IN THE FIJI COURT OF APPEAL

(Criminal Case No. 2 of 1987)

Criminal Appeal No. 1 of 1988

Between:

AMJAD ALI s/o Subhan Ali — Appellant

- and

THE STATE — Respondent

Mr. S.M. Koya for the Appellant

Mr. I. Mataitoga, Director of Public Prosecutions for the Respondent

Date of Hearing: 16th May, 1990

Delivery of Judgment: 6th June, 1990

JUDGMENT

On 31 October, 1988 appellant was convicted after trial in the Lautoka High Court on a charge of aircraft sabotage contrary to Section 76(1)(b) of the Penal Code (Cap.17) and was sentenced to 2 years' imprisonment which was suspended for 3 years.

The particulars of the offence against the appellant were as follows:

> *"AMJAD ALI s/o SUBHAN ALI, on the 19th day of May, 1987 at Nadi International Airport in the Western Division, placed on an aircraft in service, namely Air New Zealand Boeing 747 Flight No. 24 explosive substances which were likely to destroy the said aircraft or cause damage to it which would have rendered it incapable of flight."*

The material part of Section 76(1)(b) of the Penal Code upon which the formulation of the above particulars was based provides as follows:

> *"Aircraft Sabotage*
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> *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....."*

Appellant is appealing against conviction only.

The notice of appeal was filed on 30 November, 1988 with many assorted grounds of appeal.

However since then it has transpired and is now conceded on all sides that this appeal turns essentially on one of two questions, namely

(1) Did the prosecution establish at the trial that the substances placed by the appellant on Air New Zealand Boeing 747 Flight No. 24 were explosive substances likely to cause damage to the aircraft which would have rendered it incapable of flight within the meaning of sub-section (1)(b) of Section 76 of the Penal Code?

(2) If the answer to the first question is in the negative, is the Fiji Court of Appeal legally empowered on the evidence before the High Court to find the appellant guilty of any other offence.

The answer to question (1) above depends on the true meaning or interpretation of the words "a device or substance which is likely to destroy that aircraft or to cause damage to it" in the provision of Section 76(1)(b) of the Penal Code.

The issue in this appeal therefore so far as question (1) is concerned is one of statutory interpretation having regard to the facts of the case.

At the material time and since 1980 appellant was an employee of Air Terminal Services based at Nadi International Airport. He started his life in the airline business in 1971 when he was a traffic officer for Qantas Airline.

At the time of the alleged offence appellant was a Customer Services Supervisor, a senior post at Nadi Airport. His duties were to supervise ground personnel regarding loading and unloading of aircraft, embarkation and disembarkation of passengers. He had to liaise with other airline people. He worked on a shift basis.

On his own admission appellant was greatly disturbed and affected by the military coup d'etat of 14 May, 1987. He was most upset by the overthrow of the democratically elected government and concerned about the lives of government parliamentarians who had been seized by the coup makers.

He decided to do something to save them and return the country to parliamentary democracy.

His first task was to get some dynamite. How he did this is best told in his own words:

> *"On 16/5/87 I met a friend in Nadi - Shakukat Ali. I enquired if I could get some dynamite. I went with him to Rarawai in Ba to Mr. Taiyab's house. The purpose was to get dynamite. I met Mr. Taiyab. Shaukat Ali talked to Taiyab. I was there. Shaukat Ali asked for dynamite. Taiyab went away and came back after one hour. We were waiting at this house. When Taiyab came he had a box - carton with lid. We were sitting about 10 meters away and he made the dynamite. He told me that he had modified the dynamite for electric ignition. He said he had inserted fuse into the dynamite. He described it. he said he wet it with water - the fuse, so it will not ignite easily. The fuse was put in water. He said nothing will happen unless lit with cigarette or match for 20 seconds or so. He gave me four packages in a paper bag. I took the paper bag containing the four packages and put in the balcony upstairs - in my house. The time was about 10.30 p.m."*

In the early morning of 19th May, 1987 while lying in bed he made up his mind that he should hijack one of the aircraft and chose as his target the Air New Zealand Flight No. 24 which was due at Nadi International Airport at 6.24 a.m.

As to how appellant smuggled the dynamite into the aircraft and to what use he put them is also best told in his own words:

> *"I carried the parcel in my hands - both hands. I went through aerobridge, went inside, went upstairs to the captain. This was cockpit area. Capt. Gleeson was there. I threw one parcel at him and told him that these wee fully charged dynamite. I said for safety of passengers and crew do exactly as told. Or I will blow you up. I only threatened the captain but within my heart I never wanted to blow the aeroplane. The captain looked at the parcel for about 1 minute and*

then put it on his left side which is called cup holder. I took one parcel inside my shirt one in my pocket. I had one in my hand. I lighted the cigarette. I told captain to close the door 2L. This was aerobridge door. Almost all passengers had boarded. The captain lifted his phone and said to close the door. I wanted all doors to be closed so that I could fly out with passengers. Then I looked back. I saw two officers in crew rest area. I told them to get out and close cockpit door. They responded and closed cockpit door. I stayed in the cockpit. Capt. Gleeson, Walsh and Mcleay were there. There were four of us in the cockpit area. I looked down and saw passengers leaving the aircraft. I told captain to get the passengers back. I wanted to fly out with passengers. I realized the captain could not do much to get the passengers back. Cockpit door was closed. I had one package in my hand, one inside the shirt, one in the pocket and other captain had in his cup holder. Then I saw door lights which show if all doors are closed. I was looking through spy hole of cockpit door. Then I told captain that I wanted 80000 kg of fuel and wanted to fly to Libya. I showed my front shirt pocket an told him I had necessary charts to go to Libya. I had no charts or maps.

The fuel started to come very very slow. I was very angry. I still had one package in hand near lighted cigarette. I had one inside shirt and one in trousers pocket. The fourth one was with captain. Once fuel started to flow in the crew started to move. I was watching them. I went to food galley section about 9 am while captain picked the explosive that he had and showed to McLeay. McLeay had a look. I put the package near food galley so crew could see and get frightened. There was oven there. That parcel may have been about 30 cm away from oven. The time would have been at 8.30 am. The other three were with me - one inside the shirt, one in pocket and one in hand. I took one out and put on crew rest seat in the cockpit. This is when the crew were scared.

I had later put one package near crew rest seat. I had two packages with me all the time. I had cigarette lit on one hand and substance in other hand. At times they were close and at times far apart. I brought lighted cigarette close to the fuse. This exercise went on for about four hours. This was done to induce fear and make crew to meet the demands. I never had the intention to light the fuse. I only wanted to scare the crew. I must have used 20 cigarettes definitely in this process."

In his sumnming up to the assessors the learned trial Judge directed them on the main legal problem as he saw it in these terms:-

> *"Lady and gentlemen assessors the meaning of the words (i.e. likely to cause damage) is plain and plain meaning rule applies. It has been submitted that the explosive substances taken by the accused in the cockpit of the aircraft that morning would not have caused damage by itself -in other words it was unlikely to explode by itself. Both Neville Ernest Ebsworth (P.W.8) and Ian James McRae (P.W.9) said the devices by itself would not have exploded. They had to be ignited for explosion.*
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> *The evidence has been that the accused was holding the fuse only about 2mm away from the lighted cigarette as said by David Walsh (P.W.10). Captain Gleeson (P.W.1) demonstrated with his hands how close the accused was holding the fuse to the lighted cigarette. Both these witnesses were extremely frightened with the actions of the accused. The accused himself on oath said and demonstrated in the witness box how close he was holding the lighted cigarette from the fuse. They were almost touching. The accused was very angry, very nervous and agitated. Emphasis is to be placed on the words "likely --- to cause damage". It is sufficient if lit cigarette is held so close to the fuse in such circumstances as to be likely to cause explosion (damage) without the explosion actually occurring. It is a matter for you to decide.*
>
> *Alright, well now what about the answer that is made to all this? Well lady and gentlemen assessors, the accused says and he has sworn to it, he went in the witness box and he swore to it that he had no intention to cause any damage to the aircraft and to anybody. He repeated, as Mr. Koya said, the evidence given by Captain Gleeson and David Walsh. The accused said he got very upset and went mad when he heard of the military coup on 14th May 1987. Lot of things went through his mind. He said he was a great believer in democracy and parliamentary system of government. He thought of detained parliamentarians and feared they may be assassinated as it happened in other parts of the world when coup took place. The accused decided to hijack an aircraft and he decided to get dynamite. On 16th May he met one Shaukat Ali who took him to one Taiyab in Varavu Ba. Taiyab gave him the four devices. Each devide had a fuse and detonators and explosive. There is no doubt accused knew they were dangerous and*

were explosive substances. He got the four devices home. On 19th May 1987 he went to work very early in the morning and decided to hijack the Air New Zealand Boeing 747 Flight TE24. About 7.15 a.m. he entered the cockpit area of the aircraft with the four explosives and locked the cockpit door. There were three others in the cockpit apart from the accused - Captain Gleeson (P.W.1), David Walsh (P.W.10) and Mcleay. Accused threatened them to blow the plane with explosives if his demands were not met. He admits holding the fuse very close to the lighted cigarette for a very long time. The action was very dangerous. He knew they were dynamites and would take 20 seconds to ignite as told by Taiyab. There was no mistake. His demands were - wanted democracy, the Queen to be the head of the State, military to be withdrawn and all detained parliamentarians to be released and brought to the aircraft. The accused said it was never his intention to damage the aircraft. Lady and gentlemen assessors it is not possible to see into a man's mind to determine what his intentions are, but one can draw inferences or conclusions from what he does. A person's intentions are in his mind. We are not mind readers. The onus is on the prosecution to prove that intention and it is never upon the accused to negative it. The accused threatened on numerous occasions to blow the aircraft. The lighted cigarette was almost touching the fuse attached to the detonator and the explosives. Wasn't this a dangerous act. Is it not a proper conclusion that he intended to blow up the aircraft. It is for you to decide."

Mr. Koya submitted on behalf of appellant that as the words of Section 76(1)(b) of the Penal Code are clear and unambiguous the Court cannot resort to extrinsic aid in statutory interpretation. In particular he made the point that the Court was precluded from referring to international conventions or relying on so-called expert opinions on the interpretation of such conventions as respondent had sought to do.

Mr. Koya argued that a pre-condition to looking at any material outside the Act was that there must be ambiguity in the Act itself. He contended that there was no ambiguity in the

meaning of Section 76(1)(b) of the Penal Code. For Mr. Koya the words "a device or substance" which is "likely" to cause damage pose no ambiguity in meaning and as such the words must be interpreted in their ordinary and natural sense. Thus the device or substance alleged in this case, namely the dynamite on board the aircraft was not likely by itself to cause damage to the aircraft. They would require to be ignited to cause damage. He said the word "likely" has the same meaning as "probable" and the probability was that on the facts the dynamite could not explode by itself i.e. without human or external, mechanical or electrical intervention.

Mr. Koya contended that the offence could only be committed if the dynamite had a time device attached so as to explode at a pre-determined time. It is his submission that the real mischief for which parliament enacted this provision under the section is to prevent and discourage people from placing on aircraft explosive substances that were inherently dangerous as to be likely on their own to cause damage to the aircraft such as time bombs. This he contended would be the result if the language of the provision is given its plain i.e. ordinary and natural meaning.

Mr. Koya argued that the learned trial Judge misdirected the assessors when he left for their decision the question whether:

> *"It is sufficient if lit cigarette is held so close to the fuse in such circumstances as to be likely to cause explosion (damage) without the explosion actually occurring."*

Mr. Koya said that the learned Judge's error in this connection was twofold, viz:-

(i) that the words "which is likely to cause damage" were not referrable or relevant to the word "places"

in the provision of the section nor referrable to the appellant's actions after he had placed the objects on the aircraft; and

(ii) that the words in the provision of the section were only referrable to "a device or substance" or as used in the Information "explosive substances" which were likely by themselves to cause damage and had nothing to do with appellant's action of holding lit cigarette close to the fuse.

On the general question of burden of proof which reposed on the prosecution at the trial Mr. Koya made the following points:-

(a) the record shows that there was ample evidence adduced by the prosecution and defence to establish that the appellant's intention in this case was to hijack the aircraft and not to damage or destroy it;

(b) the whole conduct of the appellant on the day in question was open to one inescapable inference that he wanted to hijack the aircraft and fly to New Zealand or Libya; and

(c) if appellant's conduct or circumstantial evidence was open to more than one inference it would follow that the prosecution had not established the question raised in this appeal i.e. whether the explosive substances in this case were by themselves likely to cause damage to the aircraft without the fuse being ignited.

Mr. Koya submitted that in these circumstances the charge was not proved in law so that appellant was entitled as of right to be acquitted.

Mr. Mataitoga, the Director of Public Prosecutions appearing as respondent in this appeal submitted that the provision of Section 76(1)(b) of the Penal Code is in fact an identical re-enactment of the relevant provisions of Article 1(c) of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation which was signed at Montreal, Canada on 23 September, 1971 and which Fiji signed on 21 August, 1972.

Mr. Mataitoga stated that he had sought and received overseas legal opinion on the interpretation of the words in the provision of the section and would adopt as part of his argument in this Court that opinion. For our part we see nothing wrong in this and indeed consider it perfectly legitimate. As a matter of advocacy practice counsel is quite entitled to adopt as his own other legal opinions wherever these may emanate from and put them forward for consideration by the Court.

On such a basis Mr. Mataitoga would argue that given the legislative background to the enactment of Section 76(1)(b) of the Penal Code it is clear that the very act of "placing" or "causing to be placed" on board an aircraft a dangerous device or substance is an offence. It is immaterial whether the device is self-explosive or not. No actual damage has to occur for the offence to be completed. He was of the view that the device or substance must in fact be dangerous or of such a character so as to be "likely" to destroy the aircraft or cause damage to it rendering it incapable of flight.

The drafting purpose behind the provision of Section 76(1)(b) of the Penal Code was to assure that the offence would be committed only if a genuinely dangerous substance or device is introduced on board the aircraft of a nature likely to cause damage to it. Dynamite with an attached fuse is clearly such a device.

Mr. Mataitoga would submit that on a superficial level the provision is not without ambiguity but when one looks at the legislative background of the provision it is clear that it was intended to deal with the mischief affecting safety in civil aviation. He contended that the mischief rule of statutory interpretation should be applied in order to achieve the purpose for which Section 76(1)(b) of the Penal Code was enacted.

From the submissions made by both Mr. Koya and Mr. Mataitoga it is clear that we have here a possible conflict in choice between the literal rule of statutory interpretation on the one hand and the mischief rule on the other.

For a succinct and clear statement of the two leading rules of interpreting statutes, we turn to D.C. Pearce's "Statutory Interpretation in Australia" (Second Edition) and first on the literal rule to page 15 where he stated:

> *"One of the clearest statements of the literal rule is that provided by Higgins J in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (1920) 28 CLR 129 at 161:*
>
> > *The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient, impolitic or improbable.*

.....The essential elements of the literal approach (or the "plain meaning" approach as it is often called), are:

(1) that it is the intention of the legislature that is being sought, i.e. the intention of the "writer" of the document

(2) that that intention is to be derived from the words of the Act alone and not from other sources

(3) that the words used are to be given their "ordinary and natural sense" i.e. the legislature is to be assumed not to have put a special meaning on the words

(4) that the court is not concerned with the result of its interpretation: it is not the court's province to pronounce on the wisdom or otherwise of the Act but only to determine its meaning."

As for the mischief rule we turn to page 21 for the following statements:-

"The locus classicus of the right to look to the "mischief" that an Act was intended to remedy is the statement set out in Heydon's case (1584) 3 Co Rep 7a at 7b:

That for the sure and true interpretation of all Statutes in general .... four things are to be discerned and considered - (1st) What was the common law before the making of the Act? (2nd) What was the mischief and defect for which the common law did not provide? (3rd) What remedy the Parliament had resolved and appointed to cure the disease of the Commonwealth. And, (4th) The true reason for the remedy; and then the office of all the Judges is always to make such construction as shall supress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

".....The court will consider the legal and factual situation that existed when a law was passed paying particular heed to the reasons why it was considered necessary to make a change in that law. The "purpose" of the law is sought, a fact which has in recent times led to the "mischief" approach being sometimes termed the "purposive" approach."

And at page 22:-

> *"..... Indeed, one would expect that if an Act were quite clear, it would not be necessary to ask a court to lay down its meaning. So it is in fact open to a judge, in any case where he so desires, to look to the reasons underlying the enactment of particular legislation."*

In several cases in the House of Lords, Lord Reid espoused the mischief rule approach to statutory interpretation.

In Luke v. I.R. Commrs [1963] A.C.557 at page 557 Lord Reid said:-

> *"To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words. This is not a new problem, though our standard of drafting is such that it rarely emerges. The general principle is well settled. It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail."*

Lord Reid expressed a similar view in Cramas Properties Ltd. v. Connaught Fur Trimmings Ltd. [1965] 1 WLR 892 where at page 898 Lord Reid said:-

> *"But I think that that is much too narrow an approach. This presumption is only a presumption and one must always remember that the object in construing any statutory provision is to discover the intention of Parliament and that there is an even stronger presumption that Parliament does not intend an unreasonable or irrational result."*

To the same effect is Gartside v. IRC [1968] AC553 where at page 612 Lord Reid stated:-

> *"It is always proper to construe an ambiguous word or phrase in the light of the mischief which the provision is obviously designed to prevent and in the light of the reasonableness of the consequences which follow from giving it a particular construction. If the language he said elsewhere, is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result and adopt the interpretation which leads to a reasonable practical result."*

It is a matter of legislative record that the law prohibiting aircraft sabotage (Section 76 of the Penal Code) was only introduced and enacted in Fiji as recently as 1972. The reason for the legislation is the great concern over international terrorism which featured as a continuing threat to safety in civil aviation. In other words, the legislation was designed to suppress unlawful acts which endanger aircraft safety. In our view, the purpose behind the legislation is readily deducible from the nature of the enactment itself. In these circumstances the Court has no need to look outside or beyond the legislation itself to find the purpose for the enactment of Section 76(1)(b) of the Penal Code. We are satisfied that under the section parliament intended the act of placing a substance or device on board any aircraft in Fiji which is likely to cause damage to the aircraft to be an offence. This is made clear by the exemptions in the provisions of Section 76(2)(a) of the Penal Code which are in these terms.

> *"(2) The provisions of subsection (1) shall not apply if -*
>
> *(a) the aircraft is used in military, customs or police service; "*

In Nokes v. Doncaster Amalgamated Collieries, ltd. [1980] A.C. 1014 Viscount Simon L.C. said at page 1022:

> *"If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we would avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that parliament would legislate only for the purpose of bringing about an effective result."*

In Shannon Realities Ltd. v. Ville de St. Michael [1924] A.C.185 Lord Shaw said at page 192 and 193:

> *"Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and the alternative is to be rejected which will introduce uncertainty, friction or confusion with the working of the system".*

We think that the literal approach if applied as mooted by Mr. Koya would negate and render ineffectual the intention of parliament which is to prohibit the placing of any device or substance of a dangerously explosive nature on board any aircraft in service in Fiji.

In all the circumstances of this case, it is clear to this Court that it should choose the mischief rule approach by which the words "device or substance" mean any device or substance which is of a character which is sufficiently dangerous as to be capable of destroying an aircraft or causing damage to it. On this interpretation the offence in the charge was committed when the appellant placed the explosive substances or devices on board the aircraft.

Doubt as to the proper interpretation of the section was first created by the nature of the defence conducted by Mr. Koya in the Court below. He concentrated on three aspects of the case. First and foremost the appellant was not charged with hijacking. Secondly there was no intention by the appellant

to blow up or damage the aircraft and lastly the fused dynamite could not in any event have caused damage to the aircraft unless the fuse was first lit.

The appellant freely and in great detail admitted facts which established that he had intended to hijack the aircraft. He was not charged with the offence of hijacking or as an alternative charge with that or any other offence. Had he been so charged he would not in our opinion have been so eager to make the detailed admissions he did make.

The second and third aspects of the defence appear to have diverted the attention of the Court away from consideration of the proper meaning to be given to the words "likely to destroy that aircraft or to cause damage to it which renders it incapable of flight."

The evidence did support Mr. Koya's attempt to establish what he contended was the literal meaning of the words of the section. There was doubt established whether the appellant intended only to hijack the aircraft and not to damage it and there was evidence by expert prosecution witnesses that the dynamite would not explode unless the fuse was first lit.

The Captain in the aircraft could not have been certain that the appellant in his manic state would not have carried out his threat to blow up the aircraft if his plans were frustrated when he repeatedly lit matches and placed them or a lighted cigarette as close as 2 mms away from the fuse to induce fear or terror in the crew.

While Mr. Koya attempted to establish what he considered to be the clear literal meaning of the words in question, he was forced to add words to support the meaning he advanced.

He repeatedly used such words as "by themselves" attached to the word "likely" to support his argument that the dynamite packages could not explode "by themselves".

This to us indicates that even Mr. Koya recognised the words "device or substance which is likely to cause damage" were ambiguous.

While we have in this judgment considered the literal and mischief rules of interpretation of the Section the same result could be achieved by recognising that there is in fact an ambiguity in the Section which is exemplified by posing the following question:-

> *"Do the words in question describe or limit the character or nature of the substance or device placed on an aircraft or do they describe the possible consequences of placing the substance or device on the aircraft?"*

Mr. Koya would have us accept the second part of that question.

Mr. Mataitoga argues the first part is the correct interpretation.

In our view in its context the words in question are descriptive of the nature of the substance or device and limit the nature of the substance or device to those likely to cause serious damage to the aircraft.

The word "likely" if construed as meaning "capable of" resolves any ambiguity and gives full effect to the intention of the legislature.

In that context if a child brings on board a small Chinese fire cracker, an obvious explosive object, no offence of sabotage would be committed because it was not of a nature or strength which was likely to destroy the aircraft or seriously damage it.

If we take the example a stage further - if the appellant had brought on board a parcel which he falsely stated contained powerful explosives such as dynamite when in fact it contained a harmless substance he could not be charged for sabotage since the parcel did not in fact contain a substance of a nature "likely to" or "capable of" destroying or seriously damaging the aircraft. He could however have been accused of committing one or more offences dependent upon his conduct when on board the aircraft.

Mr. Koya's defence did lead the learned trial Judge in his summing up to concentrate more on the intentions and actions of the appellant after he came on board the aircraft with the dynamite than on the meaning to be given to the words of the section. This left the learned trial Judge open to the contention made by Mr. Koya that he had misdirected the assessors.

In directing the assessors on the words "device or substance which is likely to cause damage" the learned trial Judge assumed that their meaning was plain enough to everyone so as to require no further explanation. He then left to the assessors to decide whether it was sufficient to prove the case if lit cigarette was held so close to the fuse of the dynamite in such circumstances as to be likely to cause explosion (damage) without the explosion actually occurring. It was to that end that the learned trial Judge discussed and reviewed the evidence in relation to the actions of the appellant throughout the

several hours he held the people in the aircraft hostage. In the end the assessors had no doubt that what appellant did with the dynamite was likely to cause damage to the aircraft.

In his written submissions Mr. Koya contended not without justification that the learned trial Judge had misdirected himself in construing the words "device or substance which is likely to cause damage" in Section 76(1)(b) of the Penal Code by reference to appellant's actions rather than to the nature of the substance or device.

We would agree that as the appellant was charged under Section 76(1)(b) of the Penal Code, the learned trial Judge had first to decide objectively and as a matter of law the true meaning of the words "device or substance" which is "likely to cause damage". Because he failed to do so it could not be said that the assessors were properly directed on the proper interpretation of the Section upon which the charge was based.

We have already indicated our view as to the construction that should be given to the wording of the charge based on Section 76(1)(b) of the Penal Code.

The uncontradicted account which the appellant gave regarding his antics on 19 May, 1987 on board the Air New Zealand aircraft, much of which is set out in this judgment, is on any view most incredible in its daring. On the day in question appellant had carried with him all the explosives needed to blow up the aircraft and its passengers. Appellant had confessed that his intention was to hijack the aircraft and had taken the dynamite on board to threaten the pilot and his officers. It was undoubtedly the greatest of good fortune that in the end the aircraft was not blown up and all lives on board the aircraft were saved and a possible terrible disaster avoided.

The question now is whether a substantial miscarriage of justice has occurred in this case. We think not. The nature of this case leaves us in no doubt that if the learned trial Judge had properly directed himself and the assessors on the proper interpretation of the relevant words in the Section upon which the charge was based, the outcome of this case would have been the same having regard to the overwhelming evidence adduced at the trial.

In our opinion the evidence conclusively proved (a) that the appellant deliberately placed the dynamite on board the aircraft in service, (b) that he had no lawful authority or right to do so, and (c) that he had full knowledge of its dangerous nature and potential as envisaged by the Section. Upon proof of these matters the offence was complete.

In these circumstances we would apply the proviso to Section 23 of the Court of Appeal Act.

Our conclusion in this appeal makes it unnecessary to deal with question (2) which was posed at the beginning of this Judgment.

The appeal is dismissed.

T.G. Tuivaga

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(Sir Timoci Tuivaga)
President, Fiji Court of Appeal

R. Kermode

.....

(Sir Ronald Kermode)
Justice of Appeal

Moti Tikaram

.....

(Sir Moti Tikaram)
Justice of Appeal