IN THE SUPREME COURT OF FIJI AT SUVA
ON APPEAL FROM THE FIJI COURT OF APPEAL

CRIMINAL APPEAL NO. CAV 0001/90
(Fiji Court of Appeal Criminal No. 9/88)

BETWEEN : AMZAD ALI

Appellant

AND : STATE

Respondent

Coram: The Rt. Hon. Sir Robin Cooke, (presiding)
The Hon. Sir Anthony Mason
The Rt. Hon. Sir Maurice Casey

Hearing: 23 November 1995

Counsel: A. Gates for Appellant
J. Naigulevu for Respondent

Judgment: 24 November 1995

JUDGMENT OF THE COURT

On 31 October 1988 the appellant was found guilty in the Lautoka High Court of the offence of aircraft sabotage under s.76(1)(b) of the Penal Code (Cap. 17) and sentenced to two years imprisonment suspended for three years. His appeal to the Court of Appeal was dismissed and he now seeks special leave to appeal against his conviction.

Section 76(1)(b) reads:

Aircraft Sabotage
76. (1) Any person who -

...

(b) places or causes to be placed on an aircraft in service by any means whatsoever, a device or substance which is likely to destroy that aircraft or to cause damage to it which renders it incapable of flight

commits the offence of aircraft sabotage ...

The appellant said at his trial that he intended to hi-jack an Air New Zealand plane as a protest against the coup of 14 May 1987. After obtaining four sticks of dynamite with fuses ready to ignite, he entered the plane on 19 May as it was being prepared for take-off at Nadi Airport. He threatened the pilot and crew that he would blow it up unless his demands were met and there was a frightening confrontation lasting about four hours, during which he several times held a burning cigarette within a few millimetres of the fuse. He told the Court he had no intention of carrying out his threats, his purpose being only to induce compliance with his demands for restoration of the former constitutional position.

The focus in the Court of Appeal was on the meaning of the word "likely" in the expression "likely to destroy that aircraft or to cause damage to it" in s.76(1)(b). In directing the assessors on this point the trial judge told them it was sufficient if a lighted cigarette was held so close to the fuse in such circumstances as to be likely to cause explosion (damage) without the explosion actually occurring. On appeal this direction was criticised by appellant's then counsel, who submitted that the term "likely to destroy ... or damage" the aircraft described the device or substance itself, and not the circumstances in which it might be used or handled. The evidence established that without the human intervention of lighting the fuse, the dynamite could not affect the plane. To meet this objection the Court of Appeal adopted a purposive approach to

the meaning to be given to the word "likely", and concluded that it should be construed as meaning "capable of". Notwithstanding the perceived misdirection on this point by the trial judge, the Court considered there was no miscarriage of justice and upheld the conviction.

With respect we cannot agree that "likely" is sufficiently ambiguous to warrant the search undertaken by the Court of Appeal for an extended meaning, or with its conclusion that it should be construed as "capable of". In common usage it can indicate a range of expectation that an event will occur, but as with the use of the word "probable" in determining responsibility for the foreseeable consequences of criminal conduct, "likely" has been held to denote an event which could well happen, rather than one which is more probable than not, as contended for by the appellant's counsel. We refer to the judgment of the Privy Council in *Chan Wing-siu* v. *R.* [1984] 3 All E.R. 877, 881; and to that of the majority of the High Court of Australia in *Boughey* v. *The Queen* (1986) 161 C.L.R. 10, 21 (in which the ordinary meaning conveyed by "likely" was held to be the notion of a substantial - a "real and not remote" - chance regardless of whether it was less or more than 50 per cent); and to *R.* v. *Piri* [1987] 1 N.Z.L.R. 66, 79 where the meaning of "likely" and "probable" was discussed by the Court of Appeal in the context of the New Zealand Crimes Act, and held to indicate "a real risk, a substantial risk, something that might well happen".

We are satisfied that these authorities indicate the appropriate meaning to be given to "likely" in s.76(1)(b). Having regard to the accused's admittedly dangerous conduct with the dynamite on board the plane, that substance - harmless by itself - became one likely to damage or destroy the aircraft during his confrontation with the crew. In the strain he must have been under, there was a real risk of accidental contact between his cigarette and the fuse, notwithstanding his disclaimer of any intention to damage the aircraft.

We are satisfied that the trial judge's direction was adequate and captured the essential features of s.76(1)(b), and that the appellant was rightly convicted. The application for special leave to appeal is therefore refused.

Sir Robin Cooke

Sir Anthony Mason

Sir Maurice Casey

Solicitors:
Koya and Co., Suva, for Appellant
Office of the Director of Public Prosecutions, Suva, for Respondent