

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 175 of 2017
[In the High Court at Lautoka Case No. HAC 140 of 2015]

BETWEEN : RATU INOKE TASERE
JIMI KOROIBETE
SERU KUNALAGI
ULAIASI RABUA TUIVOMO
SEMI TANIKILI
RATU OSEA BOLAWAQATABU
RATU TEVITA MAKUTU
MOSESE NAVACI
ERONI RIKORIKO
ALIVERETI NAKUINIVOU
ALIVERETI GONEWAI
JOLAME RATULEVU

Appellants

AND : STATE

Respondent

Coram : Prematilaka, JA

Counsel : Ms. S. Kunatuba for the Appellants
: Mr. L. J. Burney for the Respondent

Date of Hearing : 11 December 2020

Date of Ruling : 29 December 2020

RULING

- [1] The appellants had been charged in the High Court of Suva on two counts each of sedition contrary to section 67(1)(a) of the Crimes Act, 2009 committed with 02 others on 04 November 2014 at Sigatoka in the Western Division.

[2] The charges against each of the appellants read as follows.

COUNT ONE

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

RATU INOKE TASERE, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE -Provisional Institutions of Self-Government" with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT TWO

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

RATU INOKE TASERE, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE" with a seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.

COUNT THREE

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

JIMI KOROIBETE, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE -Provisional Institutions of Self-Government" with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT FOUR

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

JIMI KOROIBETE, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE" with a seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.

COUNT FIVE

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

SERU KUNALAGI, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE-Provisional Institutions of Self-Government" with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT SIX

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

SERU KUNALAGI, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE" with a seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.

COUNT NINE

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

ULALASI RABUA TUIVOMO, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE -Provisional Institutions of Self-Government" with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT TEN

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ULALASI RABUA TUIVOMO, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE " with a seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.

COUNT THIRTEEN

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SEMI TANIKILI, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE -Provisional Institutions of Self-Government" with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT FOURTEEN

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SEMI TANIKILI, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE " with a seditious intention of bringing into hatred or

contempt or to excite disaffection against the Government of Fiji as by law established.

COUNT FIFTEEN

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

RATU OSEA BOLAWAQATABU, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed “**NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE** -Provisional Institutions of Self-Government” with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT SIXTEEN

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

RATU OSEA BOLAWAQATABU, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity “**NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE** ” with a seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.

COUNT SEVENTEEN

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

RATU TEVITA KHAIKHAINABOKOLAWALE MAKUTU, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed “**NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE** - Provisional Institutions of Self-Government” with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT EIGHTEEN

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

RATU TEVITA KHAIKHAINABOKOLAWALE MAKUTU, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "NADROGA-NAVOSA SOVEREIGN CHRISTIAN **STATE**" with a seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established.

COUNT NINETEEN

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

MOSESE NAVACI, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed "NADROGA-NAVOSA SOVEREIGN CHRISTIAN **STATE**-Provisional Institutions of Self-Government" with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT TWENTY

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

MOSESE NAVACI, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "NADROGA-NAVOSA SOVEREIGN CHRISTIAN **STATE**" with a seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established

COUNT TWENTY ONE

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

ERONI RIKORIKO, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE -Provisional Institutions of Self-Government" with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT TWENTY TWO

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ERONI RIKORIKO, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE " with a seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established

COUNT TWENTY THREE

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ALIFERETI NAKUINIVOU, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE -Provisional Institutions of Self-Government" with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT TWENTY FOUR

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ALIFERETI NAKUINIVOU, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE" with a seditious intention of bringing into

hatred or contempt or to excite disaffection against the Government of Fiji as by law established

COUNT TWENTY FIVE

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ALIFERETI GONEWAI, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed “NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE -Provisional Institutions of Self-Government” with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT TWENTY SIX

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ALIFERETI GONEWAI, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity “NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE” with a seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established

COUNT TWENTY SEVEN

Statement of Offence

SEDITION: Contrary to Section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

JORAMA RATULEVU, on the 4th day of November, 2014, at Sigatoka in the Western Division, did sign a document headed “NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE -Provisional Institutions of Self-Government” with a seditious intention to raise discontent or disaffection amongst the inhabitants of Fiji.

COUNT TWENTY EIGHT

Statement of Offence

SEDITION: *Contrary to Section 67 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

JORAMA RATULEVU, on the 4th day of November, 2014, at Sigatoka in the Western Division, did an act with a seditious intention, namely took an oath to serve as a Cabinet Minister for the entity "NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE" with a seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established

- [3] After the summing-up on 02 November 2017, the assessors had unanimously opined that 08 of the above appellants (i.e. 1st, 2nd, 5th, 7th, 10th, 11th, 13th and 14th accused) were guilty of both counts as charged. The majority of assessors had been of mixed opinions regarding the remaining 04 appellants (i.e. 3rd, 8th, 9th and 12th accused). The High Court judge had agreed with the assessors regarding the 08 appellants above mentioned and found them guilty and convicted them on 09 November 2017. The trial judge had agreed as well as disagreed with the assessors and the majority of assessors regarding the other 04 appellants, convicted them accordingly and sentenced them on 09 November 2017. Other than the 05th accused who had received a sentence of 02 years, 07 months and 11 days of imprisonment all other appellants had been sentenced to 02 years, 03 months and 11 days of imprisonment on 29 November 2017 without non-parole periods.
- [4] The prosecution case could be summarized as follows. Napolioni Batimala (PW2) had testified that on 04 November 2014 he was present at Cuvu village where some people were appointed as Ministers. According to the witness names were read out and those appointed took an oath on the Holy Bible. The witness knew those who were appointed as Ministers on the day and was able to identify the 01st, 02nd, 09th, 10th, 12th and 13th accused among those persons in court. The prosecution had also relied on the records of interview of the appellants in support of its case which according to the prosecution were made voluntarily.
- [5] None of the above appellants had given evidence or call witnesses on their behalf.

- [6] The trial judge's analysis of the version of events disclosed in the cautioned interviews of the appellants against whom the assessors' opinion was unanimous could be gathered from the judgment of the trial judge in a summary form from paragraphs 37 (RATU INOKE TASERE), 38-41(JIMI KOROIBETE), 63-65 (ULAIASI RABUA TUIVOMO), 66 (SEMI TANIKILI), 67-69 (MOSESE NAVACI), 70-71 (ERONI RIKORIKO), 72-73 (ALIFERETI GONEWAI) and 74-75 (JOLAME RATULEVU),
- [7] The trial judge at paragraphs 85-100 (SERU KUNALAGI), 123-134 (RATU OSEA BOLAWAQATABU, 135-150 (RATU TEVITA MAKUTU) and 151-167 (ALIFERETI NAKUINIVOU) had dealt with the cautioned interviews of the appellants against whom the assessors' opinion was mixed.
- [8] A timely notice to appeal against conviction and sentence had been filed on behalf of the appellants on 29 December 2017 by Aman Ravindra-Singh Lawyers. Written submissions on their behalf had been filed on 18 June 2020 by Law Solutions. The State had tendered its written submissions on 09 July 2020.
- [9] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellants could appeal against conviction and sentence only with leave of court. The test for leave to appeal is '**reasonable prospect of success**' (see Caucan v State AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and State v Vakarau AAU0052 of 2017:4 October 2018 [2018] FJCA 173, Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and Waqasaga v State [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see Chand v State [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), Chaudry v State [2014] FJCA 106; AAU10 of 2014 and Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.
- [10] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; House v The King [1936] HCA 40; (1936) 55 CLR 499, Kim Nam Bac v The State Criminal Appeal No.AAU0015 and Chirk King Yam v The

State Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of **Kim Nam Bae's** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

- (i) *Acted upon a wrong principle;*
- (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) *Mistook the facts;*
- (iv) *Failed to take into account some relevant consideration.*

[11] **Grounds of appeal**

CONVICTION

1. *That the Learned Trial Judge erred in law when he dismissed the application for a Voir Dire on the issue of admissibility of a photocopied document titled the Nadroga Navosa Sovereign Christian State Provisional Institution of Self Government"*

2. *That the Learned Trial Judge erred in law as outlined under the provisions of Voir Dire under section 288 of the provision of the Criminal Procedure Decree which allows for the determination for the of any issue in the course of the trial in any Court.*

3. *That the Learned Trial Judge erred in law and fact as there was no evidence provided by the prosecution to prove that any of the accused person had a seditious intention.*

4. *That the Learned Trial Judge erred in law and fact by making a finding that the accused intended the consequences of their actions when they signed the document headed "Nadroga Navosa Sovereign Christian State Provisional Institution of Self Government" since there was no evidence provided by the Prosecution that any of the accused knew the contents of this document headed "Nadroga-Navosa Sovereign Christian State Provisional Institution of Self Government.*

5. *That the Learned Trial Judge erred in law and fact by making a finding that the Accused intended the consequences of their actions when they signed the document headed "Nadroga Navosa Sovereign Christian State Provisional Institutions of Self Government" since there is no evidence provided by the Prosecution that any of the accused had ever participated in the drafting, writing or authoring of this document headed "Nadroga-*

Navosa Sovereign Christian State Provisional Institution of Self Government."

6. *That the Learned Trial Judge erred in fact by making a finding that the accused took an unlawful oath when there was no evidence provided by the Prosecution that the oath was illegal.*

7. *That the Learned Trial Judge erred in law and fact by making a finding that the accused had taken an unlawful oath as there was no written wordings provided by the Prosecution during the trial to prove that this oath was against the State and unlawful.*

8. *That the learned Trial Judge erred in law and fact by making a finding that the Accused took an oath to serve as Cabinet Ministers in an unlawful entity since there was no evidence provided by the Prosecution which proved that the accused persons had planned to establish a separate state in Nadroga and Navosa.*

9. *That the Learned Trial Judge erred in law by failing to uphold the Fiji Constitution 2013 as provided for under section 2 (1) which provides for the Fiji Constitution 2013 as the supreme law of the land.*

SENTENCE

10. *That the Appellant appeals against their sentence on the grounds that it is manifestly harsh excessive and wrong in principle considering that they were first offenders.*

11. *The Learned Trial Judge erred when his Lordship failed to take into relevant account matters all the appellants (a) age, (b) poor health conditions & (c) previous good character while considering the mitigating factors prior to sentencing.*

01st and 02nd grounds of appeal

- [12] The appellants complain that the trial judge failed to hold a *voir dire* inquiry into admissibility of the original of Prosecution Exhibit 28 called "*NADROGA-NAVOSA SOVEREIGN CHRISTIAN STATE -Provisional Institutions of Self-Government*" despite objections of the appellants. I cannot see any reference to such an objection or a ruling in the summing-up or the judgment. However, it appears from the summing-up and the judgment that the appellants' real challenge at the trial had not been to the photocopy of PE28 produced by the prosecution, for they had admitted their signatures on PE28. None of them gave evidence to the contrary either.

- [13] Therefore, not producing the original of PE28 does not appear to have prejudiced their defense and caused a miscarriage of justice and therefore, these grounds of appeal have no reasonable prospect of success.

03rd and 04th grounds of appeal

- [14] The appellants challenge the finding of seditious intention against them under the above two grounds.
- [15] The trial judge had identified the elements of the charges levelled against the appellants in paragraphs 15, 18-27, 28 and 29 of the summing-up. The judge had then directed the assessors on what the prosecution had to prove in terms of establishing seditious intention in paragraphs 32, 33, 36, 37. The trial judge had brought to the attention of the assessors the evidence led by the prosecution against the appellants including their cautioned interviews in paragraphs 42-129 and the fact that the appellants had remained silent but the judge had warned them that no adverse inference should be drawn against the appellants due to their silence. The judge had then analyzed once again what the prosecution had undertaken to prove in terms of both charges in paragraphs 188-190 of the summing-up and the appellants' position *vis-à-vis* the charges from paragraphs 191-248. The judge had specifically directed the assessors in paragraph 223 of the summing-up that they need to look at the contents of the entirety of PE28 before coming to a conclusion whether the words used in the document are seditious or not in terms of section 66 of the Crimes Act. The trial judge had quoted the following paragraphs in particular from PE28 for consideration of the assessors at paragraph 226 of the summing-up.

226. The document headed "Nadroga-Navosa Sovereign Christian **State** Provisional Institutions of Self-Government" (prosecution exhibit no. 28) **states** *inter-alia*:-

Page 1, first paragraph

"We, the democratically elected (by consensus) leaders of the People, hereby declare Nadroga-Navosa Province to be an independent and sovereign **State**, and to be hereinafter known as the "Nadroga-Navosa Sovereign Christian **State**".

Page 2, Line 15

"Therefore, we intend to put immediate end to all self-serving governments of all persuasions who have ruled us contemptuously in the past, as from the date of this Declaration."

Page 2, second paragraph, line 5

"We also claim the rights accorded us by the Statutes of Genocide 1949 for protection against genocidal laws which have been promulgated by the current government of Fiji over the past eight years, and which are now enshrined in their Fiji 2013 'mainstreaming' Constitution..."

Page 3, second paragraph

"As native people of Fiji, we reject outright the 'mainstreaming' Constitution of the current government, assented to on 6 September, 2013..."

Page 3, second paragraph, line 6

"We also reject outright the use of the thesis written by Muslim man, Aiyaz Saiyed Khaiyum, who is Fiji's current Attorney-General and Justice Minister,... for the 'extermination' of the native Fijian race of people from the landscape of Fiji, our country of origin..."

Page 3, third paragraph

"Our overwhelming desire to free and extricate ourselves and our future generations from the tyranny of foreign subjugation and genocidal laws intended for our extermination ... is the single decisive impetus for our Unilateral Declaration of Independence on 10 October, 2014."

Page 7, paragraph 6

*"As attested to by facts articulated in this Declaration, we, the democratically elected (by consensus) leaders of the People of Nadroga-Navosa for reasons pertaining to our own survival, and that of our generations to come, hereby declare this province of Nadroga-Navosa to be an independent and sovereign **State**, and to hereinafter known as the "Nadroga-Navosa Sovereign Christian **State** "..."*

- [16] Having done so, the trial judge had referred the assessors to the appellants' position that no seditious intention was entertained at paragraph 227 and elaborated once again the explanations of the appellants at paragraphs 191-248. He had also directed the assessors to consider the cautioned interviews and PE28 *in toto* to decide whether the contents of PE28 were seditious or not. He had also directed the assessors in paragraph 271 that they had to decide whether those acts *i.e.* signing PE28 and taking an oath as a Cabinet Minister were done with seditious intention. The judge had also

brought to their attention the deeming provision of section 66(2) of the Crimes Act in relation to deciding the seditious intention on the part of the appellants (see paragraphs 22 and 272). Finally, the trial judge had given directions to the assessors to find the appellants not guilty if they believed their version and then directed them that even if they did not believe them still they had to consider whether prosecution had proved its case beyond reasonable doubt (see paragraphs 278, 279 and 283 of the summing-up)

- [17] After the assessors had expressed unanimous and mixed opinions on the appellants, the trial judge had in his judgment directed himself according to the summing-up and gone further and analyzed the evidence against each one of them from paragraphs 37-82 (on unanimous opinions) and paragraphs 83-167 (on mixed opinions) and convicted all of them on the charges levelled against them except RATU OSEA BOLAWAQATABU (08th accused) who was found not guilty of the 15th count.
- [18] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide Mohammed v State [2014] FJSC 2; CAV02.2013 (27 February 2014), Kaiyum v State [2014] FJCA 35; AAU0071.2012 (14 March 2014), Chandra v State [2015] FJSC 32; CAV21.2015 (10 December 2015) and Kumar v State [2018] FJCA 136; AAU103.2016 (30 August 2018)]
- [19] On the other hand when the trial judge disagrees with the majority of assessors the trial judge should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical

examination in the light of the whole of the evidence presented in the trial [vide Lautabui v State [2009] FJSC 7; CAV0024.2008 (6 February 2009), Ram v State [2012] FJSC 12; CAV0001.2011 (9 May 2012), Chandra v State [2015] FJSC 32; CAV21.2015 (10 December 2015), Baleilevuka v State [2019] FJCA 209; AAU58.2015 (3 October 2019) and Singh v State [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]

- [20] On the careful consideration of the judgment I am of the view that the learned trial judge had measured up to his legal obligations in respect of unanimous and mixed opinions when he agreed and disagreed with the assessors.
- [21] The appellant's argument that there was no evidence of discontent or dissatisfaction among the inhabitants of Fiji would hold little water as the charges levelled against them did not require such evidence to make the appellants culpable. In my view, tangible evidence of actual discontent or dissatisfaction among the inhabitants of Fiji is not required to prove a charge under section 67(1)(a) of the Crimes Act, 2009. What is required is the inference of the intention to raise discontent or dissatisfaction among the inhabitants of Fiji.
- [22] The appellants also argue that there was no evidence that they were aware of the contents of PE28. The trial judge had after a careful analysis held that except RATU OSEA BOLAWAQATABU (08th accused) others were aware of the contents. RATU OSEA BOLAWAQATABU was acquitted of count 15 because the judge was not satisfied that there was evidence that he was aware of the contents of PE28.
- [23] In any event, none of the appellants gave evidence and took up that position at the trial. Therefore, the only evidence the trial judge had before him to consider was the prosecution evidence including their cautioned interviews.
- [24] Therefore, I do not think that these grounds of appeal have a reasonable prospect of success.

05th ground of appeal

- [25] The argument here is that the appellants were not involved in any planning and the formulation of the document PE28 and they could not write and read English.
- [26] It is clear that the prosecution had not conducted its case on the basis that the appellants were the authors of PE28 or they had compiled PE28 or they were involved in formulating PE28. To incur criminal liability under section 67(1)(a) of the Crimes Act, 2009, the prosecution did not have to attribute the authorship of PE28 to the appellants. The trial judge had fully understood it and never attempted to attribute such an authorship of PE28 to the appellants either in the summing-up or the judgment. It had been brought to the meeting on 04 November 2014 by Ms. Mereoni Kirwin.
- [27] Therefore, this ground of appeal has no reasonable prospect of success in appeal.

06th to 08th grounds of appeal

- [28] The gist of the argument here is based on the oath taken by the appellants. The appellants complain of the oath supposedly taken by him, its contents (actual words) and it being different to the oath administered on the Cabinet Ministers of the Fiji Government.
- [29] The trial judge had dealt with what the prosecution was expected to prove under the counts based on the oath at paragraph 37 of the summing-up. The eye-witness Mr. Napolioni Batimala had testified to the appellants having taken an oath but he could not remember the contents of the oath. Then the trial judge had addressed the assessors on the oath taking event at paragraphs 271 of the summing-up.
- [30] In the judgment the trial judge had given his mind to the evidence on the appellants having taken an oath as Cabinet Ministers. The judge had correctly concluded that the exact words of the oath did not really matter.
- [31] Therefore, these grounds of appeal have no reasonable prospect of success in appeal.

09th ground of appeal

- [32] The appellants have not demonstrated how the learned trial judge had failed to uphold the Constitution of Fiji. The trial judge at paragraph 82 of the summing up had correctly recognised that political rights are not absolute rights and could be lawfully restricted to protect the tranquillity of the State with sedition being one such instance.
- [33] Therefore, this ground of appeal has no reasonable prospect of success in appeal

10th to 12th grounds of appeal (sentence)

- [34] The appellants complain that the sentence passed on her was harsh and excessive and wrong in principle in all circumstances of the case.
- [35] The maximum sentence for an offence under section 67(1) is 07 years of imprisonment. The trial judge had picked the starting point at 03 years, given a discount of 06 months for all mitigating features (there being no aggravating factors as conceded by the state) and reduced 02 months and 19 days of remand period to arrive at the final sentence of 02 years, 03 months and 11 days.
- [36] The appellants complain that the trial judge had not considered the fact that they were first time offenders. However, I find that in paragraph 70 of the sentencing order that the judge had referred to the fact that the appellants except ULAIASI RABUA TUIVOMO were persons of good character without any previous conviction. He had also considered individual medical conditions of the appellants.
- [37] The appellants have submitted that the starting point of 03 years is too high but has not substantiated that assertion with any law or judicial precedents.
- [38] The trial judge had carefully considered the objective seriousness of the offence, the purpose of the sentence, some previous sentencing decisions, why the sentence should not be suspended and explained why he was not imposing a non-parole period (*vide* paragraphs 8 – 16, 66, 67, 68-72 and 73 of the sentencing order).

- [39] The trial judge had not erred in principle. Neither was the sentence harsh and excessive. The trial judge had not taken any irrelevant matters into account contrary to the appellants' criticism.
- [40] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (**vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].
- [41] Before parting with this ruling I wish to point out that the drafting of appeal grounds has left a great deal to be desired. As stated in **Silatolu v The State** [2006] FJCA 13; AAU0024.2003S (10 March 2006) the counsel seems to have adopted a 'scatter gun' approach in drafting some appeal grounds. In **Pal v State** [2020] FJCA 179; AAU145.2019 (24 September 2020), I made *inter alia* the following remarks on drafting of appeal grounds.

*'[20] Lord Parker CJ in **Practice Note (Crime: Applications for Leave to Appeal)** [1970] 1 WLR 663 reminded counsel that 'it is useless to appeal without grounds and that the grounds should be substantiated and particularized and not a mere formula'. Though what degree of particularity is required may not be capable of precise definition, they should be detailed enough to enable court to identify clearly the matters relied upon.*

*[21] It is the duty of the counsel in drafting and arguing grounds of appeal to act responsibly and not to make sweeping and unjustified attacks on the summing-up of the trial judge unless such attacks can be justified [vide **Morson** (1976) Cr App R 236]. Thus, counsel should not settle or sign grounds of appeal unless they are reasonable, have some real prospect of success and are such that he is prepared to argue before the court [vide paragraph 2.4 of the '**A Guide to Proceedings in the Court of Appeal Criminal Division**' ('the Guide') published in 77 Cr App R 138].*

[22] Du Parcq J in **Fielding** (1938) 26 Cr App R 211 said that

'It is most unsatisfactory that grounds of appeal should be drawn with such vagueness Ground 4 is in the following terms: "That the judge failed adequately to direct the jury as to the law and evidence to be considered by them".'

'It is not only placing an unnecessary burden on the court to ask it to search through the summing-up and the transcript of the evidence to find out what there may be to be complained of, but it is also unfair to the prosecution, who are entitled to know what case they have to meet.'

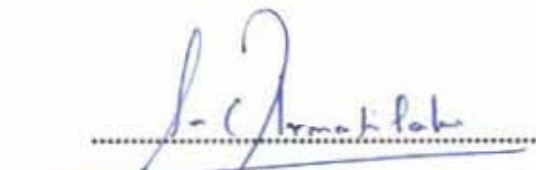
[23] In **Singh** [1973] Crim LR 36 the Court of Appeal drew attention to the danger of extracting sentences from the summing-up out of context when, if they had been quoted in context, they would have been unobjectionable. **Nico** [1972] Crim LR 420 similarly states that the terms of any misdirection relied upon must be set out in the grounds.

[24] While the grounds of appeal should be reasonable full, counsel should not go to the opposite extreme and overloading them [vide **Pybus** (1983) *The Times*, 23 February 1983]. In **James; Selby** [2016] EWCA Crim 1639; [2017] Crim.L.R.228 the court warned that if grounds of appeal are inexcusably prolix and not consolidated, an application for leave to appeal might be refused on the basis that no ground was identifiable.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.




Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL