
Criminal law and social change in Fiji: Lessons from two criminal trials

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INTRODUCTION

I had the privilege in 2004 and 2006 to prosecute two criminal trials in Fiji on behalf of the Fijian Director of Public Prosecutions. He had requested outside assistance from the New South Wales Director of Public Prosecutions because of the political sensitivity of the two matters. The prosecution of these two matters gave me the opportunity to contemplate the foundations and structure of our own criminal justice system in Australia. Many of the legal issues that I dealt with during these two trials had not been confronted in New South Wales since the days of the early colonialists. Fiji is a developing democracy in which many serious constitutional, legal and political hurdles still have to be overcome. For this reason, some very interesting decisions have been made in the Fijian courts. The courts of some other former British colonial territories, particularly in the Caribbean, are in a very similar position. Many of the most bizarre factual and legal issues in the Privy Council have come on appeal from the courts of small, emerging, post-colonial nations.

The rule of law is an integral part of a democracy. A stable and independent criminal justice system is probably the most important single element of the rule of law. It would be easy to view the struggles of the Fijian people to achieve stable political and legal systems as something which only developing countries have to grapple with. However, this view involves extreme historical short-sightedness. The progression of a nation from the rule of the jungle or the mob to a stable democracy where the rule of law is respected can be a long road or a short road. In England, for example, it was a very long road over many centuries, which included numerous wars (including one which lasted over a hundred years), coups, regicides, and numerous political and legal upheavals.

Fiji only achieved independence from Britain in 1970. In the 37 years since independence, in an attempt to provide a solid foundation for the rule of law and political democracy, there have been great strides forward and some significant slides backwards. Fiji now has an independent judiciary of considerable stature and ability, an independent Director of Public Prosecutions, a fully functioning police force, a functioning, but grossly overburdened prison system, an independent and structured legal profession, a Human Rights Commissioner, a law school and a very solid and intricate body of legal precedents developed in its own superior courts and the superior courts of other Pacific island nations. On the other hand, the last 30 years have also seen no fewer than four coups in Fiji, the last of which, a bloodless military coup by Commodore Frank Bainimarama, commenced during the course of the second trial which I conducted last year.

FIJI SINCE INDEPENDENCE

Fiji today has a racial divide which is much more serious for the overall health of the nation than any of the ethnic divisions that we have in Australia. Race was, and still is a most significant political issue in the Republic of the Fiji Islands.¹ The communal divisions are essentially a legacy of British imperialism, beginning in 1874 when Ratu² Seru Cakobau, then the dominant chief in Fiji, invited Britain to take over the islands.³ The population is largely composed of two very distinct

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¹ For analysis of the racial divide in Fiji and the account of the 2004 trial see: Tedeschi M, "Prosecuting in Paradise – Race, Politics and the Rule of Law in Fiji" (2005) 44(1) *Crime, Law and Social Change* 79.

² The title "Ratu" means Chief.

³ See Laracy H, "An historic View of Fiji" in Lal BV and Peters M (eds), *Coup: Reflections on the Political Crisis in Fiji* (Pandanus Books, 2001); Davies J, *On the Source of Inter-Ethnic Conflict in Fiji*, May 2000, <http://ourworld.compuserve.com/homepages/rhimona/karere/davies.htm> (viewed 30 July 2007).

communities: the indigenous Fijians and the Indo-Fijians. Indigenous Fijians are the descendants of the original Polynesian and Melanesian inhabitants of Fiji who migrated to the South Pacific about 3,500 years ago. The indigenous Fijians hold 84% of the land through the Native Land Trust Board and completely dominate the armed services and the civil services, including the police. The Indo-Fijians are generally descendants of indentured labourers brought to the island by the British in the 19th century to work the sugar cane plantations. They own most of the successful businesses, and are financially and educationally the dominant sector of the economy. By the 1970s, the Indo-Fijian proportion of the total population had crept past that of the indigenous community. The indigenous Fijians, who had for many years watched with overriding concern the growth of the Indo-Fijian population, the ever-increasing financial power which they exerted, and the slow expansion of Indo-Fijian political influence in Parliament, had become fearful of losing their political ascendancy to the more vocal and politically conscious nationals of Indian origin.⁴ By 1986, Indo-Fijians accounted for 48.6% of the population and were the largest ethnic group in the country, whilst the indigenous Fijians comprised only 46.2% of the population.

RABUKA COUPS IN 1987

Arising out of fears by the indigenous Fijians that they were losing control of their own country, in 1987, Lieutenant Colonel Sitiveni Rabuka led two successful military coups, the first ousting the newly elected multi-racial Labour Government of Dr Timoci Bavadra, a traditional leader from western Fiji who headed a government dominated by members of Fiji's Indian community. Rabuka appointed himself a Major General and became the new Prime Minister of Fiji; later that year he declared Fiji a republic. The indigenous stranglehold on the political life of Fiji continued unabated. Major General Rabuka, transformed himself from a military strongman into a fully-fledged civilian political leader. A racially biased Constitution, which reduced the number of parliamentary seats for Indo-Fijians, was adopted in 1990 and under this Constitution, Rabuka was elected Prime Minister in 1992. The new Constitution was intended to ensure the perpetual political supremacy of the indigenous Fijians by dividing the electorate into racial blocks and reserving to the indigenous sector a majority of seats in the Parliament.⁵

Not a single coup participant was ever prosecuted for any criminal offence arising out of the two coups in 1987. The sequelae of the coups were entirely played out in the political, economic and social arenas. The criminal courts were seen as having no role in dealing with what had in essence been a complete rupture of the legal status quo. In 1993, international condemnation and economic considerations led to Rabuka initiating a constitutional review which resulted, in 1997, in a revised multi-racial Constitution omitting some of the more objectionable aspects of the 1990 document. Fiji was readmitted to the Commonwealth and economic prosperity slowly returned. The new Constitution was, however, rejected by extremist indigenous elements who claimed that in introducing the multi-racial Constitution, the government had sold out indigenous rights.⁶

THE 1999 ELECTIONS

In the 1999 elections, the first under the 1997 multi-racial Constitution, the nightmare of the extremist indigenous population became a reality when, for the first time, the indigenous vote was split.⁷ The indigenous population showed for the first time that race and land rights were not the only significant political issues, and they voted in droves for the multi-racial Fiji Labour Party, now led by former

⁴ See Sherlock D, "Constitutional and Political Change in Fiji", *Australian Parliamentary Library Research Paper*, 11 November 1997.

⁵ See Fiji Constitution Review Commission, *The Fiji Islands: Towards a United Future. Report of the Fiji Constitution Review Commission 1996*, Suva, 1996, App B, for a discussion on the differences between the 1990 and 1997 Constitutions.

⁶ Lal BV, "A Time to Change: The Fiji General Elections of 1999" in Lal BV (ed), *Fiji Before the Storm* (Asia Pacific Press, Canberra, 2000), esp pp 33-34; Alley R, "The Coup Crisis in Fiji" (2000) 35(3) *Australian Journal of Political Science* 515 at 517.

⁷ See Lal (ed), n 6, Chs 3-5.

Trade Union leader, Mahendra Chaudhary, an Indo-Fijian.⁸ The vote resulted in Chaudhary replacing Rabuka as Prime Minister and becoming the first non-indigenous Prime Minister since independence from Britain in 1970. The state of the economy and a desire for political stability were as much at the crux of this election as racial issues and the Constitution. The Chaudhary Government was truly a multi-racial one, with two indigenous Fijians as his Deputies and a Cabinet dominated by indigenous Fijians. Rabuka gracefully retired from active politics.

GEORGE SPEIGHT'S COUP

On the morning of 19 May 2000, the Labour Government of Fiji was celebrating its first anniversary in office. Mahendra Chaudhary and several of his close associates held a small private party at Parliament House in the capital, Suva, to mark the occasion. As a result, the commencement of the parliamentary sitting was delayed. At the same time, a large group of indigenous people were massing in central Suva to demonstrate their disaffection with the government on land rights issues. They began to march towards the President's offices at Government House. The Prime Minister had been assured by the Commissioner of Police the previous day that the marchers posed no threat to the government or the Parliament. At about 10.30 am, the Parliament began sitting for the day. The Deputy Prime Minister was addressing the Chamber when a group of seven or eight heavily armed men under the leadership of George Speight came into the Chamber and seized the Prime Minister and a large number of parliamentarians as hostages. Speight announced that he was affecting a civilian coup in the name of the indigenous Fijians. The marchers, on hearing of the coup, changed their plans and hurriedly advanced to the Parliament building where they formed a human shield around the complex to protect the intruders inside.⁹

The President of Fiji at that time was Ratu Sir Kamisese Mara, a traditional High Chief, former Prime Minister and a statesman of immense national and international status. Ratu Mara's daughter, who was a Member of Parliament, was one of those kept hostage by Speight and his rebels.¹⁰ Under the Constitution, the President of Fiji is a largely ceremonial Head of State who is appointed by a body known as the Great Council of Chiefs. He is, however, according to the Constitution, the Commander-in-Chief of the Republic of Fiji Military Forces (RFMF). The Constitution obliges him to follow the advice of his Prime Minister, but in this instance his Prime Minister was being held hostage. Ratu Mara went on national television on the day of the coup and called upon his nation to stand firm against the coup plotters and to remain calm. He informed the populace that the heads of the armed forces and the police had assured him of their loyalty, as had the chairmen of the Great Council of Chiefs and the Public Service Commission. Ratu Mara declared a state of emergency and issued a number of presidential decrees that day in which he assumed full executive authority over the nation and gave orders to the armed services and the police in an attempt to maintain law and order.¹¹

A standoff then ensued, with the armed coup plotters, some indigenous supporters and the hostages inside the parliamentary complex being surrounded by a large cordon of soldiers who controlled anyone going in or out of the complex. This perilous impasse was not resolved for another 56 days, during which time most of the Indian and expatriate members of the former government were kept hostage under appalling conditions and under constant threat of losing their lives. Ratu Mara maintained his position of leadership for 10 days after the coup, when he allowed himself to be

⁸ Lal BV, "Chiefs and Thieves and Other People Besides: The Making of George Speight's Coup" (2000) 35(3) *Journal of Pacific History* 281; Ong M, "Fiji: May Elections and the New Government", Parliament of Australia, Parliamentary Library, Current Issues Brief 17 1998-99, esp pp 9-10.

⁹ There is a strong suggestion that the march was orchestrated to draw police away from the Parliament, and then to provide a human shield for those who had taken it over. In the early moments of the coup, Speight made a series of mobile phone calls to one of the leaders of the march.

¹⁰ "Fiji Leaders at Loggerheads", *BBC News*, 31 May 2000, <http://news.bbc.co.uk/2/hi/asia-pacific/770439.stm> (viewed 30 July 2007)..

¹¹ This assumption of executive authority was later declared by the courts to have been a valid exercise of his functions in the extreme situation that he faced: see *Prasad v Republic of Fiji* [2000] FJHC 122; Hbc0217.001 (15 November 2000); *Republic of Fiji Islands v Prasad* [2001] FJCA 2; Abu0078.00s (1 March 2001).

transported for his own safety onto a Fijian Navy warship situated off Suva. Shortly afterwards, he stood aside as President to allow Commodore Bainimarama to assume executive control as the head of an interim military government. He was never again to serve as President.¹²

A number of prominent indigenous leaders, including some members of the Parliament that had just been invaded, were offered positions by Speight in his new rebel government in the first 24 hours of the coup. Some of them unhesitatingly refused the positions they were offered. Others hesitated, and then, after an opportunity to think overnight, declined. However, a number accepted with relish; no doubt, they were mindful of the fact that none of those who had taken part in the 1987 coups had been punished. The formation of this rebel government was an important step in the attempt by Speight to wrestle power away from the legitimate President and government and to convince the people of Fiji that he effectively held the reins of power. In effect, it lent significant credibility to George Speight's takeover.¹³

SWEARING-IN OF GEORGE SPEIGHT'S PRESIDENT AND MINISTERS

On the morning of 20 May, the day following the coup, George Speight announced to the media that there would be a swearing-in of his new President and Ministers at the Parliament later that day. At about midday, a large group of people assembled in the government conference room in the Parliament building, including George Speight, two of his close associates, Timoci Silatolu and Joe Nata, and seven other persons who had agreed to accept positions as President and Ministers in Speight's rebel government. There was also a large contingent of the media, including a cameraman from Fiji TV One. Speight then announced that Ratu Jope Seniloli, a minor Chief from the miniscule but politically prominent island of Bau,¹⁴ would take an oath of office as interim President. Ratu Seniloli had worked as a schoolteacher for 33 years. In his retirement he had become the President of the main political party of indigenous Fijians, the Soqosoqo no Vakavulewa ni Taukei (SVT) Party, although he had never been a Member of Parliament. Seniloli was handed a bible by Joe Nata and he then read out an oath of office as interim President. Ironically, the form of the oath was taken straight from the oaths prescribed for a President in the 1997 Constitution. He then signed the written oath.

The others whom Speight chose to participate in his rebel government were, with one exception, existing indigenous Members of Parliament. Ratu Rakuita Vakalalabure, who was sworn in as Minister of Justice, was a qualified lawyer who, in 1999, had won a by-election for a seat in the Parliament as a member of the indigenous SVT Party, which was the main opposition party. Ratu Viliame Volavola was a Lieutenant Colonel in the Fiji Military Force, a minor Chief from the Province of Tailevu, a trained surveyor, an elder in the Mormon Church, and a member of the Fijian Association Party, which, although an indigenous party, was in coalition with Mahendra Chaudhary's Fiji Labour Party. Isireli Leweniqila was a Member of Parliament and a member of the indigenous SVT Party. He had an economics degree and had previously served for some years in local government. He had taken over his father's parliamentary seat in the 1999 election. Ironically, his father had been the Speaker of the House of Representatives in 1987 during Rabuka's first coup. Peceli Rinakama was also a Member of Parliament and a member of the Fijian Association Party in the government coalition. The only person

¹² In a court affidavit in November 2000, Ratu Sir Kamisese Mara recorded that on 29 May, while on the warship, Commander Bainimarama had informed him that in his opinion the 1997 Constitution did not provide a framework for resolving the crisis and should be abrogated. Ratu Mara continued, "I indicated that if the Constitution were to be abrogated, I would then not return to the Office of President". The Commander then assumed executive authority as "Commander and Head of the Interim Military Government of Fiji". On 29 May, the Commander purported to abrogate the Constitution (as it turned out unsuccessfully). See *Republic of Fiji Islands v Prasad* [2001] FJCA 2; Abu0078.2000s (1 March 2001). Ratu Mara did not formally resign his position as President until December 2000. In a videoed interview released only after his death in 2004, Ratu Mara hinted that he had been tricked into leaving Government House for the safety of the warship where he surrendered power to Commodore Bainimarama.

¹³ "State Sums Up its Case", *Fijilive*, 3 August 2004.

¹⁴ The Island of Bau, which is only a few hundred metres across, is the titular and historic home of the Confederacy of Kubuna, one of the three great Confederacies that make up the nation of Fiji. Ratu Jope had status as the only Chief who still lived on the Island, although he was not in a position to be a Paramount Chief in his own right.

who was not a Member of Parliament was Viliame Savu, a retired radio technician and aircraft telecommunications engineer who had been politically active for nearly 30 years in one of the indigenous land rights movements, the Nationalist Vanua Party. Savu was one of the principal organisers of the mass march on Suva which had occurred on the morning of 19 May 2000. Savu was filmed leading in the front row of the marchers. In a later interview with the police he admitted knowing beforehand about the intended coup.¹⁵

Later that day, Speight issued a number of decrees, purporting to act in the name of his new rebel government. However, his President and Ministers never actually exercised any further official functions. A few days after the swearing-in ceremony, his President, Ratu Seniloli, departed Suva for his island home. Without the support of the armed services or the Great Council of Chiefs, those who had seen themselves as the leaders of a new indigenous government must soon have realised that Speight would eventually have to capitulate. Meanwhile, the "carnival" atmosphere at Parliament continued, punctuated by occasional acts of violence or threats of violence, with numerous traditional kava-drinking ceremonies to break the tension and monotony. The potential for a catastrophic massacre was always just a hair-trigger away. The Speight group with their hostages and the large, protective group of civilian supporters around them could have gone on a killing spree on the slightest pretext or misunderstanding. That this did not happen is a great tribute to the military personnel at the Parliament and their commanders. At least one soldier was killed. In the meantime, law and order had almost entirely broken down, not just in Suva but throughout Fiji, with numerous members of the Indo-Fijian community subjected to acts of rape, other personal violence and arson.¹⁶ Makeshift road blocks manned by self-appointed vigilantes suddenly appeared around the country. Even before the resolution of the coup, more Indo-Fijians who had the opportunity to leave the country had already done so. Many more were to follow.

MUANIKAU ACCORD

The resolution of the crisis only came on 9 July 2000, after a 56-day standoff, with the signing of the Muanikau Accord by Speight and Commodore Bainimarama.¹⁷ The Accord provided for the release of the hostages, the dispersal of the rebels from the parliamentary complex, and the return of all firearms to the military. The Accord also purported to guarantee immunity from prosecution to all those who had been engaged in the coup. Shortly after the Accord was signed, Commodore Bainimarama issued a decree as head of the interim military government purporting to grant that immunity from prosecution. Commodore Bainimarama was considered to have been the saviour of the nation, particularly by the Indian community. Bainimarama was viewed as the sole figure who had stood up to Speight and prevented him from taking power and setting up a new government. All of this had been achieved without any loss of life among the hostages at the Parliament.

QUEEN ELIZABETH BARRACKS MUTINY

Several months after the resolution of the coup, in November 2000, a military mutiny took place at the Queen Elizabeth Barracks in Suva. Almost all the mutineers were soldiers from the Counter Revolutionary Warfare Unit. The mutiny was carried out by soldiers who were disgruntled with the Commodore's role during and after George Speight's coup and particularly the bad treatment that had been afforded by the army to those soldiers who had assisted Speight.¹⁸ During the mutiny, a serious

¹⁵ This admission later led to him being convicted and gaoled for misprision of treason, an offence of failing to notify the authorities of the intended coup.

¹⁶ "Goodbye Democracy", *The Guardian*, 19 June 2000, <http://www.guardian.co.uk/fiji/article/0,,344893,00.html> (viewed 30 July 2007); "Isle of Terror", *The Guardian*, 30 May 2000, <http://www.guardian.co.uk/comment/story/0,,319946,00.html> (viewed 30 July 2007); International Bar Association, *Comments on Fiji's Promotion of Reconciliation, Tolerance and Unity Bill* (London, 2005); Alley, n 6 at 515-521; Lal, n 8.

¹⁷ "9 Hostages released in Fiji Ahead of Chief's meeting", *Asia Political News*, 17 July 2000.

¹⁸ After the coup a military inquiry was launched into the role of the Counter Revolutionary Warfare Unit. Shortly before the mutiny, an announcement had been made that the unit was to be disbanded. The demands of the mutineers were: first, no disbandment of the unit, and secondly, the replacement of Commodore Bainimarama as Commander.

attempt was made on the life of Commodore Bainimarama.¹⁹ The rebellion was ruthlessly put down, resulting in the deaths of eight soldiers and the wounding of 18.

CHARGES ARE LAID AGAINST GEORGE SPEIGHT AND OTHERS

Despite the Muanikau Accord and the immunity decree, within a short time of a civilian government taking over, George Speight and a number of his leading coup followers, including Colonel Ligiari, Timoci Silatolu and Joe Nata, were charged with treason. The list of those charged with treason did not include those who had sworn oaths of office as President or Ministers on 20 or 21 May. It was only in early March 2003 that the Fiji High Court delivered a verdict in the treason trial of Silatolu and Nata,²⁰ Speight having previously pleaded guilty to treason.²¹ Their convictions provided the impetus for reconsidering the prosecution of those who had taken oaths of office as President or Ministers under Speight. By that time, it was no longer possible to charge them with treason because there was a statutory limitation period of two years on any prosecution for that offence and that period had already expired. The six persons who had taken oaths of office were therefore charged with a different offence under the *Public Order Act* of taking an oath that purported to bind the person to commit treason, an offence which carried a maximum sentence of life imprisonment. This was an offence based upon an ancient common law offence with virtually identical elements that had become virtually moribund throughout the common law world.

Since the end of the Speight coup, Seniloli had held the position of Vice-President of Fiji. Vakalalabure had been re-elected as a Member of Parliament and appointed as Deputy Speaker of the Lower House. In mid-2004, the Fijian Government of the day held office by a very slim margin, and those accused who were Members of Parliament stood to lose their seats if convicted. For all these reasons, this prosecution was of great public interest and considerable political sensitivity in Fiji. The Fijian Director of Public Prosecutions called for an expatriate prosecutor to prosecute these charges to assure everyone of objectivity and impartiality.²² I was chosen to be the Prosecutor.

TRIAL OF THE VICE-PRESIDENT AND FIVE OTHERS

There was a real legal issue which arose prior to the hearing of the trial about whether it was an abuse of the court processes to charge the accused with taking an illegal oath which bound them to commit treason when treason itself was not available to be charged because of the limitation period. This was a complicated area of law on which I could not find any precedents in the Fiji courts. On this issue of law, I found that there was a total divergence of approach between the United Kingdom on the one hand, which allowed the prosecution to avoid a limitation period by charging another offence, and New Zealand on the other, where such steps were forbidden as being an abuse of the court's processes. Australian courts took a position somewhat in the middle.²³ The Fiji Criminal Procedure Code provided that where there was no explicit provision applicable in the Code the courts were to follow the English procedures. Justice Shameem gave her ruling on this and other preliminary issues of law several weeks after the pre-trial hearing. On the issue of abuse of process she adopted the United Kingdom.

On Monday, 28 June 2004, the trial commenced in the High Court in Suva sitting in a court room normally reserved for the Supreme Court,²⁴ a room that in years past had been the Chamber of the Fijian Parliament, including at the time of the Rabuka coup. The trial judge assigned to the matter was

¹⁹ "Troops Found Guilty of Fiji Mutiny", *Sydney Morning Herald*, 21 July 2004.

²⁰ Criminal Action HAC 011 of 2001 before Justice Wilson in the High Court.

²¹ Speight pleaded guilty on the basis that most of his followers would not be charged with treason. He was initially sentenced to death, but that sentence was immediately commuted to life imprisonment, and shortly afterwards the death penalty was abolished in Fiji.

²² Nicholas Cowdery AM QC, the Director of Public Prosecutions, NSW and Bob Debus, Attorney General, NSW, were very supportive in providing this assistance to promote the rule of law in Fiji.

²³ See *R v Saraswati* (1991) 172 CLR 1.

²⁴ The ultimate appeal court in Fiji.

Justice Nazhat Shameem, a singularly impressive and suitably impassive Indo-Fijian High Court judge in her mid-40s who had achieved high office in a conservative and racially-divided society despite being a woman, and an Indo-Fijian. The six accused were all represented by local counsel. Ironically, Seniloli, the rebel President and current Vice-President, was represented by Mehboob Raza, an Indo-Fijian counsel considered to be one of the leaders of the local Bar, who in 1987 had been unceremoniously sacked by Colonel Rabuka from the position of Director of Public Prosecutions, a post he had held for only several days.

In Fiji, the trial judge has a more extensive role than a trial judge in most other common law countries. In Fiji, instead of a jury, there is a panel of between three and five assessors, who are lay people chosen at random by the court Registrar from the electoral roll. Their function is to make a recommendation to the trial judge about the verdict. Their recommendation need not be unanimous. The judge is then at liberty to depart from their recommendation, but if he or she does so, then reasons must be given. The judge is therefore the ultimate decider of the facts. I was concerned lest I end up with a bunch of elderly, hard-headed indigenous Fijians bound by traditional loyalties. However, I was gratified when we were provided with a list of the five assessors who were to hear our case to see that the three men and two women appeared to be a racially mixed bunch: an Indian employee, a Chinese media worker, a European woman married to an indigenous Fijian, a Fijian senior civil servant, and a bald-headed man whose ethnicity was impossible for me to guess.

I had decided before the trial began to try to limit the evidence to what was really required to prove the charges. I had culled the witnesses from more than 30 in my original brief to a mere 10 whom I thought were essential. I opened our case to the assessors and the judge by pointing out that the charge against each accused was a very simple one which focused entirely on the oath of office which each of them had taken. I stressed that they were not charged with treason and it was not a part of the prosecution case to allege that they had any prior knowledge of the coup, or any involvement in assisting Speight to carry it out. I also said that it was not necessary for the State to prove that the accused had subsequently carried out any functions or taken any decisions in their role as rebel President or Ministers, as the offence was completed when the oaths were taken. All that we had to prove was that the oath itself, on its face, purported or appeared to bind or commit the accused to carry out acts which, if done by them, would have amounted to treason. Our case was that any actions as rebel President or Ministers at a time when the lawful President, Ratu Mara, was exercising executive functions as the legitimate Head of State would have amounted to treason. I informed the court that our case would be entirely based on the events of 19-20 May 2000.

The best line of evidence in the trial came during the cross-examination of Ratu Tuakitau Cokanauto. He was being cross-examined by one of the defence counsel about the responsibilities of leadership of a Fijian Chief. Referring to his ancestor who had ceded Fiji to the British in 1874, he said:

I would like to say that in our traditional role as Chiefs, when Ratu Cokabau laid down his club, he took up the rule of law. It is the role of Chiefs to see that the rule of law is maintained and in keeping with the spirit of the laying down of that club.

Ratu Cokanauto had pinpointed what this trial was all about: maintaining the rule of law rather than the rule of the gun or the club. From my point of view, if the trial resulted in some future potential coup leader thinking twice before taking up arms against another lawful government, it would all have been worthwhile.

Defence counsel were in a very difficult position in defending their clients in this trial. The offence itself had been videotaped and played on national television, a highly unusual feature for a serious crime. The principal legal argument about abuse of process had been lost. What were they to do? Early in the trial, some of the defence counsel tried raising in front of the assessors some spurious issues that did not amount to defences at law. These included re-ventilating the abuse of process issues and pointing out that some others involved in the coup had not been charged. These were irrelevant to the issues before the assessors, and the judge upheld my objections and would not allow the defence counsel to pursue them. One of them even wanted to argue before the assessors that because his client was guilty of the more serious charge of treason, he should be acquitted of the lesser charge of taking an illegal oath. The judge also upheld my objection to this.

THE DEFENCES EMERGE

The real defences slowly emerged during the cross-examinations of my witnesses, but they were only properly detailed during the defence cases in unsworn statements from the dock which each accused made.²⁵ Four of the six accused (Vakalalabure, Volavola, Leweniqila and Rinakama) raised the defence of compulsion or duress. The law provides that if a person does an act which would otherwise be a crime under the threat of death or serious bodily injury to himself or another, then the person threatened is excused from criminal liability. The classic example is of some bank robbers who flee from the scene of their crime by threatening a passing driver with a gun, thereby forcing him to take them in his car and drive away from the bank. In this case, four of the six accused suggested that they had only gone along with the oaths of office because they felt threatened by Speight's armed men around the parliamentary complex and they felt that their own lives and the lives of the hostages were at risk if they did not comply with Speight's wishes.

The law of Fiji provided that compulsion was not available as a defence to this charge unless, within 14 days of the compulsion being removed, an accused person has reported the otherwise unlawful oath to a magistrate, senior police officer or army commander. Clearly, each of the accused had failed to report their oath as required. The defence counsel were quite taken aback by this requirement when I brought it to the attention of the court. However, I felt with every legal bone in my body that they should be permitted to argue this defence before the assessors, and that to prevent them from doing so ran a great risk of being held a miscarriage of justice in the appeal courts. So I worked out and presented to the judge a cogent argument why they should be allowed to raise compulsion. The law that they were alleged to have broken was one from England in the late 1700s, which sought to proscribe illegal conspiracies among people who had sworn in secrecy to support each other and to commit serious crimes. In the present case, the oaths had been taken in a very public arena, so that the whole nation knew about them. I submitted that because of the public notoriety of the oaths it could be argued that there had been constructive notification, as the accused were entitled to assume that a whole host of persons in positions of authority knew full well about their oaths, and that this relieved them of their individual obligation to report them. Justice Shameem entirely agreed with this approach.

Compulsion is not available as a defence if an accused has had an opportunity to get away from the source of the threat and has failed to avail himself of it. In this case, the evidence showed that the four Fijian Association Party members who had met with Speight and been offered posts in his new government, including the two accused, Volavola and Rinakama, who had been given the opportunity by Speight to go home and return to the Parliament to take their oaths. The other two, my witnesses, Ratu Tuakitau Cokanauto and Leone Tuisawaqa, had left the Parliament and not returned, but these two accused had stayed at the Parliament and taken the oaths. In my address, I submitted that their failure to take this opportunity to leave disentitled them to claim the defence of compulsion.

The main difficulty with the defence of compulsion for these four accused who had raised it was that not one of them had mentioned it in their police interviews as a reason for accepting their post from George Speight. In my address to the assessors, I drew their attention to every opportunity the accused had been given in their interviews to say that they had only participated because they had felt threatened. Ratu Rakuita Vakalalabure, the rebel Attorney General, had the additional problem that he had appeared at George Speight's second press conference on the afternoon of 19 May, sitting next to Speight and Silatolu. Speight introduced Silatolu as the interim Prime Minister and Vakalalabure as the interim Home Affairs Minister. Silatolu said that Vakalalabure would be liaising with the military and the police on behalf of the group. After Speight and Silatolu spoke, Vakalalabure addressed the assembled media in Fijian about how pleased he was that the indigenous people had taken over the reins of government.

Ratu Jope Seniloli raised a quite different and rare defence: that of necessity. In fact, this was the first trial I had ever done in more than two decades as a criminal law barrister in which this defence

²⁵ As at the dates of both trials conducted in 2004 and 2006, accused persons in Fiji were still permitted to make an unsworn statement from the dock which is not subject to cross-examination by the prosecutor.

had been raised. It allows a person to break the law in order to overcome a serious and imminent peril. The law says that where a person is faced with an imminent and serious peril and he genuinely believes on reasonable grounds that the *only* way of overcoming the peril is to do an illegal act, the person is excused from breaking the law so long as the breach of the law is not out of proportion to the peril. The classic example is a person who is walking along the street at night and he sees a deserted factory on fire and realises that unless he breaks into the factory and puts out the fire, the factory will be destroyed. Technically, the person has committed the offence of trespass or break and enter, but the law says he is to be excused.

In his unsworn statement to the court, Seniloli's defence was that he went to the Parliament and agreed to accept a post in the rebel government in order to utilise his chiefly authority to control the rebels and prevent them from harming the hostages. He also claimed that he thought that he would be able to help stop the looting and rioting that was happening in Suva and other parts of the country. He maintained that it was always his intention to restore the previous government.

The trouble with this defence for Seniloli was that he did not take a single active step to try and alleviate the hostages' situation or to prevent the burning and looting. In fact, he did not even visit the hostages once. After being appointed rebel President, he spent the next 24 hours in the parliamentary complex and then returned to Bau Island. In my address to the assessors, I suggested that if Seniloli had really been motivated to try and help the hostages and to stop the looting and burning he could have done any number of things to help, such as going to Ratu Mara and offering to make a joint statement to the nation requesting everyone to remain calm and calling on Speight to release the hostages. Instead, he placed himself in a position of direct opposition to Ratu Mara at a time when the latter was desperately trying to prevent the nation descending into chaos. At the time, Ratu Mara was the sole remaining person who was in any position to try and regain lawful control. I submitted that the defence of necessity had been disproven, as Seniloli had not been faced with a situation where he genuinely believed that his only realistic choice was to take the oath.

All accused except Savu also raised as a defence the proposition that these oaths had been a mere sham or pantomime which George Speight had staged for the media, rather than being serious oaths, and that they therefore had not possessed the required mental element in taking an engagement in the nature of an oath. It was part of the prosecution case that these were serious engagements that they had entered into, and not merely playacting. In my closing address to the assessors, I drew the analogy of a rehearsal for a wedding where the bride and groom practise taking their vows before the real ceremony. I submitted to the assessors that if they were watching a wedding rehearsal there would be many telltale signs that they would see that would alert them to the fact that it was not the real thing. For example, there would be hardly any guests present, the clothing of the participants might be casual, there could be some discussion about the ceremony between the parties and possibly even idle chatter that would not be seen at the real ceremony. On the other hand, I suggested to the assessors that if they watched the video of the swearing-in ceremony of the accused, they would see plenty of signs that this was no mere sham or pantomime but rather the real thing.

VERDICTS AND SENTENCES DELIVERED

On 5 August 2004, after deliberating for about three hours, the assessors returned and recommended guilty verdicts against five of the six accused: Seniloli, Vakalalabure, Volavola, Rinakama and Savu. Their vote was four to one in respect of the first four and unanimous for Savu. They unanimously recommended the acquittal of Leweniqila. Justice Shameem immediately indicated her acceptance of these recommendations and entered verdicts accordingly. The assessors clearly accepted that Vakalalabure had been a willing organiser of the swearing-in and they clearly rejected Seniloli's claim of necessity.

A day later, Justice Shameem sentenced all five convicted persons. Vakalalabure was given the longest term of six years. Seniloli was sentenced to four years. Volavola and Rinakama were given three years and Savu one year. Under normal circumstances, they each expected to serve about half these sentences.

The conviction of Ratu Jope Seniloli, the Vice-President of Fiji, in August 2004 had immediate political consequences. The government was faced with the embarrassing prospect of a serving

Vice-President in corrective custody. The Fijian Constitution provides a very cumbersome and time-consuming process for the removal of a Vice-President. This impasse was eventually resolved. His release in late November 2004, three months into a four-year sentence, was followed three days later by his resignation as Vice-President.

On 11 November 2004, the Fiji Court of Appeal dismissed all the appeals against conviction and sentence. The Supreme Court of Fiji subsequently heard an appeal by Vakalalabure and confirmed his conviction.

MAJOR GENERAL SITIVENI RABUKA

It was not until the conclusion of the trial of the alleged instigator of the mutiny, Ratu Inoke Takiveikata,²⁶ that consideration was given to prosecuting Rabuka. After a lengthy police investigation and extensive consideration in the office of the Director of Public Prosecutions, Rabuka was charged in relation to two telephone calls he was alleged to have made to a very senior officer in the RFMF, Lieutenant Colonel Viliame Seruvakula, in which it was alleged that he had suggested to Seruvakula the removal of Commodore Bainimarama as the Commander of the RFMF. Rabuka was charged with two counts of advisedly attempting to incite a member of the RFMF to commit a mutinous act. The first offence was alleged to have occurred around 4 July 2000, the date of one of the many breakdowns of talks between the military and the George Speight group that eventually led to the Muanikau Accord which ended the George Speight coup. The second offence was alleged to have been committed during the mutiny at the Queen Elizabeth Barracks on 2 November 2000. It should be said at the outset that Major General Sitiveni Rabuka was acquitted on both these charges and is therefore entitled to the presumption of innocence.

Because of Major General Sitiveni Rabuka's lengthy history at the helm of the Fijian nation and the political sensitivity of a trial of such a person, the decision was taken by the Fijian Director of Public Prosecutions to again seek the assistance of outside counsel to prosecute this matter. Because of my previous involvement in the trial of the Vice-President and others in 2004, I was asked to return in November 2006 to do this prosecution.

A fortnight after losing the 1999 elections, Rabuka had retired from active politics, but assumed the position of Chairman of the Great Council of Chiefs, a position of great significance and prestige, but a position which removed him from the everyday power and politics that he had become used to since 1987. During his trial, the prosecution alleged that by mid-2000, a year after losing power, Rabuka had become dissatisfied and disillusioned with being an indirect player in the political arena and a backroom player as far as day-to-day politics were concerned, and that he was desirous of assuming again a significant national position of real power. It was alleged that there were very few positions that he coveted, but one position which he was very keen to hold was as the Commander of the RFMF. In fact, at the time of the first alleged offence, the Commander of the RFMF held the reins of executive authority of the State, because the President had lawfully handed over those reins to Commodore Bainimarama about 10 days after the coup. The position of President was in fact at that time in abeyance, because the President had stood down, although not officially resigned.

It was alleged that on the very day of the George Speight coup, when President Mara called a meeting of senior civil servants, the military acting commander, the Commissioner of Police, and Rabuka as Chairman of the Great Council of Chiefs, Rabuka suggested to President Mara that he, Rabuka, should be reappointed as the Commander of the RFMF. That offer was not taken up by the President. Nine days later, at another meeting with the President, the Commander of the RFMF, and various other persons, Rabuka allegedly told the President that he, Rabuka, would be able to sort out the rebels if he was appointed interim Prime Minister. The President, likewise, did not follow up this offer by Rabuka.

By early July, the stand-off at the Parliament between those who had staged the coup and the military who surrounded them had been going for about six weeks. The situation at the Parliament was

²⁶ In November 2004 Ratu Inoke Takiveikata was convicted and sentenced to life imprisonment for his role in the mutiny. In June 2007 his conviction was set aside by the Fiji Court of Appeal and a new trial ordered.

extremely precarious, with the lives of the hostages being constantly at risk. Commodore Bainimarama was politically in a commanding but delicate position, attempting to maintain the slender rule of law and order in Fiji. The men who took over the Parliament under the leadership of George Speight were largely soldiers from the Counter Revolutionary Warfare Unit, also known as the First Meridian Squadron (IMS). That unit had been set up by Rabuka, when he was the Commander of the RFMF. The unit was set up to protect Rabuka and, as its name suggested, to prevent any hostile forces from staging another coup. The unit was said to be fiercely loyal to the man who had created it. After Rabuka retired as Commander of the RFMF, it was alleged that he took on an unofficial role as the honorary Colonel of the IMS. The members of the unit, it was suggested, continued to hold him in very high regard.

ALLEGED INCITEMENT TO MUTINY

Between late June and 4 July 2000, various attempts were made to reach a settlement of the stand-off at the Parliament. Both sides, the army and the rebels, came together at the Queen Elizabeth Barracks to discuss an accord to resolve the George Speight coup. On 4 July, the rebels did not arrive for some pre-arranged talks and there was a general feeling that the talks had collapsed. It was alleged at the trial that later on the same day that the talks had failed, Rabuka attempted to incite a mutinous act by trying to convince Lieutenant Colonel Seruvakula, the Commander of the largest unit of regular soldiers in the RFMF, to remove Commodore Bainimarama as the Commander of the RFMF. It was alleged that Rabuka's real motive was to remove Commodore Bainimarama so that he himself could take over as Commander. Colonel Seruvakula was the commanding officer of the 3rd Fiji Infantry Regiment and was the third most senior person after the Commander and the Commander of Land Forces. He had under his command at least 900 soldiers. It was suggested at the trial that if Rabuka had succeeded in convincing Colonel Seruvakula to use his position as the officer in command of so many troops, it may well have resulted in the forced removal of Commodore Bainimarama. Whether it would have succeeded or not, that was alleged to have been Rabuka's aim when he incited Colonel Seruvakula.

At the trial, Colonel Seruvakula gave evidence that at about 8.30 pm on the evening of 4 July, Rabuka had telephoned him and told him about the collapse of the talks with the rebels. He suggested to Colonel Seruvakula that the failure of the talks showed the weakness of Commodore Bainimarama. He then allegedly said:

You are about to convene another meeting. During that meeting, look very carefully. If no one is supporting the Commander, then replace Frank. Do not follow around blindly. If he cannot perform his duties, remove him.

This phone call was the first offence alleged in the indictment. Evidence was given that immediately after this telephone call Colonel Seruvakula had told those of his soldiers who were around him what Rabuka had said to him.

Colonel Seruvakula did not act on what Rabuka had suggested to him. However, it was suggested at the trial that what Rabuka had done involved a serious attempt to convince another person in the military to unlawfully remove Commodore Bainimarama as the Commander of the RFMF. Clearly, Rabuka did not intend Colonel Seruvakula to remove the Commodore entirely on his own. Colonel Seruvakula had many contacts amongst the senior officers in the military force and he was the leader of a large number of soldiers himself. What was alleged was that Rabuka hoped that with his encouragement, Colonel Seruvakula would get the support of other senior officers and use his position as the head of a large group of soldiers to force Commodore Bainimarama to stand down. In order to understand the significance of Rabuka's conversation with Colonel Seruvakula, the prosecution said it was necessary to place it into the background of the enormous standing which Rabuka had in the community and the precarious situation of the nation at that time. The prosecution case was that this was no idle chatter, but rather a serious attempt to remove the Commander.

MUTINY AT QUEEN ELIZABETH BARRACKS

The second charge against Major General Rabuka involved an allegation of events that occurred on the afternoon of the mutiny at the Queen Elizabeth Barracks in Suva on 2 November 2000. On that

day, a group of about 60 or 70 rebel soldiers from the IMS, under the leadership of Captain Shane Stevens, staged a rebellion at the barracks. The rebellion involved a very serious attempt on the life of Commodore Bainimarama. For many hours, the rebel soldiers and loyalist soldiers fought a ferocious battle for control of the barracks. During the course of this rebellion a number of soldiers lost their lives or were seriously injured.

The uprising began at 1 pm on 2 November 2000 with a sudden assault by IMS soldiers on the headquarters building, officers' mess, front gate, armoury, and other key buildings of the barracks. The rebel soldiers had three demands. Demand number one was for the removal of Commodore Bainimarama. Demand number two was that the IMS not be disbanded. Demand number three was for there to be no reprisals against the rebel soldiers arising from the mutiny. A serious attempt was made by the rebel soldiers to murder Commodore Bainimarama while he was eating lunch in the officers' mess, however the Commodore was able to escape through a window with his personal guards and to flee down a steep ravine at the back of the barracks while other loyal soldiers kept the rebels at bay. The Commodore then proceeded to the naval base in another part of Suva, where he remained until after the mutiny had been put down.²⁷

The plan of attack by the rebel soldiers that day was in fact seriously flawed. Despite having the advantage of surprise, they thankfully failed in their plan to assassinate the Commander. They also neglected to secure the back entrance of the barracks, and they completely ignored the Engineers Camp, a section of the barracks physically below the main barracks, which on that day contained over 300 loyal soldiers and a full armoury. The original plan hatched by Captain Stevens involved bringing in a large group of civilians to enter the barracks and provide a protective barrier for the rebels in much the same way that civilians had protected the George Speight group at the Parliament earlier that year. This part of the plan was thwarted, and no civilians were able to come anywhere near the barracks.

The battle between the rebels and the loyalists raged for most of the afternoon and evening, with periods of respite during ceasefires in order to remove the bodies of those killed, take the wounded to hospital, and engage in talks to try to resolve the situation. At about 3 pm, Captain Stevens was shot and seriously wounded, and shortly afterwards he was taken to hospital. This left the remaining rebels with only two junior officers, and to a large degree, rudderless. The most senior officer remaining, Lieutenant Charles Dukuliga, was left as the leader of a group of rebels facing an overwhelmingly superior force of loyalist soldiers commanded by a determined group of Lieutenant Colonels.

ALLEGATIONS CONCERNING RABUKA'S MOVEMENTS AND ACTIONS ON THE DAY OF THE MUTINY

It was alleged at Major General Rabuka's trial that on the same day as the mutiny, Rabuka was invited to lunch in the boardroom of the Sun Insurance Company in central Suva. Also at the lunch were a number of senior corporate and business executives and various other dignitaries. The lunch began shortly before 1 pm. In between the first and second courses of the lunch, at exactly the time that the rebellion began raging at the Queen Elizabeth Barracks, Rabuka began to receive a number of phone calls, both on the landline at Sun Insurance and on his mobile phone. He also made a number of calls on his mobile phone from a quiet hallway at Sun Insurance at around the time that the mutiny began. His words during some of those calls were overheard by two of the catering staff at the lunch and given in evidence at the trial. While at the lunch, Mr Rabuka allegedly told one of the Sun Insurance people: "It looks like I will be the next person at Government House."

Rather than going straight to the Queen Elizabeth Barracks, Rabuka stayed at Sun Insurance until around 5 pm. It was alleged by the prosecution at the trial that if he had been genuinely interested in helping to resolve the mutiny at the barracks, he would have immediately gone to the barracks upon hearing of the events there. Rather, it was suggested that he relished the prospect of the IMS soldiers doing battle with those soldiers loyal to Commodore Bainimarama. It was alleged that Rabuka thought that either Commodore Bainimarama would be killed or alternatively there would be an impasse that

²⁷ Commodore Bainimarama had been the Commander of the Fijian Navy prior to becoming commander of the RFMF.

he could exploit by riding in as the “white knight” and working out a resolution that would involve him taking over as Commander. It was suggested that Rabuka did not want to be personally involved in the revolt, but that he waited until he thought the situation would be resolved or at least stalemated. By standing back, he was able to see which way the wind was blowing before making an appearance at the barracks. The last thing he wanted was to be seen as being associated with the rebels; rather, he wanted to be seen as the white knight riding in at the last moment to redeem the situation.

It was in the context of all of this that it was alleged at the trial that Rabuka had telephoned Colonel Seruvakula on his mobile phone. Colonel Seruvakula gave evidence that shortly after the start of the mutiny Rabuka had called him when he was at a live firing practice at a location several hours away from Suva and had said words to this effect:

You have heard that the boys have taken over the camp. I want you to know that if there is to be any negotiations here, only I can facilitate it.

When Colonel Seruvakula suggested to Rabuka that Rabuka should speak to the Commander, Rabuka said “No, I just want to talk to you”. It was suggested by the prosecution that Rabuka did not want to consult with the Commander because he was in fact seeking to undermine the Commander. Shortly after this call, Colonel Seruvakula headed towards the barracks to try and assist the loyalist soldiers. By 2 pm, when it had become apparent that the rebels were not going to easily succeed in taking over the barracks and killing Commodore Bainimarama, Rabuka had allegedly been telephoned and asked by one of the rebel soldiers, Sergeant Waganiboro, to mediate between the rebels and the military. Despite this request to mediate in this ferocious battle, Rabuka did not leave the lunch at Sun Insurance until after 5 pm, more than three hours later. It was alleged by the prosecution that he had no real concern for the soldiers on both sides who were firing live rounds at each other, but that rather he was waiting for the right moment to ride in to take advantage of the situation.

The original plan by Captain Stevens was to bring civilians into the barracks to provide a protective barrier for the rebel soldiers at the earliest opportunity. Something very similar had occurred at the Parliament when George Speight had taken his hostages in May. This was thwarted by Colonel Seruvakula while on his way to the barracks, when he ordered his soldiers to take control of two bridges that effectively prevented any civilians from approaching the barracks. Upon his arrival in Suva later that afternoon, Colonel Seruvakula went straight to the naval base where Commodore Bainimarama was situated. He then proceeded to the Engineers camp, which was a section of the Queen Elizabeth Barracks which had at all times remained under the control of the loyal soldiers.

As Colonel Seruvakula arrived at the Engineers camp, he alleged in evidence that he received a mobile telephone call from Rabuka who said to him words to this 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.

This conversation was alleged to constitute the second offence in the indictment at the trial. In the context of the rebellion which was occurring at that very time, with live shooting between members of the same armed force, involving deaths and serious injury, it was alleged that Rabuka’s words involved a serious attempt to convince Colonel Seruvakula to participate in securing the replacement of Commodore Bainimarama. As soon as Colonel Seruvakula finished this mobile phone conversation, he turned around and told those of his soldiers who were around him what Rabuka had said. About 10 minutes later, Rabuka rang Colonel Seruvakula again and said “Negotiations have to be done in this matter. The shooting has to stop”.

Despite everything that was happening at the Queen Elizabeth Barracks, Rabuka remained at the Sun Insurance lunch until around 5 pm when he finally left the Sun Insurance building with his driver and bodyguard and went to the apartments where he lived. It was alleged by the prosecution at the trial that the reason for him going home was to pick up his uniform as a Major General in the Army Reserves. He then went to the Queen Elizabeth Barracks, armed with his uniform, allegedly so that if called upon he could assume the role of Commander. When he arrived in his vehicle at the barracks sometime around 5.30-5.45 pm, Rabuka was sitting in the front passenger seat of his red four wheel drive vehicle. His bodyguard was in the back seat. Various soldiers at the barracks, both loyalists and

rebels, noticed that there was a senior officer's uniform hanging in the back of the car. At that stage, the Lieutenant Colonels commanding the loyal soldiers were planning a counter-attack which was due to commence at 6 pm.

When Rabuka found out about the planned counter-attack, it was alleged that he was horrified. It was suggested that he wanted a stalemate from which he could take some advantage, not a fierce fire-fight in which the rebels would most likely be decimated. Neither, it was suggested, did he want the rebels to surrender, because one cannot bargain from a position of surrender. It was alleged that Rabuka attempted to convince the senior officer in command of the loyalist soldiers to negotiate with the rebel soldiers, rather than launching a counter-attack, but the senior officer refused. Major General Rabuka was unceremoniously placed sitting on the floor in a secure room and then moved to another part of the barracks where he was out of the line of fire during the counter-attack. At one stage, he was chastised for using his mobile phone, and eventually his mobile phone was confiscated.

THE MUTINY IS PUT DOWN

At 6 pm, the counter-attack commenced, and by 6.45 pm the rebel soldiers had been completely defeated. Some of the rebel soldiers surrendered at the barracks, while some of them, including Lieutenant Dukuliga, literally ran away from the barracks in fear of their lives. Many of those who ran away were hunted down over the next few days and taken into custody where five of them died. This was the subject of later police investigations, but at the present time no one has been charged in relation to these deaths. Lieutenant Dukuliga was bashed into unconsciousness, but remained alive.

After the rebels had been defeated, some of the loyal soldiers wanted to summarily execute Rabuka where he had been sheltering during the counter-attack, but a middle-ranking officer (now a senior legal officer in the Fijian Director of Public Prosecutions Office) refused to allow them to do so. Later that evening, as Rabuka was leaving the Queen Elizabeth Barracks, he allegedly rang Colonel Seruvakula again and said: "There has been a setback in what has happened. It has failed, and some lives have been lost. I'm going out to drink yaqona."²⁸ It was alleged by the prosecution at the trial that what had failed was Rabuka's grand plan to replace the Commander.

THE 2006 TRIAL

The trial of Major General Rabuka commenced in November 2006. It took place before Justice Gerard Winter²⁹ and a panel of five assessors who again represented a good cross-section of the Fijian population. There were two indigenous Fijians, a Rotuman, a Polynesian and an Indo-Fijian. I was assisted by junior counsel, Ray Gibson, a Victorian Crown Prosecutor who had accepted a posting as Assistant Director of Public Prosecutions in Fiji, and we were instructed by DPP senior legal officer, Aman Ravindra-Singh. Rabuka was represented by senior counsel from Sydney, Peter Maiden SC, and local junior counsel, Salanieta Tamanikaiwaimaro. At the trial of Rabuka, a similar application to the one made in the 2004 trial was made on his behalf for a stay of proceedings based on the length of time that had elapsed since the events in question. In a very similar hearing to the one that had occurred prior to the trial in 2004, an affidavit was presented to the court explaining the reasons why the DPP had only instituted charges many years after the event. Again, the trial judge permitted the matter to proceed.

The allegations against Rabuka concerned whether or not it could be proven beyond a reasonable doubt that he had made the two relevant phone calls to Colonel Seruvakula. The trial was therefore essentially a case of word against word – a notoriously difficult situation for a prosecutor. As stated earlier, Rabuka was in due course acquitted of both charges, and therefore it must be said that the facts alleged were not proven.

When I first received my brief in this matter, I was somewhat sceptical about the prospects of conviction. However, after carefully reviewing the brief at length, I recognised that there were some significant pieces of confirmatory evidence in relation to the second charge that warranted both

²⁸ "Yaqona" is the name given to the drink derived from the root of the kava plant.

²⁹ Justice Gerard Winter was appointed from New Zealand to the High Court of Fiji in January 2004.

matters proceeding to trial. In particular, there was the evidence of what had been overheard during Rabuka's mobile phone conversations while he was at the Sun Insurance lunch. There was also the fact that Colonel Seruvakula had immediately told those soldiers around him about each of the two phone calls. I also came to the conclusion that the evidence on each charge could serve to bolster the evidence on the other charge. Clearly, however, the impression made by Colonel Seruvakula when giving evidence was going to be of paramount importance in a prosecution case.

One of the principal decisions made by the judge at the trial was whether or not to allow into evidence what the two female staff members overheard Rabuka saying into his mobile phone just outside the lunch room at Sun Insurance. This required the judge to exercise his discretion by balancing the probative force of the evidence with its prejudicial effect. The probative force of the evidence was that it could be said to support the proposition that Rabuka was sympathetic to the rebel soldiers at the Queen Elizabeth Barracks and their cause, and therefore make it more likely that he had encouraged Colonel Seruvakula to overthrow Bainimarama. The prejudicial effect was that it could also be viewed improperly by the assessors as showing that Rabuka supported the mutiny itself, a very serious allegation of criminality with which he had never been charged. Also weighing in against admission was the fact that the two witnesses could not say whom Rabuka was speaking to on his mobile phone or what the other side of the conversation had been. So unsure was I about the exercise of the judicial discretion concerning this evidence, that I had not referred to it in my opening address. Still, it was a matter for the exercise of the judge's discretion, and not for the exercise of mine. Nevertheless, when Justice Winter exercised his discretion in favour of admitting the evidence, I was still sufficiently concerned about it that I rang a very senior colleague in Sydney to discuss whether or not I should actually lead the evidence that the judge had allowed in. My colleague was of the view that having obtained an exercise of the judge's discretion, I should lead the evidence. And that is what I did.

Lieutenant Colonel Seruvakula was very impressive when he gave evidence. He is a man who has not only served his country in a very senior military capacity, but he has also spent many years working for the United Nations in a senior managerial role. The two female catering staff also gave their evidence in a very convincing manner.

Major General Rabuka gave sworn evidence. He was not required to do this. He could have made a dock statement, which would not have been subjected to cross-examination. His defence was basically that Seruvakula had misunderstood the two telephone conversations. He also denied the conversations overheard by the catering staff in the corridor at Sun Insurance. He suggested that the first phone conversation with Seruvakula on 4 July was merely a suggestion that Commodore Bainimarama should be replaced as a negotiator in the talks with the rebels. His explanation for the second mobile phone call during the mutiny was that he was merely asking Seruvakula what the demands of the rebel soldiers were. This enabled me during cross-examination to reinforce the fact that he was suggesting that a person as able and accomplished as Seruvakula had completely misunderstood the essential meaning of two significant, relatively straightforward phone conversations, coincidentally the two conversations with which Rabuka had been charged. The cross-examination also focused on his failure to offer any assistance whatsoever to resolve the mutiny until around 5 pm, by which time many casualties had already been sustained.

The purpose of cross-examination of an accused is largely to act as a sounding board so that the members of the tribunal of fact (in this case both the assessors and the judge) can assess whether they are of the view that an accused is open, truthful and reliable or is vacillating, evasive and unreliable or even lying. The cross-examination of an accused is often the most important part of a criminal trial. Almost all other evidence received by the tribunal of fact is second-hand information when it comes to them. However, what they see in the reaction of an accused person during cross-examination is something that they see directly for themselves, and hence is a first-hand impression.

VERDICTS DELIVERED

On 11 December 2006, the five assessors returned with their recommended verdicts. By a majority of three to two, they recommended that Rabuka be acquitted on the first charge (the alleged conversation on the day the Queen Elizabeth Barracks talks failed). By a majority of four to one, they

recommended that Rabuka be convicted on the second charge (the alleged conversation with Seruvakula during the mutiny). When Justice Winter retired to consider his verdicts, it never seriously occurred to me that he might depart from the recommendations of the assessors. The five assessors came from a broad spectrum of the Fijian community as a whole and I was of the view that it was highly unlikely that an expatriate New Zealander who had only been a local judge for a little over 18 months would depart from the views of these representatives of the community. However, when Justice Winter returned about an hour later, he announced the acquittal of Rabuka on both charges. As required by law, he provided his reasons. He stated that he was of the view that the prosecution had failed to prove its case on either count beyond a reasonable doubt. In particular, he was of the view that the prosecution had failed to prove that during the two conversations Rabuka had had the specific intention of inciting Seruvakula to unlawfully overthrow Commodore Bainimarama.

While I was surprised by the judge's departure from the recommendations of the assessors, I was not surprised by the verdicts themselves, for the same reasons that had initially caused me to have reservations about the matter when I first received the brief. I also felt that there was a real chance of any conviction being overturned by an appeal court on the ground that the judge's discretion had miscarried by the admission of the evidence of Rabuka's phone conversations overheard at the Sun Insurance lunch. Whether or not the learned trial judge was also concerned about this possibility, I do not know.

LESSONS FROM FIJI

As I explained earlier, my two visits to Fiji to prosecute these fascinating trials caused me to think very deeply about our own criminal justice system in Australia. There were many interesting observations that I was able to make. The overwhelming sensation that one takes away from an experience like this is that we in Australia are very fortunate to have a criminal justice system which is well resourced in comparison to a developing nation like Fiji. One comes away with feelings of gratitude that we live in such a stable and relatively affluent country.

Other observations which I made during the two visits include the following.

Importance of contributing to the rule of law in a developing country

As opposed to the aftermath of the 1987 coups, many of those who participated in the George Speight coup of 2000 were prosecuted and punished. I came away from the trial in 2004 convinced that the main significance of the trial was that it would serve to deter any future would-be coup plotters who would see that many of those who had assisted in 2000 had been prosecuted and punished. Although the Vice-President had been released very shortly after his conviction, he had paid a heavy price for his peripheral involvement with George Speight by surrendering his vice presidency. The mere fact of Ratu Seniloli having to undergo a very public criminal trial, being condemned for his actions by a panel of his fellow citizens, and surrendering the second-most important position in the country, in my view, provided a strong deterrent to others for the future. Vakalalabure, the Deputy Speaker of the Lower House, had received a lengthy gaol term and lost his seat in Parliament. He was inevitably going to lose his right to practise law, at least for a time.

I am convinced that as Australian lawyers we have much to contribute to promoting the rule of law in other jurisdictions that request our assistance in conducting significant criminal trials, either for the prosecution or the defence.

Advocacy

I am convinced from many periods that I have spent overseas in which I have had a chance to observe court proceedings, not just in Fiji, but in developed countries as well, that the standard of advocacy in Australia is high. That does not mean that there is not an important role to play for organisations such as the Australian Advocacy Institute in promoting advocacy training for Australian lawyers. However, we have much to contribute to developing countries in terms of advocacy training. The importance of a barrister's responsibilities as an officer of the court is generally not appreciated as much in Fiji as it is in Australia. In Fiji there is much more focus on the obligation to the client. By participating as counsel in select cases in overseas jurisdictions, we can educate others by example, just how important are our duties as officers of the court.

Court reporting

In many developing countries, court reporting is virtually unknown. Whilst I had the benefit of a trial transcript in both trials which I conducted in Fiji, the standard of court reporting was less than what I have come to accept as standard in Australia.

Interpreting and translating

In Fiji there are no formal programs for training or accreditation of court interpreters. The judge's associate performs the role of court interpreter between Fijian and English. Some of the associates are quite good at this, whilst many are extremely poor. The danger is that someone such as myself who does not know the Fijian language might be quite ignorant of a significant mistake. In my first trial in 2004, the judge's associate did all the court interpreting. In my second trial in 2006, after an unsuccessful first attempt by the judge's associate, Justice Winter allowed me to secure the services of a professor of linguistics from the University of the South Pacific as the court interpreter. This professor, an expatriate Englishman, was the author of the only dictionary of Fijian English. Although he had had no training or previous experience in court interpreting, he very quickly learnt how it had to be done, especially the requirement for using the same personal pronouns as the witnesses.

Records of interview in Australia are invariably conducted today using electronic video recording. In a country like Fiji, recorded interviews are almost unheard of. Most interviews are written out in long hand by the investigating police officer, generally in one of the native languages. The interviewing officer then has the responsibility for translating the interview into English, the language of the court. The quality of these translations is variable. Cases have been known where a denial of an offence has been mistranslated as an admission.

Media and the courts

Prior to the Rabuka trial, Justice Winter received a request from the one and only local television channel, Fiji One, to permit them to video the proceedings in their entirety and to broadcast them on national television at night. The judge took into consideration the national significance of these proceedings, the prominence of the accused, and the interest which the matter had generated thus far in the media. He was of the view that the vast majority of Fijians had no way of getting to the court to watch the proceedings in person. He was also of the view that the proceedings had a very salutary role to play in the life of the nation and in promoting the rule of law. After considering the matter carefully, Justice Winter handed down a well-considered and well-written judgment in which he gave cogent reasons for allowing Fiji One to video the proceedings, subject to some stringent conditions. Those conditions included no filming of the assessors, filming of the accused only during the first 15 minutes of each day, Fiji One giving access to the recording to any other media organisation requesting it, delayed broadcasting of each day's proceedings until after the conclusion of evidence for that day, no broadcasting of proceedings held in the absence of the assessors until after the conclusion of the trial, and various other commonsense conditions.³⁰

I must admit that prior to this trial I was firmly of the view that I disliked the whole idea of television cameras in the court room. However, the broadcasting of the judge's opening remarks and the opening addresses of counsel proved to be of such great educational value and created such overwhelming interest in people who would never otherwise attend a court, that I am now of the view that the broadcasting of at least some parts of some proceedings is in the public interest.

I must admit that after the evidence of the first witness for the prosecution was broadcast, the defence made an application, which the judge accepted, to revoke his permission for Fiji One to broadcast the evidence of witnesses each night. He permitted Fiji One to video record the proceedings, including all the evidence, however he prevented the station from broadcasting the evidence until after the conclusion of the trial. This was on the grounds that other witnesses yet to give evidence who saw the broadcasts might be inclined to tailor their evidence to fit in with what they heard in the broadcasts

³⁰ *Sitiveni Rabuka v State*, Criminal Case Number HAC 16 of 2006, application by Fiji TV to record and broadcast trial, decision on 22 November 2006.

of evidence by earlier witnesses. I concede that this difficulty is one which is very hard to overcome if evidence is to be broadcast during a trial. However, in my view an appropriate balance is struck by permitting the immediate broadcasting of the judges opening remarks, opening and closing addresses by counsel, the summing up by the trial judge, the taking of a verdict (without showing jurors), and sentence proceedings.

I am of the view that in suitably selected trials here in Australia, judges should feel able to permit those parts of the proceedings to be recorded and broadcast on television. The educational value of such a step would be immense.

The jury system

As I have already explained, the criminal justice system in Fiji does not permit ordinary citizens to act as jurors in delivering a final verdict in a criminal trial, as jurors do in Australia, but restricts them to a mere advisory role, reserving the final decision to the trial judge. I suspect that the reason why they do not have a full jury system in Fiji is because they do not trust their citizens to deliver a true verdict according to the evidence and in accordance with the law, but rather they fear that jurors would deliver verdicts based upon completely extraneous considerations such as race. My experience in Fiji in both the trials which I conducted is quite the contrary. The assessors who were most firmly in favour of the conviction of the indigenous accused persons were in fact the indigenous assessors. I suspect that these assessors, like many of us, are hardest on their own. In my view, it is regrettable that the Fijian legislature has not seen fit to allow Fijian citizens to give binding verdicts as jurors in criminal trials.

I am a great supporter of the jury system in Australia. My experience during 30 years as a criminal law counsel, both for the prosecution and for the defence, is that you invariably get more good commonsense decisions on issues of fact from 12 ordinary citizens than you do from a single judge, no matter how learned he or she may be. There is something about having 12 ordinary people and requiring them to make a joint decision that tends to soften most of the sharp edges. The most important part of the jury system is that the community as a whole has ownership of the most important part of the process, namely the delivering of convictions or acquittals. We only have to look at the all too frequent criticisms of judges' sentencing decisions in the media and in the community at large to realise how important it is that the community has a sense of ownership of the most important decisions in the criminal system.

However, if the jury system is to continue to survive and to flourish in Australia, it needs to be nurtured and supported by appropriate changes to bring it into line with modern conditions. The jury system originated in England at a time when jurors were sent out to consider their verdict without food, without water, and without fire. These days, of course, we feed and water our jurors and send them home to the comfort of their homes at night. That is why the hung jury rate had become so high. Hung juries were a rarity a century ago. The adoption of majority verdicts, be they convictions or acquittals, in most Australian jurisdictions has been a step in the right direction to bring jury trials into line with modern conditions. Further steps are necessary if we are to nurture and promote a flourishing jury trial system. They include:

- Paying appropriate compensation to jurors, particularly in lengthy trials.
- Lengthy trials have become so common. If one reads accounts of criminal trials 100 years ago, one realises that a two-day trial was quite an exception. The average length of trial in the District Court of New South Wales today is over 10 days, and in the Supreme Court most murder trials take months. Lengthy trials impose intolerable burdens on jurors. Any judge, if really honest, would admit that a significant proportion of court time is wasted time; too often, counsel on either side spend inordinate amounts of time examining or cross-examining on matters that never end up being the subject of any addresses or submissions.

We should consider giving judges more extensive powers to prevent counsel on either side from engaging in fruitless, pointless or unduly repetitive examination or cross-examination or overly lengthy or repetitive submissions or addresses. At the moment, despite some recent changes to the law, trial judges are still loath to pull up counsel for fear of appellate intervention. The problem requires a cultural change. Appellate courts, in my view, should reinforce the power and indeed the responsibility of trial judges to prevent counsel from wasting valuable court time.

Court time is not a limitless public commodity. The community has a right to determine what resources it is prepared to put into the judicial system and to insist on accountability for the cost of justice. Consideration should be given, in my view, to granting judges the power to impose appropriate and fair time limits on counsel's submissions. If it is good enough for the High Court to impose time limits, it should be good enough for trial courts.

- Some judicial summings-up are so lengthy that it would be quicker to call all of the evidence again. By the time a jury has sat through closing addresses from both counsel, in my experience they hardly need to be reminded yet again by the trial judge of the salient parts of the evidence. Even though appellate courts have said over and over again that trial judges do not need to engage in lengthy summing-up on the facts, many trial judges cannot resist the temptation to do so. Consideration should be given to adopting the system used in many of the United States where the judge's summing-up contains only directions of law.
- When jurors are first chosen at the commencement of a trial, a lengthy introductory explanation is given to them by the trial judge. Most jurors are quite anxious at this early stage of a trial, and they are unlikely to remember much if anything of the judge's introductory comments. In particular, jurors are likely not to hear, or to forget, the warnings about what they are not permitted to do during the course of a trial. A written document in plain language easily understood by non-lawyers should be provided to jurors during the judge's introductory explanation. This will enable them to go back and read for themselves what they are and are not permitted to do during the course of the trial.
- The judicial Bench Books contain comprehensive statements of the law to cover every conceivable direction a trial judge is likely to need to give to jurors. Consideration should be given to a rule which requires counsel on both sides to identify from the Bench Book those directions which they suggest should be given to the jury, and a requirement for the judge to give that direction in the precise form stated in the Bench Book.
- Many judges deliver directions of law to jurors at a speed and in a manner that would be challenging for a legally qualified practitioner to follow, let alone a non-legally trained member of the public. It is quite unrealistic to expect lay jurors to understand directions of law delivered in an oral summing-up alone. It should be mandatory for trial judges to provide to jurors written directions on every area of law that arises in a trial. Those directions should be in clear, concise, plain language.
- Despite provision having been made for case management of criminal matters in many of the nation's Supreme Courts and District Courts, there is still a marked resistance on some Benches to intensive case management, particularly in complex matters. In New South Wales, legislation has existed for some years providing for intensive judicial case management and supervised disclosure in criminal matters declared as complex. Despite this legislation, the number of matters that have been declared complex can be counted on the fingers of two hands. Such case management, on the rare occasions that it has been used, has undoubtedly reduced the number and complexity of issues to be litigated at trial. The savings to the community and the avoidance of unnecessary jury time are self-evident.

Above all else, what is required is a healthy respect on the part of appellate courts for the overwhelming sense of responsibility of most jurors and a respect for the fact that the vast, overwhelming percentage of jurors take their responsibilities extremely seriously and pay meticulous regard to directions of law, including warnings, given to them by the trial judge. Like the legislature in Fiji, some appellate courts in Australia underestimate the overwhelming desire of most jurors to apply the law as given to them and to conduct themselves in an appropriate way. Appellate courts should, in my view, pay due regard to the ability of jurors to put aside evidence which has inadvertently been introduced. We should trust jurors that if they have inadvertently come upon information not led at the trial, they will follow firm directions given to them by the trial judge to ignore such material.

We live in an age in which technology and the media are ubiquitous. The average Australian spends more time watching television and on the internet than he or she spends eating. Despite criminal sanctions in some States, it is unrealistic to expect that not a single one of 12 jurors will come upon some information concerning some aspect of the facts or the law of a trial. What we can

realistically expect, and what my own experience and those of many of my colleagues demonstrate, is that jurors who do come across information otherwise than in the court room will conscientiously heed the judge's warning about not taking such matters into consideration. Acquittals of accused persons with notorious records known throughout the community illustrate this point very vividly. The only other approach is to lock up jurors for the duration of a trial. This would place an intolerable and unacceptable burden on jurors.

If we do not support the criminal jury system in this way, we will see the whole system whittled away. Every aborted trial, every jury verdict which is overturned because of an irregularity, indeed every hung jury is another nail in the coffin of the jury system, particularly at a time of fiscal austerity. As it is, the jury system is being whittled away bit-by-bit and by stealth. Over the last two decades many serious criminal charges which were once the province of jury trials are now dealt with to finality in the Local Court by a Magistrate sitting without a jury. Every time the jurisdiction of the Local Court is enlarged to include ever more serious crime, the jury system is diminished, to the detriment of the community. Many quite serious crimes which can now be dealt with in the Local Court would be dealt with in the United Kingdom or the United States in a jury trial. Politicians are only too willing to allocate more and more serious matters to the Local Court for purely economic reasons. The Local Court is generally only too willing to accept increased jurisdiction and concomitant increased sentencing powers, because it enhances the standing of that court. In my view, we should resist this creeping diminution of the jury trial system. We do so by taking every step to support the jury system as it is and by adapting it as much as we can to modern conditions.