STATE v SITIVENI LIGAMAMADA RABUKA (AAU0007 of 2007)

COURT OF APPEAL — CRIMINAL JURISDICTION

ELLIS, PENLINGTON and MCPHERSON JJA

18, 25 June 2007

Practice and procedure — appeal — attempting to incite commission of mutinous act — order setting aside acquittal on count 2 of attempt to incite mutiny — overheard conversations were incriminating — there was rational explanation consistent with innocence — Respondent's guilt not proven beyond reasonable doubt — Penal Code s 55(b).

The Respondent was charged with two counts of attempting to incite the commission of a mutinous act. The first was an attempt made by the Respondent to persuade Lt Col Seruvakala, as Commanding Officer of the Third Fiji Infantry Regiment, to remove Commodore Bainimarama from his position as Commander of the Republic of Fiji Military Forces. The Respondent was acquitted of the first attempt.

The second attempt was to incite mutiny, allegedly directed at Lt Col Seruvakala. On that occasion, an uprising at the Queen Elizabeth Barracks among troops from the First Meridian Squadron took place. An attempt was made that day to murder the commodore, but he was able to escape. Full-scale warfare ensued between loyal soldiers and rebels, of which several soldiers were killed and wounded. Mutiny had been put down early that evening.

At the time the uprising began, the Respondent was having lunch at the barracks. He received several phone calls while the uprising was taking place. The overheard conversations made by the Respondent linked him to the uprising. One of those overheard words made by the Respondent was, "What else are you waiting for? Kill him straight away!". The Respondent denied the allegations. According to him, he heard about the mutiny taking place only after he had started lunch. The conversations made by him were to negotiate a ceasefire. The Respondent was acquitted of count 2 of an attempt to incite mutiny. The Appellant lodged an appeal for an order to set aside the acquittal on count 2.

Held — (1) There was nothing in his Lordship's reasons that suggested that he founded his decision on issues of credibility or by choosing between the prosecution and defence witnesses as a matter of credit. It was not a question of preferring the Respondent's testimony over that of Colonel Seruvakula that dictated his Lordship's decision to acquit on count 2.

(2) The court concluded that the State had failed to prove the charge in count 2 was beyond reasonable doubt. There was nothing in the evidence "to give rise to another hypothetical explanation as to the conversation between him and the respondent". It was clear that the rational explanation was consistent with innocence of the Respondent's presence at the barracks during the mutiny and of his remarks to Colonel Seruvakula. His purpose was to be appointed or accepted as negotiator in order to bring the fighting to an end.

(3) The court did not consider that there was a compelling inference of fact to be drawn that the Respondent intended to incite mutiny.

Appeal dismissed.

Cases referred to

Peacock v R (1911) 13 CLR 619; 17 ALR 566, applied.

Joseph v R [1948] AC 215; *R v Bond* [1906] 2 KB 389; *Ram Bali v R* [1960] 7 FLR 80; *Ram Dulare v R* [1955] 5 FLR 1; *Raduva v R* Crim App 109 of 1985, cited.

D. Goundar and *R. Gibson* for the Appellant

P. Maiden and *S. Tamanikaiwaimaro* for the Respondent

[1] Ellis, Penlington and McPherson JJA. Sitiveni Ligamamada Rabuka, who is the Respondent to this appeal, was charged with two counts of attempting to incite the commission of a mutinous act contrary to s 55(b) of the Penal Code. The mutinous act incited is alleged to be joining in a combination with other persons subject to service law in attempting to effect the removal of the Commander of the Fiji Military Forces, Commodore Voreqe Bainimarama. In each count the person who was the target of the attempt to incite is averred to have been Lt Colonel Viliame Seruvakula. The two counts, 1 and 2, are the same except as regards the dates on which the offences were committed. Count 1 alleges 4 July 2000. Count 2 alleges the date of the attempt to incite as 2 November 2000. It is the one with which this appeal by the State is primarily concerned. On the appeal, counsel for the Appellant State and the Respondent Accused both agreed that they were content to have the appeal determined on the material in the principal court record without resorting to the transcript of evidence from the trial.

[2] It is not necessary for the present to examine in detail the circumstances of the first count in respect of which the Respondent was acquitted following the opinions of three out of the five assessors at the trial, with whom the learned judge agreed. Suffice to say that what was alleged by the State in count 1 was an attempt by the Respondent to persuade Lt Col Seruvakula, as Commanding Officer of the Third Fiji Infantry Regiment, to remove Commodore Bainimarama from his position as Commander of the RFMF. Colonel Seruvakula was in command of some 900 soldiers of the Third Fiji Regiment and was himself the third most senior officer in the military establishment. The offence was alleged to have been committed at a time when the insurrection organised by George Speight was still taking place, and when talks had failed to put an end to it by negotiation.

[3] The second attempt to incite mutiny (count 2) was again alleged to have been directed at Lt Col Seruvakula, this time on 2 November 2000. On that occasion there was an uprising at the Queen Elizabeth Barracks which began at 1 pm among troops from the First Meridian Squadron. They demanded the removal of Commodore Bainimarama; also that First Meridian Squadron not be disbanded, as was being proposed; and that there be no reprisals against the rebellious troops. An attempt was made that day to murder the commodore while he was at lunch at the officers mess, but he escaped to the naval base. Full-scale warfare then developed between loyal soldiers and the rebels, in the course of which several soldiers were killed or wounded. By early evening that day the mutiny had been put down.

[4] At the time that the uprising began at the barracks, the Respondent was having lunch as the guest of Sun Insurance Company at its office in central Suva, where he remained from 1 pm until about 5 pm. During that lengthy period several telephone calls were received by the Respondent, and snatches of his conversations were overheard by administrative or catering staff as they moved around outside the dining room in an area where calls were taken or sent by the Respondent.

[5] Of the conversations or portions of them that were overheard, his Lordship in his reasons for judgment said there was no corroborative evidence of those between 1 pm and 1.15 pm. This is presumably a reference to the fact that conversations that took place at that time were not shown on the log of telephone

calls recorded in the relevant exhibit. A clerk, Sainiana Tagi, of the insurance company, overheard a call between about 2.45 pm and 3 pm in the course of which she heard the Respondent say, "What else are you waiting for? Kill him straight away!". This is perhaps the single most incriminating aspect of the evidence about the overheard conversations. Assuming Sainiana's recollection was accurate, the problem is, as his Lordship in his reasons said —

> What did the overheard information relate to? The answer to that is [that] no one will ever know as the conversations were not completely overheard and so lack context.

The difficulty for the State is that we do not know precisely who the Respondent was talking to when he said this, or whom he was talking about. In that way, it is correct to say that the conversations "lacked context".

[6] The Respondent's case at trial was that he had heard about the mutiny taking place at the barracks only after he had started lunch at the insurance company office and that his part in the conversations about that event was concerned with his offers to negotiate a ceasefire between the rebel forces and the loyal troops or their commander. There is a good deal of independent evidence, which his Lordship accepted, that the Respondent did offer to negotiate. He made an offer to do so to Colonel Kacisolomone, who is a senior retired officer of the forces and a member of Commodore Bainimarama's military advisory group. He made a similar offer to Colonel Seruvakula, and also to a Colonel Hennings. In addition, he spoke to Mr Lomaloma about it. He too is a former army officer of some prominence who in November 2000 was working as a civil servant under Major General Konrote at the Ministry of Home Affairs, where he was in charge of national emergency facilities. According to his evidence, his thoughts turned to the Respondent as someone who might be able to resolve the problem at the barracks. Mr Lomaloma spoke to the minister about arranging for the Respondent to negotiate a ceasefire. The minister told him to go ahead, and Mr Lomaloma then telephoned the Respondent and asked him to go to the barracks and negotiate a ceasefire, which the Respondent agreed to do.

[7] When at 5 pm that afternoon the Respondent finished lunch at the insurance company office, he travelled out to the barracks, then still under the control of the rebels, where he went to the officers' mess. Much reliance was placed by the State on the fact that on arrival he was seen by some witnesses to have with him his army uniform. It was distinctive in that, being a former Major-General, the collar and shoulders were decorated with red badges or flashes which a number of witnesses claimed to have noticed. On the other hand, two other witnesses as well as the Respondent were equally adamant that the Respondent brought no uniform with him. It is very doubtful whether the question of the uniform justified the time and effort expended on it at the trial or on appeal. The prosecution case presumably was that the Respondent was planning to wear the uniform in order to promote the incitement to mutiny, or intending to do so as soon as it succeeded in having Commodore Bainimarama removed from command. However, the Respondent's action in taking the uniform with him to wear was and is equally capable of being explained as designed to stress his military position and authority when he came to negotiate a ceasefire. As a Major-General, he would have outranked all others at the barracks. The uniform would certainly have been more appropriate and impressive than the shirt and sulu that he had been wearing at the insurance company lunch.

[8] When the Respondent arrived at the barracks in the late afternoon, Colonel Baledrokadroka was in charge of the loyal troops and was about to launch a counter attack against the rebel soldiers. Colonel Seruvakula himself had during that day been out to a practice range some distance from Suva, and had not long arrived back at the engineers headquarters from which the attack on the barracks was planned to take place. He received a telephone call from the Respondent in the mess at 5.40 pm, which was 20 minutes before the counter attack began. It lasted for 4 minutes and 22 seconds, in the course of which the Respondent said to the colonel words to the effect —

> What has happened here today is the result of the boys' dislike for the leadership in the military. If the boys don't want the leadership in the military, then today is the appropriate day to change it.

About 10 minutes later he telephoned Colonel Seruvakula again, and said: "Negotiations have to be done in this matter. The shooting has to stop". The Respondent attempted to persuade the colonel as senior officer in the command of the loyal soldiers to negotiate with the rebels rather than to attack them. This suggestion was rejected. The Respondent was placed on the floor of a secure room, and was later moved elsewhere to be out of the line of fire. His mobile telephone was eventually taken from him so that he could make no more phone calls. The rebels soldiers surrendered by about 6.45 pm. Later, as the Respondent was leaving, he phoned Colonel Seruvakula yet again and said —

> There has been a set back in what has happened. It has failed and some lives have been lost. I'm going out to drink yagona.

[9] The foregoing account places the prosecution case on count 2 at about its highest level of persuasion and assumes that the text of these conversations is as they have been set out here. After listening to the summing up, the assessors returned with their opinions. Four of them were satisfied that the Respondent was guilty of count 2; the fifth that he was not. His Lordship considered the assessors' opinions and on 11 December 2006 delivered written reasons deciding that the Respondent was not guilty of count 2. He said he was not satisfied beyond reasonable doubt of the Respondent's guilt. Judgment was entered accordingly. This appeal was lodged by the Director of Public Prosecutions for an order setting aside the acquittal on count 2 and replacing it with an order of conviction of the Respondent in respect of that count. The essence of the various specified grounds of appeal is that the learned trial judge erred in law in substituting his view of the Respondent's guilt on count 2, in preference to the opinions of a clear majority (four out of five) of the assessors that the Respondent was guilty of the offence charged in that count.

[10] Section 299(2) of the Criminal Procedure Code (Cap 21) provides that at a trial with assessors it is the judge who is to give judgment "but in doing so shall not be bound to conform to the opinions of the assessors". By the same provision, a judge who does not agree with the majority opinion of the assessors must give written reasons for differing from that or those opinions. It is, or course, well settled that under a statutory provision like s 229(2) the decision whether or not to convict or acquit is that of the judge and not that of the assessors: see *Joseph v R* [1948] AC 215 at 221, together with the case in the footnote to that report at 219–20; and see also *Ram Dulare v R* [1955] 5 FLR 1. However, cases in which the judge properly convicts in the face of a contrary opinion of assessors in favour of acquittal are said to be "rare", more especially where the difference turns on the credibility of a particular witness or witnesses: *Raduva v R* (Crim

App 109 of 1985). Where the judge does disagree with the majority opinion of assessors, the reasons for judgment in which this is done should be cogent or, as is sometimes said, "cogent and careful": *Ram Bali v R* [1960] 7 FLR 80.

[11] The present case is not one in which the judge convicted contrary to a majority opinion in favour of acquittal. It is a case of acquittal by the judge in the face of majority opinion from the assessors favouring conviction. Nor, contrary to what is submitted in the director's written outline, is it a case in which the result turned substantially, if at all, on matters of credibility. From what we read in the learned judge's reasons for judgment, he accepted the Respondent's evidence especially in relation to his being asked by Mr Lomaloma to go to the barracks to negotiate, as well as the evidence about the Respondent's own offers to negotiate made to Colonel Kacisolomone, Colonel Seruvakula and Colonel Hennings on the afternoon of 2 November 2000. There is nothing to suggest that his Lordship did not also accept as credible the evidence of Colonel Seruvakula. There may at times have been questions whether, after a lapse of 6 years, witnesses were able to remember critical conversations as perfectly as they thought they did; but there does not seem at the trial to have been much occasion for findings of credibility based on a conclusion that one or more were dishonest witnesses who were not telling the truth. At all events, there is nothing in his Lordship's reasons that suggests that he founded his decision on issues of credibility or by choosing between the prosecution and defence witnesses as a matter of credit. It was not a question of preferring the Respondent's testimony over that of Colonel Seruvakula that dictated his Lordship's decision to acquit on count 2.

[12] What was determinative was his Lordship's conclusion that the State had failed to prove the charge in count 2 to his satisfaction beyond reasonable doubt. This is evident from para 18 of his Lordship's reasons. What he was addressing there appears from the preceding paras 14–18 of those reasons. Before the Respondent could properly be convicted, it had to be proved (and beyond reasonable doubt) that there was no rational explanation of his conduct and especially of his statements to Colonel Seruvakula other than that he was intending to incite mutiny, in the sense of defying authority for the purpose of subverting it. What was at issue was simply the application to what was said by the Respondent of the principle in *Peacock v R* (1911) 13 CLR 619 at 634; 17 ALR 566 at 591 (*Peacock*). Was there any reasonable hypothesis other than the guilt of the Accused? If so, he was entitled to be acquitted.

[13] In the director's written outline in para [41], there is a passage that submits that there was nothing in Colonel Seruvakula's evidence "to give rise to another hypothetical explanation as to the conversation between him and the Respondent". This appears to invoke the principle in *Peacock* above. It is, however, clear that there is a rational explanation consistent with innocence of the Respondent's presence at the barracks during the mutiny and of his remarks to Colonel Seruvakula. His purpose was to be appointed or accepted as negotiator in order to bring the fighting to an end. Whether or not this is the true explanation, it is not possible from what the Respondent said on that afternoon to conclude unequivocally to the requisite standard of proof that his purpose was to effect the subversion of military discipline or authority with a view to bringing about the removal of Commodore Bainimarama by unlawful means. Each of the remarks he made to Colonel Seruvakula is plainly susceptible of an innocent or non-criminal interpretation. They do not demonstrate an intention on the Respondent's part to persuade Colonel Seruvakula to join in a combination with

him or other soldiers to effect the removal of Commodore Bainimarama as leader of the Fiji Military Forces. Only the president could lawfully have removed him from that post. Of that, the Respondent must surely have been aware having himself at one time been Commander of the RFMF.

[14] The State sought to prove as part of it case a motive on the part of the Respondent for engaging in an act or acts of incitement to mutiny. At one time he had occupied positions of great importance and prestige in the land. He had been Commander of the RFMF and later Prime Minister of Fiji. Then in 1999 his political party lost the general election and with it his power lapsed. He later became chairman of the Great Council of Chiefs, but was unable to regain the position of Commander of the RFMF, which he is said to have coveted. At the time of the George Speight coup in 2000, the Respondent suggested to President Ratu Mara that he, the Respondent, should be appointed commander; but his proposal was not taken up, nor was his offer to deal with the rebels if he were appointed interim prime minister.

[15] There may be some antipathy between the Respondent and Commodore Bainimarama, which may account for some of the Respondent's remarks about him to Lt Col Seruvakula. Further, the First Meridian Squadron, who were the rebellious troops on 2 November 2000, had originally been set up by the Respondent as the Counter Revolutionary Warfare Unit, and the ties between them and him remained very strong. At the date in question he was the honorary colonel designate of the squadron. This would explain why the Respondent was so eager to ensure that fighting between that squadron and the rest of the army did not take place, or was brought to an end as quickly as possible. It falls well short of showing that the Respondent's motive was to incite mutiny in order to achieve an ambition of being the leading figure in the armed forces or in the nation as a whole.

[16] In the final analysis, the question that fell to be determined by the learned judge at trial was whether on the evidence, much of which in critical respects is or may be taken to be undisputed, the compelling inference of fact to be drawn was that the Respondent was intending to incite mutiny in what he said to Colonel Seruvakula on 2 November 2000. His Lordship did not consider that such a conclusion was or would be justified beyond reasonable doubt. In our respectful view it is not possible in this court to disagree with them.

[17] Paragraph 3 of the notice of appeal contains a number of subparas (i)–(vii), of which (iii) is, we are told, not now being pressed. Each of those subparagraphs complains that the learned trial judge erred in law in doing or not doing, or finding or not finding, the matters complained of. With the exception of those in (v) and (vi), none of those matters is one of law. Each of them is a matter of fact as to which his Lordship was before convicting required to satisfy himself beyond reasonable doubt on the evidence at trial. Subparagraphs (v) and (vi) are properly regarded as matters of law. They concern a direction given to the assessors in summing up that they should consider the charges on counts 1 and 2 separately. That was plainly correct. The assessors ought not have arrived at a conclusion on one count and then simply have extended it to the other count. The only possible defect in the summing up at that point is that his Lordship said the assessors should "Isolate the evidence that is relevant to that charge". There was, we observe, no request at the time for a redirection; but it may perhaps have been taken to mean that the evidence on one charge could not be used to establish the other. At least as regards the intention that had to be proved by the prosecution,

that process may have been open to the assessors on the evidence here. Evidence of incitement on 4 July probably could have been relied on to help prove intention to incite on 2 November, and vice versa. See *R v Bond* [1906] 2 KB 389 at 420–1. To the extent that the direction may have had the effect of excluding use of that evidence for the purpose of proving intention on either occasion, it was incorrect. It is, however, difficult to believe that it was this that led one out of five assessors to arrive at his opinion of not guilty, on count 2. In any event, his Lordship in his judgment agreed with that assessor's opinion, and, as we have already indicated, we consider that he was justified in doing so.

[18] In our view, the appeal against the judgment of acquittal on count 2 should be dismissed. There can be no suggestion of our making an order for costs in a criminal appeal like this.

Result

Appeal against judgment of acquittal on count 2 is dismissed.

Appeal dismissed.