

**IN THE COURT OF APPEAL, FIJI**  
**[ON APPEAL FROM THE HIGH COURT]**

**Criminal Appeal No. AAU 0028 of 2011**  
**(High Court Case No. HAC 005 of 2011)**

**BETWEEN** : **RATU INOKE TAKIVEIKATA** *Appellant*

**AND** : **THE STATE** *Respondent*

**Coram** : **Gamalath, JA**  
**Prematilaka, JA**  
**Bandara, JA**

**Counsel** : **Mr. A. Naco for the Appellant**  
**Mr. L. J. Burney for the Respondent**

**Date of Hearing** : **23 May 2019**

**Date of Judgment** : **6 June 2019**

**JUDGMENT**

**Gamalath, JA**

[1] The following are the five grounds of appeal upon which the appellant relied in prosecuting this appeal;

#### Ground 1

That the High Court erred in law and in fact when it didn't comply with the Fiji Court of Appeal Order on retrial date 25<sup>th</sup> July 2007 where the orders were to have a retrial on Counts 1,2,3, and 4 of the original charges against the Appellant.

#### Ground 2

That the High Court erred in law and in fact when it didn't comply with the Fiji Court of Appeal and proceeded with a trial resulting in a mistrial.

#### Ground 3

That the Learned trial Judge erred in law and in fact when he proceeded to the trial of the Appellant where the consolidated charge included the essence of the 5<sup>th</sup> Count for which the Appellant had been acquitted of.

#### Ground 4

That the learned trial Judge erred in law and in fact when he convicted the Appellant on the same evidence of one of the key witnesses when in the earlier trial his evidence was rejected by the Court and had resulted in the acquittal of the Appellant on the 5<sup>th</sup> Count of the original charge.

#### Ground 5

That the conviction against the Appellant should be squashed and the subsequent sentence should be declared invalid.

- [2] Briefly stating the facts relating to the appeal are that the appellant, after trial, was convicted in the High Court of Suva on the charge of Inciting to Mutiny, contrary to section 55(b) of the Penal Code, Cap 17. According to the particulars of the offence the appellant, *“between 6 August 2000 and 24 September 2000, had advisedly attempted to incite Captain Shane and Sergeant Manoa Bonafasio, knowing that they were serving in the Fiji Military Forces, to commit to the mutinous act of joining in combination with other members of the Fiji*

*Military Forces to execute a takeover of the Queen Elizabeth Barracks in Suva*". Following the conviction, the learned Trial Judge sentenced the appellant to life imprisonment with a non-parole period of 8 years.

- [3] This conviction is consequent upon a re-trial ordered by the Court of Appeal and the learned President of the Court of Appeal His Lordship Calanchini J , in the Single Judge's Ruling relating to this appeal set out the relevant facts as follows;

*"[2] It is at this point convenient to set out briefly the history of the present proceedings. The Appellant was initially tried in November 2004 in the High Court at Suva. He faced five counts. The first count was incite to mutiny contrary to section 55(b) of the Penal Code Cap 17 (the Code). The particulars of that offence were that the Appellant on 6 August 2000 at Deuba 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.*

*[3] The second count was incite to mutiny contrary to section 55(b) of the Code. The particulars were that the Appellant on or about 17 August 2000 at Suva advisedly attempted to incite persons serving in the Military Forces of Fiji, namely Captain Shane Stevens, Sergeant Manoa Bonafasio and Corporal Alikisio Alava 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.*

*[4] The third count was incite to mutiny contrary to section 55(b) of the Code. The particulars were that the Appellant on or about 27 August 2000 at Nausori advisedly attempted to incite persons serving in the Military Forces of Fiji, namely Captain Shane Stevens and Sergeant Manoa Bonafasio, 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.*

*[5] The fourth count was aiding soldiers in an act of mutiny contrary to section 56(a) of the Code. The particulars were that the Appellant between 26 August and 25 September 2000 at Suva aided a non-commissioned officer of the Fiji Military Forces namely Sergeant Manoa Bonafasio in an act of mutiny, namely his attempt on 2 November 2000 in combination with other persons subject to service law to take over the Queen Elizabeth Barracks in Suva by providing him with mobile phone equipment for coordination of the said attempted takeover.*

*[6] The fifth count was incite to mutiny contrary to section 55(b) of the Code. The particulars were that the Appellant on or about 17 September 2000 or 24 September 2000 at Suva advisedly attempted to incite persons serving in the Military Forces of Fiji, namely Captain Shane Stevens and Sergeant Manoa Bonafasio 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.*

[7] *Following a lengthy trial the five assessors returned majority opinions of not guilty on count 1, majority opinions of not guilty on count 2, majority opinions of guilty on count 3, unanimous opinions of not guilty on count 4 and unanimous opinions of not guilty of count 5. In a reasoned judgment delivered on 24 November 2004 the learned trial judge disagreed with the opinions of the assessors in respect of counts 1, 2 and 4. The Judge agreed with the opinions of the assessors in respect of counts 3 and 5. As a result the Appellant was convicted on counts 1 to 4 and acquitted on count 5. The Appellant was sentenced to concurrent terms of life imprisonment on counts 1 to 3 and a concurrent sentence of 18 months imprisonment on count 4. Being dissatisfied with his conviction the Appellant filed a timely appeal in the Court of Appeal against conviction and sentence. For reasons that are not directly relevant to the present appeal the Court of Appeal allowed the appeal, quashed the convictions on counts 1, 2, 3 and 4 and ordered a new trial on those four counts. (**Takiveikata –v- The State** AAU 65 of 2004; 25 June 2007).*

[8] *There were subsequently appeal proceedings in the Supreme Court on issues that are unrelated to the present appeal (**State –v- Takiveikata** CAV 16 of 2007; 24 July 2008).*

[9] *The new trial that had been ordered by this Court took place between 16 and 28 February 2011. The new trial proceeded on one consolidated count only. The offence was incite to mutiny contrary to section 55(b) of the Code. Although a copy of the indictment for the new trial has not been included in the material filed by the parties, a reference to the particulars can be found on page 3 of the Appellant’s supplementary submissions filed on 29 November 2016.*

[10] *It is stated there that the particulars of the new charge are:*

*“Ratu Inoke Takiveikata between 6 August 2000 and 24 September 2000 at Suva advisedly attempted to incite Captain Stevens and Sergeant Bonafasio knowing that they were serving in the Fiji Military Forces to commit to the mutinous act of joining in combination with the other members of the Fiji Military Forces to execute a takeover of the Queen Elizabeth Barracks in Suva.”*

- [4] In the Judgment of the Court of Appeal of Fiji, **Takiveikata v State** [2007] FJCA 45;AAU 0065.2004 (25 June 2007)], the retrial was ordered ; accordingly, the final order of the Court was that “the verdict of guilty on Counts 1,2,3 and 4 are quashed and a new trial is ordered on those Counts”. Based on this decision of the Court of Appeal, the subsequent trial commenced with a single information to which I have already made reference.
- [5] Having regard to the proceedings in the High Court relating to this appeal, for some unfathomable reason, the Counsel who had strenuously defended the appellant did not

seem to have considered it as necessary to raise any objection to the form and style of the information, at the time the appellant was being arraigned. In relation to that, it is relevant to mention that the present grounds of appeal, as a whole is directed at the alleged formal defects in the information on which the appellant faced trial for it violated the plea of autrefois acquit. It is manifestly clear from the proceedings in the High Court that the appellant had the benefit of being ably defended by his Counsel. It is, therefore, unfathomable as to what must have been the rationale for not raising the plea of autrefois acquit then. In this background I find it difficult to resist to think that among other many unknown reasons, one reason for perceivable acquiescing in must have been due to the fact that the task of meeting a single count, in place of four different counts may have been seen as advantageous for the appellant. As reflected in the proceedings, at the conclusion of the prosecution's case the counsel for the appellant strenuously urged that the proceedings should be terminated for want of evidence to establish a prima facie case. Even at that stage there had been no objection raised against the information.

- [6] The procedural law clearly deals with the situations akin to this as follows;

Criminal Procedure Code 2009 (Cap.21)

*Orders for amendment of information, separate trial and postponement of trial*

214. — (1) every objection to any information for any formal defect on the face of it shall be taken immediately after the information has been read over to the accused person, and not at a later time. (My emphasis)

Plea of autrefois acquit and autrefois convict

219. — (1) any accused person against whom an information is filed may plead —

(a) that he or she has been previously convicted or acquitted (as the case may be) of the same offence; or

(b) that he or she has obtained the President's pardon for his or her offence.



*(2) If either of such pleas are pleaded in any case and denied to be true in fact, the court shall try whether such plea is true in fact or not.*

*(3) No plea may be made under sub-section (1) by a member of the Fiji Military Force, the Fiji Police Force or the Fiji Prisons Service when that member is charged with a criminal offence and he or she has previously been tried and convicted for that matter under a disciplinary law.*

*(4) If the court holds that the facts alleged by the accused do not support the plea, or if it finds that it is false in fact, the accused shall be required to plead to the information. (Emphasis is mine)*

- [7] The plain reading of the above two provisions of the Criminal procedure Act makes it clear that the two sections are required to be considered in conjunction and in particular when the plea of autrefois acquit has been raised, and an inquiry should be held to determine the validity of such plea [see section 219 (2) and (4) ].
- [8] In the absence of such an approach being adopted at the trial stage in the High Court, I am of opinion that the grounds of appeal upon which the appellant is presently relying lack support or strength of the law. In other word the procedural law does not render any support in favor of the appellant's complaint against his conviction. I need to mention that the counsel for the appellant, in his submissions before us conceded that the Director of Public Prosecutions is legally permitted to prefer new charges in a retrial. This is an arguable fact and it is academic as far as this appeal is concerned.
- [9] Due to the reasons as stated above I hold the view that this appeal lacks merit.

**Prematilaka, JA**

- [10] I have read in draft the judgment of Gamalath, JA and agree with the reasoning and conclusion herein.

**Bandara, JA**

- [11] I have read the draft judgment of Gamalath, JA and I agree with his conclusions and the order.

**The Orders of the Court are:**

1. The conviction and the sentence affirmed.
2. The appeal is dismissed.



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**Hon. Justice S. Gamalath**  
**JUSTICE OF APPEAL**

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**Hon. Justice C. Prematilaka**  
**JUSTICE OF APPEAL**

A handwritten signature in blue ink, appearing to be "N. Bandara", written above a dotted line.

**Hon. Justice N. Bandara**  
**JUSTICE OF APPEAL**