IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0065 OF 2004

BETWEEN:	**RATU INOKE TAKIVEIKATA**	*Appellant*
A N D :	**THE STATE**	*Respondent*

Coram: **Ellis, JA**
Penlington, JA
McPherson, JA

Hearing: **14th June 2007**

Counsel: **P Maiden SC)**
J Watts) for the appellant
Ms S Tamanikaiwaimaro)

D Frearson) for the respondent
Ms A Prasad)

C B Young for the Attorney General

Date of Judgment: **Monday 25th June 2007**

JUDGMENT OF THE COURT

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[1] This is an appeal against conviction and sentence. The appellant faced the following 5 charges:

FIRST COUNT

Statement of Offence

INCITE TO MUTINY: Contrary to section 55(b) of the Penal Code, Cap.

Particulars of Offence

RATU INOKE TAKIVEIKATA on or about the 06th day of August 2000 at Deuba in the Central Division, advisedly attempted to incite a person serving in the Military Forces of Fiji, namely Corporal Peni Naduaniwai, to commit a mutinous act, namely to join in combination with other persons subject to service law in executing a takeover of Queen Elizabeth Barracks in Suva.

SECOND COUNT

Statement of Offence

INCITE TO MUTINY: Contrary to section 55(b) of the Penal Code, Cap. 17.

Particulars of Offence

RATU INOKE TAKIVEIKATA, on or about the 17th day of August 2000 at Suva in the Central Division, advisedly attempted to incite persons serving in the Military Forces of Fiji, namely Captain Shane Stevens, Sergeant Manoa Bonofasio and Corporal Alekisio Alva, to commit a mutinous act, namely to join in combination with other persons subject to service law in executing a takeover of the Queen Elizabeth Barracks in Suva.

THIRD COUNT

Statement of Offence

INCITE TO MUTINY: Contrary to section 55(b) of the Penal Code, Cap. 17.

Particulars of Offence

RATU INTOKE TAKIVEIKATA, on or about the 27th day of August 2000 at Nausori in the Central Division, advisedly attempted to incite persons serving in the Military Forces of Fiji, namely Captain Shane Stevens and Sergeant Manoa Bonofasio, to commit a mutinous act, namely to join in combination with other persons subject to service law in executing a takeover of the Queen Elizabeth Barracks in Suva.

FOURTH COUNT

Statement of offence

AIDING SOLDIERS IN AN ACT OF MUTINY: Contrary to Section 56(a) of the Penal Code, Cap. 17.

RATU INOKE TAKIVEIKATA, between the 26th day of August 2000 and 25th day of September 2000 at Suva in the Central Division aided a non-commissioned officer of the Fiji Military Forces namely Sergeant Manoa Bonofasio, in an act of mutiny, namely his attempt on the 02nd day of November 2000 in combination with other persons subject to service law to takeover the Queen Elizabeth barracks in Suva, by providing him with mobile phone equipment for coordination of the said attempted takeover.

FIFTH COUNT

Statement of Offence

INCITE TO MUTINY: Contrary to section 55(b) of the Penal Code, Cap. 17.

RATU INOKE TAKIVEIKATA, on or about the 17th day of September 2000 or the 24th day of September 2000 at Suva in the Central Division, advisedly attempted to incite persons serving in the Military Forces of Fiji, namely Captain Shane Stevens and Sergeant Manoa Bonofasio, to commit a mutinous act, namely to join in combination with other persons subject to service law in executing a takeover of the Queen Elizabeth Barracks in Suva."

[2] The trial was before Gates J and 5 assessors. Trial commenced on 1 November 2004 and concluded on 24 November 2004. the assessors returned the following decisions following the Judge's summing up and a relatively brief retirement.

Count 1	-	4 to 1 in favour of acquittal
Count II	-	3 to 2 in favour of acquittal
Count III	-	3 to 2 in favour of conviction
Count IV	-	5 to 0 in favour of acquittal
Count V	-	5 to 0 in favour of acquittal

The next day the Judge gave his decision convicting the appellant on Counts 1 to 4 and acquitting him on Count 5.

[3] The appellant submits that the Judge was biased against him and that on that ground alone that should be a retrial on the first 4 counts. The appellant goes further and submits that this Court should review the evidence and conclude that the appellant should be acquitted on all counts.

Bias

[4] On 25 November 2004 the day after the verdict and sentence a Mr Brodie, rang the appellant's solicitors and told them of a conversation he and his wife had with the Judge at a cocktail party at the French Embassy on Bastille Day 14 July 2004. Their account of this was put into affidavits on the same day 25 November 2004, which we now set out:

"I, Donald Ross Brodie of 15 Johnson Street, Toorak Suva Engineer make oath and say as follows:

1. I have been acquainted with Ratu Inoke Takiveikata for approximately 18 months. Ratu Inoke lives at 3 Johnson Street, Toorak. I understand that he has resided at the aforementioned address for approximately 3 months.

2. In the last 12 months I have had a professional/business relationship with the said Ratu Inoke. This relationship concerns the development of the Hydro-electric capacity in Naitasiri/Namosi area.

3. That on the 25th of November 2004, at approximately 8.45a.m. I rang the office of Apaita Seru Solicitors. I initially spoke to a receptionist who put me through to a person who identified himself as Mr Wendler. After a brief discussion with Mr Wendler, Mr Wendler advised that I speak with Mr Seru and I left my name and telephone number.

4. Approximately 9.10a.m. on the same day, I received a call from Mr Apaita Seru. I briefly described to him an occasion when I spoke with Justice Gates at a Social function held at the residence of the French Ambassador in Suva. This function was to celebrate Bastille Day on the 14th of July 2004. I was in the company of my wife, Marita, when I had a conversation with Justice Gates on that evening.

5. I attended at the office of Mr Seru at about 11.30am.

6. That as best I'm able to remember my wife and I encountered Justice Gates at the Social function held at the French Ambassador's residence. It was about 9.30pm and he was by himself. I recalled that we greeted each other. I have previously been acquainted with Justice Gates as he had undertaken legal work for me when he was in private practice as a Lawyer.

7. As best I remember the conversation proceeded by Justice Gates asking me "How is Business?" I replied words to the effect: "It's been slow." I then remarked obviously that business was not slow for him as he had to deal with many Court cases.

8. I am not now able to recall how the topic of Ratu Inoke's case came up in our conversation but I recall that Justice Gates remarked that Ratu's Lawyers were attempting to delay or postpone the trial. The Judge, to the best of my recollection also remarked that Ratu Inoke was seeking to have a form of traditional Fijian trial. The Judge further remarked that this was "nonsense" or words to that effect.

9. The part of the conversation I distinctly remember was when Justice Gates said words to the effect that he would ensure that Ratu Inoke would be "put away." My wife was present during the entirety of this conversation. I recall turning to look at my wife's face as we both looked at each other in amazement at hearing those words by the Judge. At this point our conversation was interrupted by a guest who then left in the company of Justice Gates.

10. I know the facts in this my Affidavit to be true and accurate to the best of my knowledge and belief."

"I, Margaretha Helene Brodie of 15 Johnson Street, Toorak Suva, make oath and say as follows:

1. I am the wife of Donald Ross Brodie.

2. I remember attending Bastille Day celebrations at the residence of the French ambassador on Ratu Sukuna Road, Suva. This was in the evening on the 14th of July 2004.

3. I attended the function in the company of my husband and arrived there between 6.30pm and 7.00pm.

4. During the function at the ambassador's residence, my husband and I happened to meet Justice Gates. I am acquainted with Justice Gates but only on a superficial level, that is, I have met him in the street, at the supermarket and at other social functions over the years. My husband has

also in the past instructed him as his lawyer when Justice Gates was in private practice.

5. When my husband and I met Justice Gates at the social function I recall that we exchanged greetings and Justice Gates asked my husband about his business. As best I recall during the conversation my husband described to the Judge about a hydro project he was involved in and how Ratu Inoke, the Qaranivalu, was of assistance in obtaining signatures of consent from various landowners in respect of the project. Further to the best of my recollection, Justice Gates said "they were trying to drag the case out". At the time I did not understand what the Judge was talking about. The Judge further remarked words to the effect that "they were trying to obtain a local Fijian traditional trial."

6. What I clearly remember of the conversation between my husband and Justice Gates was that Justice Gates said referring to Ratu Inoke that "I am going to put him away." When I heard this I reacted in astonishment and both my husband and I looked at each other after this was said by the Judge.

7. Following this, a person approached Justice Gates and left our company with the judge.

8. I know the facts in this my Affidavit to be true and accurate to the best of my knowledge and belief."

[5] These affidavits were filed in this Court as the basis of an application by the appellant to call fresh evidence on appeal. The Brodies' complaint was referred to the Judge who denied the accusation and he too completed an affidavit on 21 December 2004 where he states:

"I Anthony Harold Cumberland Thomas Gates of the High Court, Government Buildings, Suva, Judge, make oath and say as follows:

1. I have been shown copies of the affidavits of Donald Ross Brodie and Margaretha Helene Brodie, filed in these proceedings.

2. I remember meeting both deponents at the Bastille Day celebrations held at the residence of the French Ambassador.

3. As I was leaving the party I stopped briefly to talk to Mr & Mrs Brodie as Mr Brodie had been my client when I had been in private practice.

4. We exchanged pleasantries, the details of which I do not now recollect. I did not say anything about the conduct to date of the case by the defence, nor about any pending applications. Nor did I express a view on "a form of traditional Fijian trial" or as to any punishment I was minded to pass in the event that Rt Inoke were to be convicted.

5. If "a form of traditional Fijian trial" refers to a trial by assessors exclusively of paramount chiefly rank, this issue did not get raised in court till 15 September 2004, some 2 months later, the first day of the pre-trial conference, when Rt Inoke's new counsel Mr Wendler mentioned he would be requesting such a trial.

6. It was Mr Brodie who raised the topic of Rt Inoke's trial. He asked whether the charges Rt Inoke faced were serious. I said he faced several different charges but the courts had in the past considered such offences as serious. Much would depend upon the facts of the case and how the evidence unfolded I said. I then left.

7. Mr Brodie revealed nothing about his own business involvement with Ratu Inoke, or that he knew him, or that he lived in the same street as Ratu Inoke."

[6] This Court granted leave to call the fresh evidence and when the appeal came before us Mr and Mrs Brodie and the Judge gave evidence and were cross-examined. Mr Young had been asked by the Attorney-General to represent the Judge. He appeared before us and sought leave to cross-examine. This was opposed by the appellant's counsel. We refused leave to ask questions of the witnesses but allowed Mr Young to remain in Court and to make submissions which he did at the conclusion of this part of the hearing.

[7] The following points assist us in determining what took place on the evening of 14 July 2004.

(i) Mr Brodie met the accused after 14 July but before trial and told him that the Judge was against him but did not tell him the Judge had said he would put the appellant away. He said the appellant was not concerned and said that everything would go alright. Mr Brodie also said he mentioned the matter to several business associates.

(ii) Mr Brodie was questioned about a business transaction where he was alleged to have given a secret commission to a State employee. We are not required to decide whether or not this

involved criminality on Mr Brodie's part. We must bear what we were told in mind, but we should say we were impressed with Mr Brodie's explanation and candour.

(iii) There certainly were delays in bringing the matter to trial, the main cause being unavailability of senior defence counsel.

(iv) Mr Brodie said that the question of a "traditional Fiji trial" was very much in the public arena before 14 July 2004. This was not contested in cross-examination, and is to be compared with the Judge's claim that that was not raised until September 2004 when the appellant applied for such a trial.

(v) Mrs Brodie said the conversation arose near the beginning of the cocktail party, so a little after 6p.m. perhaps whereas Mr Brodie deposed to 9.30p.m. and the Judge said about 9p.m. or as he was leaving.

(vi) The Judge did not use direct speech in his affidavit.

(vii) The delays in the Brodies bringing the precise words claimed to have been said to the appellant's attention. In assessing this we bear in mind that the Brodies are lay people, Mr Brodie's concern was dismissed by the appellant and Mr Brodie took action immediately he learned the outcome of the trial.

(viii) The Judge did not know of the allegation until some 5 months after the cocktail party and the fact that the complaint arose out of cocktail party chat.

(ix) There is no suggestion of any ill-will on the part of the Brodies against the Judge, nor any ulterior motive behind their complaint.

(x) The Brodies did know the accused, and Mr Brodie had had business dealings involving the accused, not as a client but because of the accused's chiefly status and involvement with his villagers in regard to proposed hydro works.

(xi) The Judge did not contradict the Brodies directly in his affidavit, but he did so before us.

(xii) It is very unlikely that an experienced Judge would say such a thing.

(xiii) The Judge assumed in his affidavit that the alleged comment related only to sentence. In our view it related both to conviction and sentence in the minds of the Brodies.

(xiv) In response to criticism of the Judge's affidavit Mr Young submitted we should bear in mind it was only prepared for the application to call further evidence, and not the trial of the bias allegations. Mr Young submitted that Mr Brodie had agreed with the possibility that what the Judge said in para 6 of his affidavit was correct and that lessens the possibility that he said "I will put him away."

[8] We were impressed with the way Mr & Mrs Brodie gave their evidence and responded to very forthright cross-examination when both were called liars. We also readily agree that in general terms it is unlikely that a judge would say what was alleged and that he was at a disadvantage being faced with allegations of what was said at a cocktail party some 5 months earlier. We accept that no improper motive was suggested for the Brodies' complaint, or for the Judge's remarks. Taking all these matters into consideration and bearing in mind the seriousness of the allegations we are satisfied that the Judge did say to the Brodies "I will put him away" as they claim

[9] Finally as to the facts relating to the allegation of bias there is the reversal by the Judge of the assessors opinion that the accused was not guilty of Counts 1, 2 and 4. In Fiji the verdict in a criminal charge is that of the judge and not the assessors and he may override their opinions. This is done from time to time but seldom where the opinions are for acquittal. We were referred to two such cases ***Raduva v R*** 7CA 109/198C and ***State v Lautabui*** HAC009 of 2001S.

[10] For judicial bias to result in a retrial, the test has been formulated by the High Court of Australia recently in ***Antoun v The Queen*** [2006] HCA 2, 80 ALJR 497. This Court relied on that case in its decision in the application to adduce further evidence; further counsel for the appellant and counsel for the State agreed that it formulates the proper test. ***Antoun*** was a case of alleged bias on the part of the trial judge in dealing with a submission of no case to answer. We again set out two passages from judgments delivered in the High Court. Hayne J stated at p18:

"The principle to be applied in determining these appeals is not in doubt. If a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide, the judge is disqualified from trying the case."

And Callinen J said at p39:

"The test of apprehended bias is not in doubt. It was stated by Gleeson C.J., McHugh, Gummow and Hayne JJ in Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337 at 345:

"The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited least the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) might not bring an impartial mind the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors actually influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror."

It should be noted that the test as stated emphasises that a possibility, that is relevantly to say, the appearance of a possibility of an absence of an impartial mind on the part of the judge, may lead to disqualification."

[11] In the earlier application this Court also relied on ***Amina Koya v State*** [1998] FJSC 2 in which the N.Z. Court of Appeal decision in ***Auckland Casino Ltd v Casino Control Authority*** [1995] 1NZLR 142 was approved. In the N.Z. case it was said at page 149 by Cooke P delivering the judgment of the Court that there was little if any difference between the Australian test of whether a fair-minded observer might reasonably apprehend or suspect that the judge had prejudged and the English test of whether there is a real danger or real likelihood, in the sense of real possibility of bias.

[12] We also followed the decision in this Court in ***Seniloli v State*** Cr App AAU0041.2004S which followed ***Koya***. The Court said:

> *"Any allegation of bias is of fundamental importance because it is in the public interest that there should be total confidence in the integrity of the system of administration of justice. If there was a real danger or likelihood of bias, it must follow that there has been a miscarriage of justice and the conviction cannot stand."*

[13] We are satisfied that, even without considering what actually happened at trial, any fair minded lay observer who knew that the Judge had said to the Brodies in relation to the up-coming trial of the appellant "I will put him away" would apprehend that the Judge might not bring an impartial and unprejudiced mind to the trial of the appellant. There was certainly the appearance of a possibility of an absence of an impartial mind on the part of the Judge. In our view this then results in his disqualification to conduct the trial and so subject to what we say next a new trial on Counts 1, 2, 3 and 4 must be allowed.

The evidence to support a conviction

[14] Essential evidence in support of the charges came from 4 witnesses Turagacati, Kade, Bonafasio, and Stevens. Counsel took us to all the relevant passages in the evidence count by count. In respect of Count 1 Turagacati and Kade were the witnesses. In respect of Count 2 Stevens, Bonafasio, Turagacati and Kade were the witnesses. In respect of Count 3, Stevens, Bonafasio and Kade were. In respect of Count 4 Stevens, Bonafasio, Turagacati and Kade were. In respect of Count 5 Turagacati and Kade were. All 4 were accomplices. Stevens and Bonafasio had been prosecuted and sentenced. Turagacati and Kade had been given immunity from prosecution. In his summing up the Judge gave the appropriate warnings 4 assessors did not believe them in 4 Count 1, 3 in Count 2 and all 5 in Counts 4 and 5. But 3 believed Stevens, Bonafasio and Turagacati in Count 3. In the Judge's view he believed them all and he gave his reasons.

[15] A Judge's power to convict overruling assessors opinion, his obligation to give reasons and the proper approach on appeal were considered in ***Ram v Director of Prosecutions*** [1999] FJSC 1. At p.3 the Supreme Court said:

> *"By a long line of authority in Fiji, the approach by the Court of Appeal to a review of a judge's decision at variance with the opinion of a majority of assessors has been settled. It was stated by the Court of Appeal in* ***Litivai Setevano v The State*** *(Criminal Appeal No. 14 of 1989, p7):*
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> *"it is clear that a Judge in Fiji is entitled in law to disagree with the majority opinions of the assessors, and even where they are unanimous, but his reasons for doing so must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial."*
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> *Although the Court of Appeal is bound to scrutinize carefully a judgment at variance with the opinion of a majority of assessors, the statue reposes in the judge the sole power to convict or acquit. The requirement that reasons be stated does not modify that power. It is not conditioned on the expression of reasons of self-evident cogency. The whole of the circumstances must be looked at and the reasons examined in the light they cast. In that way, the reasons are exposed to critical examination. But the reasons are not open to criticism merely because they do not demonstrate that the opinion of the majority of the assessors is infected by appealable error. The judge must accept the assistance of the opinion of the majority of assessors on issues of fact but, at the end of the day, the sole responsibility for making the finding of fact rests on the judge alone."*

[16] We have been asked to make our own decision on guilt or innocence and to proceed in accordance with the decision in the High Court of Australia in ***M v The Queen*** [1994] 181 CLR 487. For present purposes it is enough to quote the headnote:

"Held by Mason C.J., Deane, Dawson, Toohey and Gaudron JJ.,

(1) that where, notwithstanding that there is evidence to sustain a verdict of guilty, a court of criminal appeal is asked to conclude that the verdict is

unsafe or unsatisfactory, the court must ask whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. In answering that question the court must pay full regard to the fact that the jury is the body entrusted with the primary responsibility of determining guilt or innocence and the fact that the jury has had the benefit of having seen and heard the witnesses.

(2) That in most cases a doubt experienced by an appellate court as to the guilt of the accused will be one which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by an appellate court that it may conclude that no miscarriage of justice occurred. That is to say, when the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, it is bound to act and to set aside the verdict.

(3) Per Brennan J. An appellate court's function is to make its own assessment of the evidence, not for the purpose of concluding whether it entertains a doubt about the guilt of the person convicted, but for the purpose of determining whether the jury, acting reasonably, must have entertained a reasonable doubt as to guilt.

(4) Per McHugh J. The correct test for determining whether a verdict should be set aside on the ground that it is unreasonable is whether a reasonable jury must have had a reasonable doubt about the accused's guilt. The court must make an independent assessment of the evidence. However, before coming to the conclusion that a reasonable jury must have had a reasonable doubt about the accused's guilt, the court must give due weight to the advantages that the jury had in regard to the evidence and the atmosphere of the trial. If, after considering the evidence, the court concludes that a reasonable jury must have acquitted, the verdict is unreasonable even though there may be sufficient evidence in law to support the verdict."

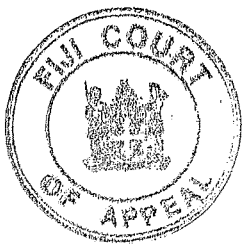
[17] Here a decision on the credibility of witnesses is made difficult by their position as accomplices and by the conflicting views of the assessors and the Judge. In such a case we think the advantage of hearing and seeing the witnesses is large and we are not prepared to make up our own minds as to whether or not a reasonable doubt exists without that advantage. This being so any detailed analysis of the evidence is inappropriate as such may affect any new trial that may be held. We are not prepared to enter not guilty verdict on the 4 counts.

[18] We record that counsel for the appellant also criticised the Judge in his summing up on lies without reference to the fact that the appellant was a negotiator in the Muanikau Accord. It is unnecessary for us to express a view on that in view of a decision to order a new trial.

Result

[19] The verdicts of guilty on Counts 1, 2 3 and 4 are quashed and a new trial is ordered on those counts.

Ellis, JA



Penlington, JA

McPherson, JA

Solicitors:

R Patel & Co for the Appellant
Office of the Director of the Public Prosecutions, Suva for the Respondent
Young & Associates for the Attorney General