9 years for the first Appellant (A1), Mr Silatolu and 7 years for the second Appellant (A2), Mr Nata. They appeal to this court against both conviction and sentence.

[2] The Appellants were in a group of 13 men charged jointly with treason and both pleaded not guilty. Of the others, the ostensible leader of the attempted coup, George Speight, pleaded guilty to treason and the prosecution accepted a plea from the remaining ten of guilty to wrongfully keeping in confinement abducted persons, contrary to s 253 of the Penal Code. The trial of the two Appellants commenced in 2002.

[3] The case arose from the events of May 2000 when a group of armed men entered the chamber of parliament and seized a number of hostages, including the prime minister and some of his cabinet, while they attempted to take over the government of the country. Although the government was disrupted and the elected government was never to govern again, the coup was a failure and, over the next 2 months, efforts were made to resolve it peacefully without further risk to the hostages.

[4] A number of those held were released during May and June. On 29 May 2000, there was a declaration of military rule by the Commander of the Republic of Fiji Military Forces (RFMF) and, throughout much of the month of June 2000,

a number of negotiations were held culminating in the signing by Speight and the Commander of the RFMF of the Muanikau Accord in early July 2000. As part of that Accord, the remaining hostages were to be released and this took place on 13 July 2000 after they had suffered 56 days unlawful custody in the parliamentary complex.

[5] This appeal has been seriously delayed for reasons it is not necessary to detail but which, in the main, were nothing to do with the conduct of the Appellants. Such delay defeats the aim of the courts to provide justice and will inevitably leave the applicants with a lingering feeling of injustice. In order to represent the Appellants in a manner which did not extend the delay, Mr Singh accepted instructions and has prepared the appeal expeditiously and, we have no doubt, to the exclusion of other professional work during that time. The trial was protracted and the record is voluminous and the court is grateful to him. For the same reasons, counsel for the State has been willing to accept an abridged timetable in order to ensure the appeal was not further delayed and this has placed the Respondent under additional pressure in the last days before the hearing.

[6] The amended grounds of appeal initially listed 27 grounds and many subsidiary grounds against conviction. Shortly before the hearing, four were withdrawn. The remaining grounds overlap and are frequently repetitive. It would not be an unfair description to suggest counsel has used a "scatter gun" approach and, at the hearing, Mr Singh conceded a number had no merit. The time frame involved in this appeal may explain that approach but the court is seldom assisted by lengthy grounds which fail to distinguish those with merit from those which manifestly have none.

[7] Taken together, the grounds can be crystallised into a number of topics and we shall deal with the appeal on that basis. We shall not deal with those grounds which were abandoned before the hearing [9, 14, 15 and 27] or not addressed in the hearing [23(a) and (b)]. The topics may be summarised as:

(1) The summing-up as a whole was unnecessarily lengthy and was unclear and unbalanced to the extent that the assessors must have been confused and that the learned judge failed to put the defence case fairly or at all.

(2) The trial judge erred in his directions on the offence of treason in particular in finding that it formed part of the law of Fiji and that, if it did, the prosecution had been commenced within 2 years as required by s 54 of the Penal Code.

(3) The learned judge's directions on law were incorrect in respect of the corroboration of the evidence of accomplices.

(4) The procedure by which the learned judge interviewed the assessors was improper and unjust, they were not fairly selected and some should have been discharged for possible bias.

(5) The trial judge erred in failing to hold that the immunity decree was legally binding.

(6) Defence counsel for both Appellants were incompetent and negligent in their conduct of the case and counsel for Silatolu had conflicts of interest which should have prevented them continuing with the trial.

[8] We have considered but find no merit or insufficient substance to merit intervention by this court in the Appellants' complaint about the judge's directions on the effect of previous inconsistent statements and contradictions [ground 5(b)], the significance of lies [5(c)], principal offenders [5(g)], withdrawal [5h)], duress and compulsion [6(e)], joint enterprise [6(f)] the

withdrawal of the seventh overt act [7] or on mens rea and actus reus in respect of possession of the documents seized from the house of A2 after he had been taken into custody [22]. We do not find any substance in the criticism of his supplying to the assessors of a written summary of the elements of treason [5(d)], his suggested criticism of the defence for failing to call witnesses [5(e)], allowing the inclusion of the unlawful oath as an overt act [6(d)], in not discharging the assessors following newspaper and broadcast reports from another trial [13(a)] or following evidence that banks had been possible targets of bombs [13(b)]. Similarly we find no merit in the ground that the complexity of the offence made it difficult to prepare the defence [17], or in the grounds challenging the manner in which additional evidence was introduced [21] or concerning and the judge's suggested failure to stop prosecuting counsel from allegedly inflaming the assessors [23(c)].

The summing-up generally

[9] Mr Singh's objections to the summing-up in general were that it was "very lengthy, unclear, excessive, repetitive, full of quotations from other cases and failed to identify the issues or assist the assessors in how they should approach and deal with them". To that list he adds that the judge summarised some aspects of the evidence incorrectly and that his directions were biased towards the prosecution case.

[10] There can be no doubt that the summing-up was lengthy. It took two-and-a-half days to deliver and the transcript runs to 148 pages of typescript. However, the length must be seen against the fact that the hearing before the assessors had taken 42 days spanning 4 months and had involved a large number of witnesses and complex issues.

[11] The Appellants' case is that the sheer length was one of a number of factors which must have left the assessors confused. As evidence of that confusion, counsel points to the fact that, after they had retired to consider the case, the assessors returned with a request for the transcript of the summing-up followed, after that was declined, by a request for transcripts of the evidence of seven witnesses including the Appellant Nata. That was also declined and, instead the judge commenced to read the evidence to the court. However, after he had started, the assessors indicated that there were only certain aspects of the evidence they wished to hear and that was read to them.

[12] The suggestion that the assessors were confused is mere speculation and it is not a part of this court's role to try and see into the assessors' minds or to determine the manner in which they reached their conclusions. The role of the appellate court is to analyse the contents of the summing-up as a whole and to intervene if it finds they are confusing in themselves or if the assessors' opinions suggest confusion.

[13] When summing-up to a jury or to assessors, the judge's directions should be tailored to the particular case and should include a succinct but accurate summary of the issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts; *R v Lawrence* [1982] AC 510; [1981] 1 All ER 974. It should be an orderly, objective and balanced analysis of the case; *R v Fotu* [1995] 3 NZLR 129 (*Fotu*).

[14] There is certainly some substance in the Appellants' suggestion that the summing-up was not always clear. However, where there was any lack of clarity, it arose from the judge's tendency, repeated in many instances, of stating the same principle a number of times in different ways. We accept that this was done in an overabundance of caution and to satisfy himself that he had explained it fully. Such a practice is not helpful in a trial by assessors. The trial judge should carefully formulate his directions on law and, where necessary, on the rules of evidence to ensure they are clear and succinct. If that is done, repetition or further examples are unnecessary and should be avoided. Assessors and jurors are not legally trained but they are, and should be treated as, reasonable members of the public with a normal ability to assimilate and understand straightforward explanations of legal principles. Repetition, over-explanation or repeated "simple examples" are unnecessary and may confuse what the assessors have, until then, seen in clear terms.

[15] It cannot be emphasised enough, that once there has been a clear and simple explanation of any aspect of the case, further repetition or elaboration is more likely to obscure than to clarify. An example cited by the Appellants occurred where the judge, following a lengthy direction on the different roles of judge and assessors (the third time he had dealt with that topic) and immediately prior to giving a clear direction on the burden and standard of proof, stated:

> Our criminal courts operate within what is called the "adversarial system"; where we have a party to prosecute, to allege, that is to say the State, and a party to answer or defend; the defence. The task is not to find out the truth about everything. It is to ascertain whether the charge has been proven and proven beyond reasonable doubt. The ultimate verdict may or may not say much about the truth. A verdict of guilty, yes, that is the truth. We hope and we expect that it will be. But not guilty, that may mean innocent or it may mean not proven. I state and direct you that the adversarial system of justice continues here in Fiji. As was stated so succinctly by a Court of Appeal in the jurisdiction where I have spent most of my judicial life:
>
> > A trial is not an inquiry in to the truth of an issue, but is concerned simply with the narrower question whether the prosecution has proved its case against the accused beyond reasonable doubt.

[16] It is difficult to understand why the judge considered it necessary or desirable to make that statement. Luckily, the cited concluding passage is well expressed and will no doubt have guided the assessors but we would suggest that he would have been better to have omitted it and relied on the direction which followed on the burden and standard of proof. Counsel for the Appellants describes it as an uncalled for direction and one which urges the assessors to convict. We do not accept that is the effect but we agree it may have been better left unsaid.

[17] Mr Singh has pointed to instances where he suggests that the content and manner of stating some of these superfluous passages were emotional and could have influenced the assessors' feelings. One example will suffice. As part of unnecessarily lengthy and repetitive directions on the easily described role of the assessors, the judge stated:

> In a very large country on the Pacific rim, the United States of America, a political leader and statesman who lived and was assassinated in the last century, President J F Kennedy, was famous for many orations and profound pronouncements including this one, to this effect: "And so my fellow citizens, ask not what your country can do for you, ask what you can do for your country".

> If I may adopt and adapt President Kennedy's inspirational quotation, as I commence my summing up at the end of this long trial, I say this to you; "And so, citizens of Fiji, ask not what your country can do for you; ask what you can do for your country, as you obey the oaths you took and as you fulfil your important role as assessors in the operation and functioning of the criminal justice system of Fiji.

[18] That passage, the Appellants suggest, directed as it was to assessors who had been through the traumatic events of 2000, would have tended to make them decide to convict rather than to acquit.

[19] We cannot agree with that conclusion. The nature of the charge and evidence in this case was such that we would suggest that it would have been better for the judge to avoid any hyperbole and to aim to sum up the case in as unemotional way as possible. The passage quoted above was unnecessary and unfortunate but we do not accept it would have had any effect on the assessors that was adverse to the Appellants.

[20] In the present case these matters together with some whimsical musings and reflections on his own experiences undoubtedly added to the length of the summing-up and did little or nothing to add to the assessors' understanding of the relatively straightforward concepts that they needed to understand. It was an untidy and unduly repetitive summing-up but we do not consider that the effect in general was to confuse the assessors and we consider that the requests by the assessors after the summing-up was completed pointed as much to their careful consideration of the evidence as it might have pointed to confusion.

[21] The final aspect of this part of the appeal is the suggestion by the defence, that the judge failed to put the defence or to put it fairly and that his general directions were slanted towards the prosecution.

[22] Mr Silatolu had given evidence for more than 4 days and called one witness and Mr Nata was in the witness box for a period extending, with frequent interruptions, over 5 days and called seven witnesses. On the third day of the summing-up, as it approached its conclusion, the judge summarised the defence of both the accused in less than three pages of typescript. However, that was only the final summary of the defence given shortly before the assessors retired. The manner in which the judge had summed up the evidence throughout the summing-up was to deal with specific aspects of the prosecution case and then to pass to the defence case in relation to that particular part of the case. When he, later, presented the brief summaries, he introduced them with a heading "Defence cases in summary and in addition to what has gone before" and that is clearly what they are.

[23] This court dealt with the judge's duty to put the defence case in *Wilsoni Dakunaivei Tamaibeka v State* [1999] FJCA 1 (*Tamaibeka*). The court pointed out that it is necessary to look at the overall summing-up to assess whether it was a fair and objective presentation of the case for the prosecution and of the case for the defence. Citing *Re Dinnick* (1909) 3 Cr App Rep 77, *R v Clayton-Wright* [1948] 2 All ER 763; 33 Cr App Rep 22 and *R v Wilkes* [1965] VR 475, the court pointed out that the requirement to put the defence fairly had long been recognised.

[24] In a short case or one in which the evidence is of small compass, the clearest way of reminding the assessors of the evidence may be simply to take the evidence of the prosecution and defence cases in turn and then summarise the main issues in contention. However, where, as in the present case, the evidence has been given over many days and the issues are complex and intertwined,

separate accounts of the prosecution and defence cases may not adequately present the issues that the assessors have to determine. In such a case, the assessors are more likely to be assisted and to have a clear understanding of the issues for determination if both prosecution and defence cases are summarised in relation to each issue as it is raised.

[25] That was the course the judge followed in this case. By the time he had delivered the bulk of his summing-up, he had related the defence cases to that of the prosecution. The brief summaries at the end were solely a final reminder to the assessors of the defences which had been put. We are satisfied that, in so doing, the judge fairly left the assessors with the defence cases at the forefront of their minds when they retired.

[26] The Appellants say the matter does not rest there. They suggest that the judge put the defence points in such a way that, although reminding the assessors it was a matter for them, he was effectively negativing them and emphasising the prosecution in respect of each aspect. Further, it was argued the manner in which the whole summing-up was structured, was biased towards the prosecution.

[27] In *Tamaibeka*, this court explained:

> A judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case but that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced. If all the issues are put in a manner favourable to one party and unfavourable to the other, the assessors may feel bound to follow the view expressed by the judge.

[28] It was pointed out in *Fotu* that, if comment is not fair, it is not corrected by adding frequent reminders that the decision on the evidence is for the assessors alone. Such a statement, although correct, may be an inadequate protection from the danger that, if the directions are slanted in a particular way, the jury may detect or perceive, and may follow, the judge's opinion in favour of one side.

[29] One of the Appellants' submissions to this court was that the judge, as part of and following a lengthy direction on the value of circumstantial evidence, gave examples which supported the prosecution case but he failed to remind the assessors of other circumstantial evidence which assisted the defence. We agree it would have been a more balanced direction had he had done so. However, the judge's direction on circumstantial evidence was correct and we see no reason to doubt that the assessors would have applied it to their consideration of the defence evidence.

[30] The suggestion that the judge had failed to place a "balanced perspective" before the assessors was made by counsel for Nata in the absence of the assessors at the time of the summing-up and the particular aspect raised was corrected by the judge later in his summing-up.

[31] The judge misstated the evidence concerning the documents taken from Mr Nata's house. The confusion related to the place the documents were found when the real issue was A2's knowledge of them. While the overall manner in which it was dealt with in the summing-up was untidy, it was ultimately a matter of fact for the assessors and we are satisfied they had the defence case on this important aspect of the case properly before them.

[32] Whenever the judge places the prosecution and defence cases together, there is always a possibility that a party may feel that his particular side was not given sufficient or clear emphasis. We accept that some of the judge's statements may have given rise to such a feeling when viewed in a partisan way but, taken as a whole, we do not feel that was the true effect of the summing-up of the defence cases.

[33] The question for this court is whether, considered as a whole, the summing-up so lacked fairness as to require an order for a fresh trial. As we have said, this was far from a model summing-up. The judge gave some infelicitously worded directions and his frequent amplification of simple concepts did little to clarify and more than once actually clouded the effect of the direction. However, we do not consider that the overall effect of the manner in which he dealt with the case was unfair and this ground of appeal is dismissed.

[34] This ground dealt with the general effect of the summing-up and we now pass to consider two specific aspects of the directions he gave. His approach to the law of treason was also relevant to our assessment of the summing-up and some of our comments in the following section were relevant to and considered by us in our overall assessment above.

The directions on the law of treason

[35] Early in the proceedings against these two Appellants, on 18 March 2000, the trial judge held a pre-trial conference at which he heard submissions in support of a motion to quash the information on the grounds:

(a) That the offence of treason as defined by s 50 of the Penal Code is obsolete and long extinct since the Republic of Fiji Island obtained republican status with the adoption of the Constitution of the Sovereign Republic of Fiji in 1990.

(b) The Republic of the Fiji Islands has not yet amended its treason law consequent upon the attainment of independence in 1970 and republican status in 1990. This means that the anomalous position prevails whereby treason is "any act which if done in England would be deemed to be treason according to the law of England for the time being in force". As the law of treason in England is defined in terms of the sovereign and the allegiance owed to the sovereign this law is patently obsolete in the independent Republic of the Fiji Islands.

(c) The information laid against the accused does not state and cannot by any amendment authorised by s 274 of the Criminal Procedure Code be made to state any offence of which the accused has had notice.

(d) Section 28(1)(j) of the Constitution of the Fiji Islands gives the right to the accused "not to be found guilty in respect of any act or omission unless the act or omission constituted an offence at the time it occurred". The acts in respect of which the accused is alleged to have committed could not constitute the offence of treason at the time they were alleged to have occurred.

[36] In a written judgment delivered on 26 March 2002, the judge rejected the submissions.

[37] When summing-up to the assessors, he went into the law as stated in his earlier decision in some detail. Grounds of appeal 25 and 26 are:

25. That the learned trial judge erred in law regarding the offence of treason under s 50 of the Penal Code AND/OR that he erred when he held that the treason law was still in force in Fiji.

26. That the learned judge erred in law when he failed to hold that there had been a time barred (sic) regarding the commencement of the treason offence.

[38] In the summing-up, which is the direction with which this court is concerned, the judge introduced the subject by a statement of the offence and then continued:

> Although this notion of treason sounds complicated, it is really not a very difficult concept but has its roots in the ancient law of England and I want to discuss something of that ancient law of England because I believe that, when you have heard me on this topic, you will have a better appreciation of what this notion of treason (not a very difficult concept in the end) is.

[39] This was followed by a lengthy history of the offence citing and quoting from the judgments in a number of cases from England. We do not consider that this was a necessary or appropriate course to have followed before the assessors. It is clear that s 50 defines treason as the performance of various acts "which if done in England, would be deemed to be treason according to the law of England for the time being in force". What was needed was a concise and clear account of the law of treason in Fiji. It needed the judge to take those aspects of the law that were relevant to the case presented by the prosecution and to explain that to the assessors in terms of the law of Fiji. The history of the offence since the fourteenth century in England and the fact that our law depends on the position of the present law in England need not concern them.

[40] However, following that dissertation, the judge summarised the law correctly using also a written summary of the elements of the offence for the assessors to consider which gave clear guidance to them.

[41] The thrust of Mr Singh's submissions to this court was not directed at the direction on treason so much as at the earlier ruling that the law was still in force in Fiji. His written submissions repeat part of the careful submissions made by Ms Waqavonovono at the pre-trial conference. We have studied the judgment which arose from those submissions and we find no reason to suggest the judge erred in his conclusion on those submissions.

[42] The second ground relates to the time limit in s 54 of the Penal Code:

> 54. A person cannot be tried for treason … unless the prosecution is commenced within two years after the offence is committed.

[43] In the present case, the invasion of parliament occurred on 19 May 2000 and the charge related to the period from that date to 14 July 2000. Having told the assessors of the time limit, the judge continued:

> This prosecution which has resulted in this trial was commenced no later than the date of the amended information … it was very likely commenced on 18 February 2002 the date of the information which the amended information and another amended information replaced. In any event, I tell you that the prosecution was commenced within time; and it is not suggested otherwise by or on behalf of either accused.

[44] The Appellants contend that the date at which a prosecution is commenced must be the date at which the witnesses are first called to give evidence in the trial. Such a contention defies common sense and Mr Singh presented no authority for the proposition. We are satisfied that the prosecution commences when the first step is taken to bring the accused before a court for the alleged offence. In this case, that was the 18 February 2002 and the fact that subsequent enquiries or further consideration of the case resulted in an amendment to the

initial information but not to the type of offence charged does not amount to a fresh commencement of the prosecution.

Corroboration of the evidence of accomplices

[45] One of the witnesses called for the prosecution was Simione Drole, a co-accused who had been charged with treason and pleaded guilty to a lesser charge. He had been called by the prosecution and was identified by the judge as an accomplice. The judge also suggested that three other witnesses who had been called by the defence should be treated as accomplices. They were Viliame Savu, Iliesa Duvuloco and Salesi Tuifagalele. The summing-up then continued:

> Ladies and gentleman assessors, experience in criminal courts has shown that the evidence of accomplices can be unreliable. Accomplices often have interests of their own to serve by giving false testimony. They may wish out of malice, to implicate others. They may wish, out of anger or disappointment, to implicate others. They may be seeking to shift the blame, or part of the blame, for the wrongdoing on to others. They may wish to help someone else, or some other authority, with a view to benefiting themselves in the ultimate. They may give false evidence for one or more of a number of reasons or for no reason at all. They may be seeking to curry favour with the authorities in order to improve their own situation or the situation of those near and dear to them.
>
> Evidence for a person who has himself been involved in the crime actually charged or who was about to become involved in the crime which is said to have actually been committed, comes from a tainted source. The evidence of such a person with an interest of his own to serve by giving false evidence may be contaminated. Now, if as I imagine you will you see Simione Drole and those other persons I mentioned as well but the most important of whom in the context is Drole, then I warn you that it is dangerous to convict on the evidence of an accomplice unless that evidence is corroborated (which means confirmed or supported) in a material particular by evidence from another source.
>
> Corroboration, in a trial like this, is evidence from a source independent of the witness to be corroborated which implicates the accused in the crime charged by tending to show that he was a participant therein, that is to say, tending to show his connection with the crime charged.

[46] That direction is unobjectionable but the judge then continued:

> Where there are two or more accomplices, one accomplice may corroborate another, provided that there is no suggestion (and none was made here, nor does it, as a matter of common sense, arise) that they have concocted a story together. I refer in this context to Savu and Drole, who may corroborate one another, and I refer to Tuifagalele and Drole as accomplices who may be assessed as having corroborated one another.

[47] We assume that the comment in parentheses is a reference to the fact that Drole was a prosecution witness and the other two were witnesses for the defence.

[48] It has long been a rule of practice in England, which has been followed in Fiji, that the evidence of an accomplice should be corroborated. The reason is clear and is based on the risk that he may have a strong reason to give false evidence against the accused.

[49] There is no general rule that witnesses who require corroboration either by statute or practice cannot corroborate each other; *Director of Public Prosecutions v Hester* [1973] AC 296 at 326; [1972] 3 All ER 1056 at 1074 (*Hester*); *Director of Public Prosecutions v Kilbourne* [1973] AC 729 at 747; [1973] 1 All ER 440 at 453 (*Kilbourne*). However, accomplices who partake in the same crime,

participes criminis, cannot corroborate each other because of the danger that they may have concocted the false story together; *Hester* case where, at AC 326; All ER 1074, Lord Diplock explained:

> … the reason which makes one accomplice a suspect witness, viz. the natural temptation to exculpate himself or to minimise the part which he played in a common crime, applies also to any other accomplice in the same crime, and there is every reason for them to concert together to tell the same false story.

[50] At AC 330; All ER 1077, Lord Cross also referred to "the obvious danger that that the two accomplices might agree together to throw as much as possible of the blame on the accused".

[51] In *Kilbourne* at AC 747; All ER 453, Lord Hailsham doubted that this rule has universal application but he supported its application in a case where the accomplices were participants in the same crime:

> Obviously where two or more fellow accomplices give evidence against an accused their evidence is equally tainted. The reason why accomplice evidence requires corroboration is the danger of a concocted story designed to throw blame on the accused. The danger is not less, but may be greater, in the case of fellow accomplices.

[52] *Kilbourne* qualified what had previously been taken as an absolute rule by adopting the classes of accomplice set out by Lord Sumner in *Davies v Director of Public Prosecutions* [1954] AC 378 at 400; [1954] 1 All ER 507 and explaining that the third class includes cases where accomplices give independent evidence as to separate offences and the circumstances are such as to exclude any chance of a jointly concocted story in which case one can corroborate another provided the evidence as to the one offence is probative and admissible evidence as to the other.

[53] At AC 748; All ER 454, Lord Hailsham suggested:

> The real need is to warn the jury of the danger of a conspiracy to commit perjury in these cases, and, where there is the possibility of this, it is right to direct them not to treat as corroborative of one witness the evidence of another witness who may be part of the same conspiracy …

[54] The judge's direction in the present case encompassed such a warning.

[55] It is clear that Tuifagalele, who had been jointly charged with the same offence as Drole and the Appellants and had pleaded guilty, albeit to a lesser charge, was an accomplice and could not be corroborative of the evidence of Drole.

[56] On the other hand, the witness Savu was called by A1 and told the court that he had been convicted of misprision of treason the basis of which charge was that he had attended a meeting on 19 May 2000 at which information was given about the coup and he had failed to alert the authorities. We are not satisfied that he was a fellow accomplice in this case and his evidence was, therefore, capable of corroborating Drole.

[57] Having found that the witness Drole required corroboration the judge was required to indicate the evidence which he considered could provide corroboration. He indicated four matters. One relied for corroboration on the evidence of Savu, another on that of Tuifagalele, the third was the evidence of the mobile telephone linkages between the telephones of the Appellants and Speight which he held was capable, circumstantially, of corroborating Drole and the fourth the documents found in Mr Nata's house. Counsel for the Appellants

points out that much of that evidence was disputed but we consider the judge directed the assessors correctly on the way in which they must evaluate such evidence.

[58] What, then, is the effect of the incorrect direction in relation to the evidence of Tuifagalele? The Court of Appeal in England has held that a failure to direct the jury on the danger of convicting on the uncorroborated evidence of an accomplice may be a ground for quashing the conviction but that, even where there was a failure to give such a direction, the proviso will be applied "if there is enough other convincing evidence to make the conviction safe and satisfactory"; *R v Jenkins* [1980] 72 Cr App Rep 354 at 358. In that case, Kilner Brown J corrected the statement in the 40th ed of *Archbold* that the proviso would only be applied in a very exceptional case.

[59] We have not been directed to any case which deals with the effect of an incorrect direction that a particular accomplice could corroborate another as occurred in respect of the evidence of Tuifagalele. However, we consider that the same test is appropriate, namely that the proviso should be applied if there is other and sufficient evidence to make the conviction safe.

[60] Although the direction was wrong, we would apply the proviso to s 23(1) of the Court of Appeal Act and dismiss the appeal on this ground. We consider that the other evidence suggested by the judge to be capable of corroborating Drole provided stronger corroboration than did the evidence of Tuifagalele and no substantial miscarriage of justice arose as a consequence.

The selection of the assessors

[61] There are three grounds we shall deal with in relation to this topic:

(10) That the learned trial judge erred in law when he interviewed the assessors without the knowledge or presence of the prosecution or defence counsel;

(11) That there had been a miscarriage of justice in which the assessors selected by the honourable trial judge were not selected on a racially balanced panel of assessors as required by law;

(12) That the trial of the Appellants in the High Court of Fiji at Suva should be declared a mistrial on the ground that two of the assessors were or had been likely or reasonably apprehended or suspected of bias against the Appellants on the grounds that the witnesses giving evidence were either their superior or workmate.

[62] The transcript of the proceedings shows that, on 27 June 2002, the judge convened a sitting of the court to which nine potential assessors were summoned. After introducing himself as the trial judge in the pending treason trial of the Appellants, he said to those present:

> You have been summoned to attend at this courtroom today, and at a later date, and you may in due course be selected (or chosen) and sworn to be one of the assessors in that pending trial. It is by no means certain that each and everyone of you will in fact be one of the assessors in the forthcoming trial. You see you may be excused from assessor service.

[63] After explaining that the members of the panel who were present would be given an opportunity that day, to seek to be excused, the judge made mention of the responsibility of those involved to "ensure not only that justice is done but also that justice is seen to be done", before adding:

> Justice would not be seen to be done if it were discovered during the trial, or even after it had finished, that one of the assessors was closely connected with one of the principal participants in the trial; was perhaps closely connected with one of the two accused persons; or with one of the witnesses; or with one of the people who are to figure prominently in the evidence.

[64] The persons who fell within the description of "principal participants" were later identified as including the accused, the prosecuting and likely defence counsel who were named, the judge himself, George Speight, Ratu Sir Kamisese Mara, other persons who had been accused of offences arising out of the events of May to July 2000, the Great Council of Chiefs, Members of Parliament and certain alleged hostages. Mr Ridgway, the Deputy Director of Public Prosecutions, added, at the court's request, the names of the forty eight witnesses who were expected to be called in the prosecution case, together with the details of the offices or employment which they held. Details were also given of some 13 additional persons who might be "named".

[65] The judge then specified the several grounds upon which those on the panel might seek to be excused, beginning with personal factors which may render them incapable of discharging the duty of an assessor such as ill health, impairment of hearing or vision or family or work commitment. He indicated that if anyone had any such difficulty, then they should raise their hand and explained:

> … if any of you do, I will then arrange to talk to you confidentially and privately in the office (or chambers) behind this courtroom. I will decide in the light of that conversation, whether to excuse you from assessor service in this trial.

[66] One panel member (number 9) raised her hand and was then spoken to by the judge privately in chambers. Upon his return to court, the judge indicated that her application was receiving consideration and that a decision would be made about it "shortly".

[67] He then outlined the second basis upon which they may be excused, namely, anyone who might be "closely connected or associated with any of the principal participants in the trial". An explanation was given of what was meant by the expression "closely connected". Four of the potential assessors (numbers 7, 5, 3 and 2) indicated that they sought to be excused and were individually interviewed by the judge in his chambers.

[68] On his return, the judge stated that two persons (numbers 3 and 7) had been excused by him and that he was reflecting on the position of the other two (numbers 2 and 5).

[69] The third basis on which they might be excused was stated to arise if, by reason of media coverage of the relevant events or otherwise, they felt themselves "unable to be (and to remain) impartial". Panel members 5 and 6 raised their hands and were separately interviewed in chambers, in the case of number 5 for a second time.

[70] Panel member 4 was discovered to be disqualified by virtue of his age and so he was excused.

[71] It was then announced that panel member 5 was excused. One final opportunity was offered, to which panel member 8 responded. He was interviewed in chambers, but his application was refused.

[72] This left five members of the panel, numbers 1, 2, 6, 8 and 9 who had not been excused, each of whom, other than member 1, had unsuccessfully applied to be excused. The judge explained to this group that they were required to attend on 22 July and informed them that, on that day after they had been brought into the courtroom:

> You will be given a number. The accused are likely to be arraigned and they will be asked for their pleas. The assessors for the trial will then be *selected by me* and they will then be sworn. [Emphasis added.]

[73] It is evident from the transcript that neither Appellant was present during this sitting. Mr Ridgway was present for the State as was Mr Vuataki, counsel for Mr Silatolu. Mr Nata did not have counsel present, although Ms Narayan, who acknowledged having been aware of the morning's sittings, did appear that afternoon, on his behalf.

[74] The trial did not commence on 22 July 2002, although there was a hearing in closed court that day attended by counsel for all parties. Mr McCoy QC for the State drew attention to the fact that he had some concerns in relation to the assessors having been interviewed in private by the judge on 27 June, it being his understanding that whatever occurred should have taken place openly in the presence of counsel and the accused. Otherwise, he suggested, what had happened might amount to a "material irregularity in the trial". He went on to explain that his concerns related, in particular, to an employee of the Government Printer and to an employee of the Broadcasting Commission, since officers of those organisations would be witnesses in the prosecution case.

[75] Counsel for the Appellants did not join Mr McCoy in expressing any reservations about the practice which had been followed.

The judge noted Mr McCoy's concerns and observed:

> … I was quite expecting that, in due course and before any of the assessors were to be invited to move forward to the assessor's box to be sworn, that was the time, not now, but that later time was to be the occasion for any objection. (if one was forthcoming) to be raised.

[76] He pointed out that the whole of what had occurred in his private chambers, in relation to the several applications to be excused, had been recorded. He added that his recollection, in relation to the employee of the Government Printer, was that he:

> … gave me sufficient information to assure me that there was no impediment to that particular assessor discharging his duty and complying with his oath and that the relationship between that person and the Government Printer himself was sufficiently distant.

[77] His Lordship indicated that he had no recollection in relation to the Fiji Broadcasting employee. He did, however, advise that he would release to the prosecution or defence a transcript of the conversations which had occurred between himself and any other person on the list, in respect of which there was a concern.

[78] Mr McCoy responded by observing:

> … if your Lordship would be kind enough to provide a list (sic) of the transcripts, I could read them very quickly with my learned friends, and that is likely to definitively resolve the matters so it is no longer an issue.

[79] When the hearing resumed, after a short adjournment, Mr Vuataki sought and was granted, leave to withdraw as counsel for Mr Silatolu and, towards the end of that day's sitting Mr McCoy stated that:

> … I can indicate hieroglyphically that, having seen the transcript, it [that is the matter which he had earlier raised] is an issue that has completely fallen away.

[80] There was no comment by counsel who were present for Mr Nata. Nor was there any response from Mr Silatolu, although by this stage he was unrepresented. So far as the transcript shows, the question of the assessor exemption procedure was not mentioned again.

[81] The trial proper commenced on 26 November 2002. On that date Mr Ridgway and Mr Kurisaquila appeared for the State, Mr Valenitabua appeared for Mr Silatolu, and Mr Wolf appeared for Mr Nata with Ms Narayan. The Appellants entered pleas of not guilty and the transcript then records the following:

> His Lordship … This Court has in mind to select not less than four (and, in fact, five) persons from a list of those summoned to serve as assessors at the sessions when this trial is to take place (section 284(1)) of the Criminal Procedure Code. I propose to call on assessors numbers one to five to come forward in turn, to stand at their chair in the assessors box, and to be sworn … They will *then be deemed to have been selected* or chosen and sworn. [Emphasis added.]

[82] The relevant provisions of the Criminal Procedure Code provide:

> 270 The High Court or the Chief Registrar of the High Court may *for reasonable cause* excuse any assessor from attendance at any particular sessions … (emphasis added)
>
> 284 (1) In each trial the Court shall select two or more, and in capital cases not less than four, persons from the list of those summoned to serve as assessors at the sessions.
>
> (2) The Court before which a case is or may be heard may, in its discretion on an application made by or on behalf of the prosecution or the accused, or at its own instance, make an order that the assessors shall consist of men only, or of women only as the case may require or may, on an application made by a woman to be exempted from service as an assessor in respect of any case by reason of the nature of the evidence to be given, grant such an exemption.

[83] There is no specific statutory provision whereby the State or the accused, is given any right to make an application in relation to the selection of an assessor or assessors, beyond that mentioned in s 284(2) of the Criminal Procedure Code.

[84] Notwithstanding, we have been informed that a practice has been adopted, similar to that seen in other jurisdictions which have trial by jury, for the parties to be given a right to challenge assessors for cause during the selection process. We assume that is what the trial judge had in mind on 22 July 2002.

[85] It is clear from the transcript that the judge treated the sitting, on 27 June 2002, as a preliminary exercise that was confined to dealing with applications for exemption. It is also clear that he appropriately identified the circumstances in which those summoned could and should apply for an exemption, namely whether there were matters which would prevent them from carrying out their duty properly.

[86] Regrettably, it has not been possible for counsel or the registry to find the transcripts of the interviews in private chambers. We cannot speculate as to their contents. All we can do is note that Mr McCoy QC who, in the exercise of his

duty to the court, had initially raised the matter, expressly stated after reading the transcripts, that the issue had "completely fallen away" and that the remaining counsel, who similarly had been given the opportunity of reading the transcripts, remained silent on the matter.

[87] Additionally we note that although all counsel were informed in July that they could raise any objection to the assessors when the time came for them to be finally selected and sworn, there was no attempt by any of them to do so.

[88] We consider that the procedure adopted on 27 June 2002 of privately hearing those assessors who sought an exemption, was most undesirable and not in accordance with usual practice but it does not follow that the trial was a nullity or that there was a miscarriage of justice. We make it clear that, in the interests of transparency and open justice, exemption applications must always be conducted openly and in the presence of the parties and their legal representatives. If the reasons for exemption are private or personal, the assessors may be given an opportunity to put them in writing which must then be shown to counsel and the parties.

[89] Similar problems would be avoided if the correct procedure was made the subject of statutory provisions. We understand the Criminal Procedure Code is currently under review and would suggest this is considered by the Law Reform Commission.

[90] The five assessors who sat throughout the trial, and who in due course returned the verdicts of guilty, were regularly summoned. They were selected by the trial judge and they were sworn. The formal requirements of the Criminal Procedure Code were satisfied, with the consequence that the trial cannot be regarded as having been a nullity. The exemption exercise called for the discharge of a discretionary power and as such any review of it by this court is subject to the well-known restrictions on the review of discretionary powers.

[91] It is for the Appellants to demonstrate that the manner in which the panel of assessors was ultimately composed, was such that they were denied a fair trial. In the absence of the transcript of the interviews we cannot say that the retention of the assessors whose applications for exemption were declined involved appealable error. In that regard, we do note that the trial judge did disclose reasons for not exempting the employee of the Government Printer which, on their face show that the discretion was exercised and that the relevant considerations were addressed.

[92] We find no merit in the submission that the panel of assessors was not racially balanced as required by law. As was observed in *Sachida Nand v R* [1980] 26 FLR 137, it is preferable that there be no mandatory rule as to the racial composition of a panel of assessors. The court there added:

> … the existing practices whereby an assessor to whom counsel for the accused objects will not normally be appointed, coupled with the right of the accused or his counsel to make representations to the Court to ensure should he so desire that the assessors include among their number at least one member of the same ethnic group as himself, fully protects the rights of an accused.

[93] In the present case, counsel had the list of proposed assessors, they had been given the earlier opportunity of reading the transcripts of 27 June, yet no objection was taken. In any event, there was one assessor of the same ethnicity as the Appellants and the panel was representative of the community.

[94] The final matter is the question of bias by the assessors. The Appellants submitted that there was a real danger of bias or a reasonable apprehension of bias, in relation to the two assessors who were, respectively, employees of the Government Printer and of the Fiji Broadcasting Commission, because some prosecution witnesses were either their work makes or superiors. Similarly in respect of the assessor who was a former bank employee, because there was evidence led of an intention to bomb banks.

[95] No application was made during the trial for the discharge of any assessor for bias, and there was no evidence of actual bias. The submission of the Appellants that the assessors in question "may have persuaded" the others to convict is mere speculation.

[96] In *Amina Koya v State* [1998] FJSC 2, the Supreme Court dealt with the question of bias; in that case in respect of the trial judge. Having considered the tests in *R v Gough* [1993] AC 646; [1993] 2 All ER 724 and *Webb v R* (1994) 181 CLR 41; 122 ALR 41 the court continued:

> Subsequently the New Zealand Court of Appeal, in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 held that it would adopt 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 the application to the majority of cases of apparent bias. This 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.

[97] This court has also noted that the English Court has subsequently adopted the same test in the case of *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700; see *Ratu Jope Naucabalavu Seniloli v State* [2004] FJCA 46 (and see also *R v Papadopoulos (No 2)* [1979] 1 NZLR 629).

[98] Adopting that test, we are not persuaded that this ground is made out.

The validity of the immunity decree

[99] It appears that prior to the arraignment, the judge heard submissions on autre fois acquit under s 279 of the Criminal Procedure Code.

[100] The basis of the plea was that the effect of the Immunity Decree 2000, No 18 of 2000 was to pardon each of the Appellants by the grant of immunity from prosecution. The decree was made by the Commander of the RFMF on 9 July 2000 and was signed by him as "Commander and Head of Government". It is not necessary to set it out in full but the Preamble describes the need to ensure the safety of the hostages and the national security and concludes:

> And in exercise of the powers invested in me under section 9 of the Interim Civilian Government Establishment Decree No 10 of 2000 and acting on the advice of the Cabinet, I hereby make the following Decree—

[101] Section 3 is headed "Grant of Immunity" and the relevant part provides:

> 3. — (1) Notwithstanding Section 14(2) of the State Services Decree 2000 (no 6 of 2000) George Speight the leader of the Taukei Civilian Group and members of his Group who took part in the unlawful takeover of the Government democratically elected under the 1997 Constitution on the 19th day of May 2000 and the subsequent holding of the hostages until the 13th day of July, 2000 shall be immune from criminal prosecution under the Penal Code for the breach of any law of Fiji and civil liability in respect of any damage or injury to property or person connected with the unlawful seizure of Government

powers, the unlawful detention of certain members of the House of Representatives and any other person and no court shall entertain any action or proceedings or make any decision or order, or grant any remedy or relief in any proceedings instituted against George Speight or any member of his Group.

(2) Subsection (1) also applies to any other person who acted under the directions, orders or instructions of George Speight or any member of the Taukei Civilian Government as a result of the unlawful seizure of Government powers and unlawful detention of the Prime Minister and certain Cabinet Ministers and members of the House of Representatives and other persons.

[102] Section 4(2) provides:

> This Decree shall not be amended or repealed by Parliament or any other Decree.

[103] The judge gave a written judgment on 31 May 2002 in which he ruled that the Appellants had not received a pardon and were required to plead to the information.

[104] Despite the ruling that the Appellants had not received a pardon, it would appear some reference was made to the matter in the trial before the assessors. In his summing-up, the judge stated:

> There was some mention, in the evidence, of talk by some people, or the expectations of some, that a pardon would be granted to some or all of the participants of the coup, that amnesties would be decreed, or that certain people would receive immunity from prosecution. I tell you, ladies and gentlemen, that there is no evidence before you in this trial to the effect that either or both of these accused received a pardon, amnesty or immunity. Therefore it is unnecessary for you to consider (or for me to give you any advice or direction) as to what might constitute a defence of immunity.

[105] The Appellants submit that the learned judge erred when he ruled that the immunity decree did not grant immunity and that the effect of that ruling meant that the defence at the trial were prevented from calling evidence of the decree.

[106] The basis of the judge's decision may be summarised briefly. Relying on the decision of this court in *Republic of Fiji v Chandrika Prasad* [2001] FJCA 2 (*Chandrika Prasad*), that the 1997 Constitution had not been abrogated, that the parliament had not been dissolved but had merely been prorogued for 6 months on 27 May 2000 and that the office of President did not become vacant until the retirement of Ratu Mara on 15 December 2000, he found that any authority to grant a pardon could only have arisen under ss 115 (and 196) of the 1997 Constitution.

[107] Under s 115, only the President has the power to grant a pardon and can only do so to a person convicted of an offence under the law of the State. Neither is there is any power to pardon offences not yet committed as the immunity decree purported to some extent to do.

[108] The Appellants suggest that as the Commander of that RFMF was the executive head of the country and in de facto control, he had the power to make such a decree. Mr Singh cites the passage from the dictum of Lord Pearce in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645; [1968] 3 All ER 561 accepted by the court in *Chandrika Prasad*:

> I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for

> ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful … Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation …

[109] The immunity decree was, the Appellants suggest, brought in the interest of justice and in the interest of the public.

[110] We disagree. The commander had no power to grant immunity and his purported grant had no lawful validity in the terms of Lord Pearce's dictum.

[111] Two other aspects of this issue should be mentioned. First is the fact that the immunity decree was raised as a plea of autrefois acquit. That cannot be an issue for the assessors and must be heard and determined before arraignment. Once it is rejected and the pleas entered, the issue is not one for determination by the assessors. Second, if the Appellants were seeking to avail themselves of the immunity decree, it would have required an acknowledgment of their involvement in the overall treasonable acts in the parliamentary complex. This would sit uncomfortably with the pleas of not guilty and we find it difficult to understand how the defence could have used that fact in the defence to the charge.

[112] We have considered the judge's decision and we accept his reasoning and agree with his conclusions. In those circumstances, his refusal to allow evidence of the decree before the assessors was correct.

The conduct of defence counsel

[113] Both Appellants were represented at the trial by counsel assigned by the authorities. Mr Singh does not pursue the original ground that this was in breach of s 28(1) of the Constitution but does suggest that A1 did not want the counsel he "had to accept" and that counsel for both Appellants were incompetent and unable to handle a trial of this complexity.

[114] He bases the complaint on two matters:

(a) The judge criticised both counsel for failing to put the defence case properly or at all to some of the prosecution witnesses and this was evidence of general incompetence in the manner they conducted the defence.

(b) Mr Valenitabua and Mr Vere who appeared for A1 had a conflict of interest which prevented them conducting the defence effectively.

[115] It is apparent from the transcript that, at various stages of the hearing, complaint was made that the defence had not been properly put. In the summing-up, the judge gave a lengthy direction under the heading "A Rule of Practice" in which he included the following comment:

> I assess there have been a number of breaches of this rule of practice by each of the two defence counsel. One of the remedies, if there has been non-compliance with this rule, is for the trial judge to comment on the topic to the assessors, as I now do, and I point out, as I now do, that the witnesses in respect of whom the breach occurred, were deprived of the opportunity to comment on the topic.
>
> I say that (I see it as my duty to say that) bearing in mind that there was no application to have any of the witnesses in question recalled for further cross examination and so, by that means, overcome the apprehended breach of the rule of practice. I do not suggest that it would be legitimate for you to draw any inference adverse to either accused from his counsel's failure, *if there was one,* to cross-examine on a matter about which his client subsequently testified.
>
> You see, there may be a number of possible explanations for the omission, by counsel, to cross-examine a witness on a topic, which do not reflect on the credibility

of the witness. I refer to inexperience, carelessness, oversight, misunderstanding of instructions, to name but a few. [Emphasis added.]

[116] He then gave examples before concluding:

> I am not saying, Ladies and Gentlemen, that you should ignore any evidence given in breach of the rule. I say no more than I have said on this topic in the last few minutes, because, as it seems to me, prosecution counsel has pointed out to you a number of respects in which particular matters were not put to relevant witnesses, and you may take such breaches of the rule of practice into account as indicating some respects in which you have been deprived of receiving certain evidence.

[117] We consider that final passage was a confusing direction and one which might even be seen as suggesting the assessors might speculate on matters not given in evidence.

[118] The Appellants suggest it shows a failure by their counsel to conduct the defence properly and must have arisen from their incompetence. In support of the latter contention they refer to a passage in which Mr Wolf, who appeared for A2, was dealing with this issue in the absence of the assessors following the direction set out above:

> We go on next to the second level of problems. Your lordship, I would be the first person to admit quite openly and honestly, that I have been in breach of the *Browne v Dunn* rule, and that is my fault, inexperience, incompetence, whatever the cause, that is my fault. There is one — and I certainly would have no problem if your Lordship, quite properly, listed them all for the assessors. I do take some issue, with the greatest respect, of indicating to the assessors that, on the one hand, there is an inconsistency on the face of the record concerning where these documents came from, that might have been an invention of the defendant, and coupling that with the suggestion that I, as counsel, should have put a question to Sergeant Aca White that the documents didn't come from the house, when, in fact, that has never been the theory of the defendant. Never once throughout the transcript, to the best of my recollection, has the defendant ever denied that these documents could have come from his house.

[119] Counsel does not challenge the judge's direction but submits to this court that this shows "a major prejudice to the Appellant due to negligence or, as pointed out by the judge, incompetence or inexperience". He asks the court to take the comment by Mr Wolf as a clear admission of his incompetence which, he suggests, was demonstrated throughout the trial

[120] The most experienced counsel may sometimes fail to put his case to a prosecution witness as the judge pointed out. The judge is entitled to explain the possible significance of that to the assessors. However, where counsel explains to the court that it was his oversight, the judge should ensure that the assessors do not read anything adverse to the defendant into the omission. A learned discourse on the rule of practice in not necessary or desirable. What was required was a direction reminding the assessors that this particular aspect had not been put so the witness had not had an opportunity to comment on it but he should then have advised them in clear terms that counsel had told the court it was his fault and they should not read anything adverse to the defendant into the omission. Following Mr Wolf's objection, the judge did correct his account of Mr Nata's evidence relating to the seizure of the documents by Sgt White but he did not mention counsel's acceptance of blame for the omission.

[121] The manner in which the Court of Appeal in England has approached the matter of the competence of counsel is explained in *R v Ensor* [1989] 1 WLR 497[1989] 2 All ER 586; [1989] 89 Cr App Rep 139 at 144 (*Ensor*) where the court cited with approval the statement of Taylor J in the unreported case of *Gautam*, 4 March 1987, that:

> … it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground for an appeal.

[122] However, in the (also unreported) case of *Swain* a few days later, O'Connor LJ added that, if the matters about which complaint is made leave the court with any lurking doubt that the Appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his advocate, it would quash the conviction. The court in *Ensor* adopted both as a correct statement of the position.

[123] Counsel has suggested that the statement set out above by Mr Wolf is an admission of incompetence. It is nothing of the sort. With the benefit of hindsight, counsel who was not present in the trial, reconsidering the case in the undisturbed atmosphere of his chambers, may well consider an alternative course would have been preferable but many different matters, often impossible to ascertain from the transcript, fell for consideration when deciding the best way they should be approached in the courtroom. Similarly, the instructions he receives from the accused person after the trial may differ in content or in emphasis from those given in the trial to the, then, counsel. A perusal of the transcript suggests that counsel for both Appellants conducted a thorough and proper defence. This court does not know the professional basis for the tactics adopted but there is nothing in the record to suggest that there was incompetence and certainly nothing to suggest flagrant incompetence.

[124] The second issue relates to counsel for A1. On 19 November 2002, shortly before the arraignment, there was a bail application on behalf of A1. It was vigorously opposed by the prosecution and the witness Simione Drole was called to give evidence of a conversation with Mr Silatolu in which he alleged that the latter had tried to persuade him to give false testimony in favour of the Appellant. He was cross-examined by Mr Valenitabua and, eventually, the application was refused.

[125] Subsequently there was an application by the prosecution to call Mr Drole as a witness in the trial. When the judge ruled in favour of calling him, Mr Valenitabua advised the court that he had represented Mr Drole in the past. The judge responded that counsel had cross-examined in the bail application and had suggested no ethical problems then. Counsel explained his position;

> My concern is: Mr Drole was my client in 2000. I know him, as a lawyer, because I have interviewed him intensely. That is my concern. I do not want to raise points here towards him and put my position as a barrister and solicitor of the High Court of Fiji in jeopardy. By that I mean he is not the only person I will be dealing with. Mr Silatolu is not the only client I will be dealing with. People are looking at me. If they know that I have a tendency to cross-examine them again on later days, as I would be doing for Drole, if I cross examine him, then where would that place me as a trusted …

[126] Following discussions with the court and the other counsel, it was suggested that the solution was to instruct another counsel to conduct the cross-examination of that witness. Mr Vere was instructed and did so when the witness was called some days later.

[127] The course taken by Mr Valenitabua was a sensible one in view of the position in which he found himself. We see no reason to criticise him for that.

[128] It now appears that Mr Vere had appeared, on behalf of Mr Chaudhry and others who had been held hostage, at the trial of the co-accused when they were to be sentenced following their pleas of guilty. He was instructed by them as interested parties and unsuccessfully sought leave for them to address the court before sentence was passed. He did not disclose this to the court in the present trial. Counsel for the Appellants now suggest that Mr Vere failed to conduct a proper cross-examination of Drole because of his previous association with those earlier applicants. It is suggested in effect that he held back because of his earlier association with the victims of the coup.

[129] Clearly, the nature of Mr Drole's evidence was such that it needed a careful examination. It is also apparent from the record that at least one important aspect of the defence was not put and the omission was the subject of comment later. At the same time, the risks of pursuing such a course before the assessors, needed to be carefully evaluated and there were good reasons why counsel may have considered it preferable to avoid them. Against that background we see no reason to suggest that Mr Vere's cross-examination was inadequate or incompetent.

[130] The appeals against conviction of both Appellants fail.

Appeal against sentence

[131] As has been stated, the judge sentenced each Appellant to life imprisonment and fixed a term of 9 years for A1 and 7 years for A2.

[132] In passing sentence the judge commented on the crimes they had committed, observing that there was a common intention held by both Appellants to attempt to achieve a coup by the overthrow of the government by force. He considered that each Appellant was heavily involved as a major participant. While he considered Mr Silatolu was a more major participant than Mr Nata, in terms of culpability little separated either of them from George Speight.

[133] He referred to what he regarded as circumstances of aggravation and found no mitigating circumstances. The gravity of the crime eliminated from consideration the fact that both Appellants had been shown to be otherwise of good character.

[134] The judge took into account that each Appellant had been in custody for nearly 3 years — equivalent to a fixed sentence already served of something in excess of four-and-a half years allowing for remission for good behaviour but he considered that there were no grounds for imposing an alternative to life sentence.

[135] The Appellants appeal against their sentence on the grounds that they were harsh and excessive and/or that the learned judge erred in the principle of sentencing. In his submissions counsel for the Appellant submitted that the judge erred:

[a] in the manner in which he took into account the times the appellants had served in custody prior to the sentencing,

[b] in imposing the sentence of life imprisonment,

[c] in ordering fixed rather than recommended minimum periods.

Time in custody

[136] We are advised that it is accepted practice to take into account time already spent in custody when considering the final sentence. In the recent decisions of *Maciu Koroicakau v State* [2001] FJCA 20 and *Jai Ram v State* [2005] FJCA 29, this court held it was not appropriate to backdate the sentence. The proper practice is to adjust the sentence to take into account the pre-sentence time in custody including an allowance for the remission that would be applicable to that time. This does not call for detailed arithmetical calculations. The court should look at the matter broadly to consider what allowance should be made.

[137] In the present case the judge initially expressed the view that the appropriate fixed term for Mr Silatolu was 12 years after allowing for four-and-half years for the time in custody. Allowing for a one-third remission, this accurately reflects the 3 years each Appellant had been held in custody prior to sentence. Adopting the same reasoning, he concluded the appropriate fixed term for Mr Nata was 10 years.

[138] Finally, at the conclusion of his comments, he observed that there was room for some leniency and mercy not only in the Appellants' interests but also in the interests of all the citizens of the Fiji Islands and to take into account reconciliation and restorative justice in fixing the period which must be served. It was for these reasons that he made a further reduction of 3 years in each case to arrive at the fixed terms of 9 and 7 years.

[139] We conclude that the process by which he allowed for the Appellants' time in custody was appropriate.

Life imprisonment

[140] By s 50 of the Penal Code as originally enacted, a person found guilty of treason "shall be sentenced to death" but Act No 5 of 2002 deleted those words and substituted the words "is liable on conviction to imprisonment for life".

[141] Section 28 (2) provides:

> A person liable to imprisonment for life or any other period may be sentenced for any shorter term.

We therefore accept the submission of counsel for the Appellants that the judge had a discretion to impose sentences of less than life imprisonment.

[142] In considering whether sentences of life imprisonment were justified in the present case, we have regard to the following factors:

(i) That treason is a crime of the utmost gravity is not a proposition that requires elaboration. This is confirmed by the death penalty that, until recently, was required to be imposed.

(ii) It is a crime which by definition strikes at the very heart of the nation. In the present case it involved an attempt to overthrow the legitimate government of Fiji by force.

(iii) The judge was satisfied that both Appellants were major participants in that attempt. They were both involved at the planning stage, at the final preparations, at the coordination of the events immediately leading to the coup, in the rebel government that was established and when decisions were made and implemented designed to achieve the objectives of the coup.

(iv) As the judge also observed, there were aggravating factors in the case of Mr Silatolu. He was a member of parliament and a member of the coalition government. He betrayed his prime minister and the government of which he was a member. His participation in the events following the storming of the parliament can only be described as deliberate, ongoing and determined. The judge also referred to the fact the Appellant had sworn, and breached, an oath of allegiance but that is challenged by counsel for Mr Silatolu and we disregard it.

(v) The judge also noted aggravating factors relating to Mr Nata. He was "the Secretary to Cabinet" and the "media man" for the rebel government. He performed an important role behind the scenes both before the storming of the parliament and while the hostages were being detained for nearly 2 months. He was very much a member of the Speight group, The documentary evidence found at his house and the mobile phone evidence established that he was an active participant and a key player.

When these and other factors referred to by the judge are taken into account, we are satisfied that for both Appellants the sentence of life imprisonment was appropriate.

Fixed or recommended terms

[143] Until the passing of a recent amendment, s 33 of the Penal Code provided:

> 33. Whenever a sentence of imprisonment for life is imposed on any convicted person the judge who imposes the sentence may recommend the minimum period which he considers the convicted person should serve.

[144] On 4 June 2003, an act to amend the Penal Code came into force. It repealed s 33 and substituted the following section:

> 33. Where an offence in any written law prescribes a maximum term of imprisonment of ten years or more, including life imprisonment, any Court passing sentence for such offence may fix the minimum period which the Court considers the convicted person must serve.

[145] It will be noted that the significant difference between the two sections is that, under the former, the judge may "recommend" the minimum period whereas, under the latter, the judge may "fix" the period. It is apparent, in fixing minimum periods in relation to the sentences passed on the two Appellants, the judge was acting under the 2003 amendment.

[146] Mr Singh submits that the Appellants could only be sentenced in accordance with the law in force when the offences were committed. As the offending occurred in May to July 2000, the former s 33 was in force. Therefore, he submitted, the judge erred in applying the 2003 amendment and imposing fixed minimum periods.

[147] The general rule concerning the retrospective operation of a statute has been expressed by Wright J in *Re Lord Athlumney* [1898] 2 QB 547 at 551 in a passage that has been frequently adopted:

> No rule of construction is more firmly established that this; that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided

> without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

Observations to a similar effect are made by Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267; [1957] ALR 231 at 232–3.

[148] In three English decisions decided during World War II, *Director of Public Prosecutions v Lamb* [1941] 2 KB 8; [1941] 2 All ER 499 (*Lamb*), *Buckman v Button* [1943] KB 405; [1943] 2 All ER 82 and *R v Oliver* [1944] KB 68; [1943] 2 All ER 800; (1944) 29 Cr App Rep 137, it was decided that the penalty imposed at the date of conviction should be imposed. In each of these cases, the relevant statutory order had been amended by increasing the penalty for a breach of the order and the amendment had come into force after the offences had been committed but before the Appellants had been convicted.

[149] These cases were considered by the Full Court of South Australia in *Samuels v Songaila* (1977) 16 SASR 397 (*Samuels*) where the penalty provisions for the offences charged had been amended between the dates of offence and sentence. The court held that the amendments applied only to offences committed on or after the date on which they came into operation. The old penalties were preserved for offences committed prior to the amendment coming into operation.

[150] At SASR 400, Bray CJ said that there was nothing in the language of the amendment to indicate any intention that it should have retrospective effect. It would be enough in his view simply to state and apply the common law principle, if it were not for the three English decisions to which we have referred above. However, he distinguished these decisions on what he referred to as technical grounds, namely that the language used in the English order could indicate an intention that the penalty in force on the day of conviction should apply, irrespective of the penalties in force on the day of the offence.

[151] He referred to *Lamb* case where Tucker J said:

> If we suppose that next week the regulation with regard to looting was to be amended by a provision which said: "any person convicted of looting shall suffer the penalty of death and regulations so and so shall be amended accordingly", I think that it would be difficult for anybody who was next week convicted of the offence of having looted six months ago to persuade the Court that that regulation had not a retrospective effect. In my view, it clearly would have a retrospective effect qua punishment.

[152] Bray CJ observed:

> I can only say with respect that there would be no difficulty at all in so convincing me. On the contrary, there would be insuperable difficulty in convincing me that they did have retrospective effect in the absence of language of the clearest and most unambiguous specificity.

We agree with that observation.

[153] Later, at SASR 404, he referred to a passage in the judgment of Cave in *Re Raison; Ex parte Raison* (1891) 63 LT 709 at 710:

> There is an old and well-known saying with regard to new laws, that you are not by a new law to affect for the worse the position in which the man already finds himself at the time when the law is actually passed.

[154] King J, in *Samuels* case at SASR 420, referred, obiter, to the position where the new law effected a reduction in penalty:

> Although the question does not arise in this case, I should perhaps indicate my view that the result would not necessarily be the same if the new penalty provisions operated

> by way of reduction of penalty. I have indicated my view above that the presumption against retrospectivity is stronger where the provisions impose some additional burden, obligation or penalty. … where Parliament abolishes a particular type of punishment, such as capital or corporal punishment, it might be easy to find a legislative intention that the type of punishment which has been abolished should not be imposed in future, even in relation to offences committed before its abolition.

[155] We agree with the approach adopted in *Samuels* case. To apply it in the present case, the section prior to the 2003 amendment was more favourable to the Appellants than the section in the amendment. If a minimum period be recommended, it is, obviously, only a recommendation which the authorities may adopt or may not adopt so the Commission on the Prerogative of Mercy has the jurisdiction to advise, if the legal requirements and circumstances otherwise justify, that a prisoner be released before the recommended minimum period has elapsed. No such discretion can exist under the 2003 amendment. Once a minimum period has been fixed, the commission has no jurisdiction to recommend the release of an Appellant before the fixed minimum period has elapsed.

[156] To that extent, therefore, the right of the Appellants to have a minimum period recommended has been impaired by the 2003 amendment. That amendment should not be given retrospective effect, with the consequence that the judge erred in applying that amendment by fixing a minimum period.

[157] The appeal against sentence is allowed to the extent that the sentences are varied by quashing the fixed minimum periods of 9 and 7 years and substituting recommended minimum periods of 9 and 7 years. All other grounds of appeal against the sentences are dismissed. The sentences are otherwise affirmed.

Orders

(1) Appeals against conviction dismissed.

(2) Appeals against sentence are allowed and the fixed minimum periods of 9 and 7 years are quashed and recommended minimum periods of 9 and 7 years substituted. The sentences are otherwise affirmed.

Appeal against sentence allowed. Appeal against conviction dismissed.