IN THE COURT OF APPEAL OF

THE REPUBLIC OF VANUATU

APPEAL CASE NO. 2/89

BETWEEN : ATI GEORGE SOKOMANU
BARAK TAME SOPE
MAXIME CARLOT
WILLIE JIMMY
(Appellants)

AND : PUBLIC PROSECUTOR
(Respondent)

6th, 7th and 14th April, 1989.
For the Appellants: B. Toomey, Q.C. and Mrs S. Bothmann-Barlow.
For the Respondent: J. Baxter-Wright.

JUDGMENT

Ati George Sokomanu, Barak Sope, Maxime Carlot and Willie Jimmy appeal against their respective convictions and sentences on 7th March 1989 before Ward J and two assessors for the following offences:

1. Seditious conspiracy (to overthrow the lawful Government) contrary to S. 64 Penal Code Act:
   Messrs Sokomanu, Sope, Carlot and Jimmy.
2. Incitement to mutiny contrary to S. 60 Penal Code Act:
   Messrs Sokomanu, Sope and Carlot.
3. Administering an unlawful oath contrary to S. 5 (1) (a) Public Order Act:
   Mr Sokomanu only.
4. Taking an unlawful oath contrary to S. 5 (1) (b) Public Order Act:
   Messrs Sope, Carlot and Jimmy.
5. Making a seditious statement contrary to S. 65 (1) Penal Code Act:
   Messrs Sope, Carlot and Jimmy.

Mr Sokomanu was also charged in the alternative with being present at the administration of an unlawful oath contrary to S. 5 (1) (a) Public Order Act but in view of his conviction for administering such an oath, no verdict was entered on this charge.

The facts are set out clearly in the judgment under appeal and need only be referred to briefly. Mr Sokomanu was at the relevant time President of the Republic; Mr Sope, Mr Carlot and Mr Jimmy were until last year members of

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Parliament. On Friday 16th December 1988 Mr Sokomanu was to open a new session of Parliament. He made a speech referring to a number of matters which caused him concern about the government of the Republic and ended by stating that Parliament was dissolved and there would be a general election in February 1989. He stated that there would be an interim government until then.

The Government did not accept that the dissolution was lawful or effective, and Parliament continued to sit. The Speaker applied ex parte to the Supreme Court for a ruling and on the following Monday, 19th December, the Court declared that the President had no power to dissolve Parliament in the manner in which he purported to do so. (This issue was considered again by the learned trial judge who reached the same conclusion).

Meanwhile, on Sunday 18th December Mr Sokomanu called Messrs Sope, Carlot and Jimmy, with others, to his office where they were given instruments appointing Mr Sope as Prime Minister and the others to various ministerial posts in the interim government. This meeting forms the basis of the charge of seditious conspiracy. Each swore an oath of allegiance. This action forms the basis of the charges of administering and taking an unlawful oath, and making a seditious statement.

Later that day, Mr Sokomanu sent out circular letters to the Police and the Vanuatu Mobile Force, informing them of the appointment of the interim government and that their continued support and allegiance to the dissolved administration was illegal. This letter forms the basis of the charge of incitement to mutiny.

The appellants, with two others since acquitted, were arrested and charged with the offences listed.

Before turning to individual counts, Mr Toomey for the appellants argued a number of general grounds of appeal:

1.1 The Judge erred in ruling that the President had no power to dissolve Parliament except on the advice of the Council of Ministers and in so directing the assessors.

1.2 The Judge erred in ruling that the President had no power to appoint an interim government, whether composed of members from within or outside Parliament.

The Constitution provides no express power for the President to act as he did. Clause 26 (3) states:

"The President of the Republic may, on the advice of the Council of

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Ministers, dissolve Parliament."

No such advice had been tendered.

Clause 39 states that "The Prime Minister shall be elected by Parliament from among its members ..."

Clause 40 (1) states "The Prime Minister shall appoint the other Ministers from among the members of Parliament ..."

So under the express terms of the Constitution, the Prime Minister and all other Ministers must be members of Parliament.

Other provisions state in effect that on dissolution, the existing Ministers shall continue in exercise of their functions until a new government is formed. The appointment of an interim government of persons who were not members of Parliament was contrary to these provisions.

Mr Toomey argued that the powers of the President are not limited to those expressly stated in the Constitution. He drew attention to various powers which, he says, show that he is anything but a figurehead without power. He drew on the concept of necessity and argued that the President must have reserve powers to dissolve Parliament and to appoint an interim government, where the circumstances justify it. He pointed to circumstances of parliamentary deadlock; or some disaster which might wipe out Parliament.

Ward J dealt with that issue in these terms:

"It is quite clear that the powers of the President to dissolve Parliament are contained in article 26 of the Constitution. He has no other and, to carry out that power under sub article (3), he must act on the advice of the Council of Ministers. Without that he cannot do it. In this case where it is agreed he had been given no such advice, he was acting unconstitutionally and the dissolution was, therefore, unlawful and void.

Even when he dissolves Parliament lawfully, there is no power to appoint an interim government as he has done here. It is clear from articles 43 and 42 that the power to govern during the period from the dissolution to the election of a new Prime Minister after a general election rests in the Prime Minister and Ministers holding office at the dissolution."

We would not go so far as the learned trial judge and state that in no circumstances may the President exercise a power not specifically given to him

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by the Constitution. Exceptional needs may require exceptional remedies. Constitutional law has long recognised that such actions may be justified on the grounds of necessity. See, for example, R v Stratton (1779) 21 St. Tr 1045 (at p. 1224); up to Sabally and Njie v A.G (1965) 1 QB 273 (at p. 293). But the necessity must be proportionate to the problem faced. Such a doctrine can only apply in very rare circumstances. The matters over which Mr Sokomanu expressed concern fell far short of the exceptional circumstances which must exist before powers of necessity could be invoked.

We agree with the learned trial judge that Mr Sokomanu had no power to dissolve Parliament without the advice of the Council of Ministers; nor to appoint an interim government; nor to appoint ministers who were not members of Parliament.

1.3 The attempted overthrow of the Government was effected by the dissolution of Parliament on 16th December 1988, before any of the acts alleged to constitute the conspiracy to overthrow the Government had taken place.

The charge of seditious conspiracy relates to the meeting at the Presidential palace on Sunday 18th December. Clearly if Parliament had been lawfully dissolved and the Government lawfully dismissed on 16th December, there was no lawful government to overthrow. But it follows from our previous conclusion that Parliament had not been lawfully dissolved that this ground of appeal also fails.

1.4 The number of Assessors appointed in the Republic (in purported obedience to the directions contained in the Criminal Procedure Act) is so small as to vitiate the trial since the Appellants were deprived of the random selection of laymen from a large and anonymous panel which is the essence of proper trial procedure under the law of Vanuatu.

This is a challenge to the basic system of trial in the Supreme Court of Vanuatu. If justified, it means that all such trials would be invalid.

Section 29 (1) of the Courts Regulation Act 1980 states:
"Subject to (various matters which do not concern us here) ... every proceeding in the Supreme Court shall be heard and disposed of before a judge sitting with two assessors who shall have an advisory function ..."

Section 153 of the Criminal Procedure Code Act makes "every citizen normally resident in the Republic who has attained the age of 18 years and who has sufficient familiarity with the appropriate language to enable him to follow readily and

appreciate the proceedings in a criminal trial ... qualified and liable to serve as an assessor ..." The number of people so qualified must be very large.

Section 156 requires the Registrar of the Supreme Court to " ... make a list of a sufficient number of persons who are ... qualified to serve as assessors ..." The list contains 11 names.

It is argued for the Appellants that the list should be "almost parallel to the list of electors" and that "its plain democratic aim" is to involve all eligible citizens in the administration of justice.

However desirable that may be, that is not what the Acts say. A " ... sufficient number of persons ..." in our view means a sufficient number to meet the needs of the Supreme Court. We note that the system was introduced before Independence when the democratic rights to which Counsel so eloquently referred were not uppermost in the minds of the Government.

The system of assessors cannot be equated with a jury system. If the system is to be changed it is a matter for Parliament.

1.5 The learned trial judge misdirected the Assessors on the standard and degree of proof required to prove the charges against all the Appellants.

At the beginning of his summing up, the judge gave a general direction to the assessors which is said to have been too brief and "should have been more expansively given". Mr Toomey pointed to several passages in the summing up which referred to believing or not believing certain evidence, with no reference to the middle ground occupied by reasonable doubt. These repeated misdirections, he said, destroyed the effect of the earlier general direction.

The general direction which the judge gave was short, concise, accurate, and clearly expressed. In our view it was impeccable, and the assessors can have been in no doubt as to the correct test. Given that clear explanation, it was not necessary tediously to repeat all the alternatives every time reference was made to conflicting evidence or arguments. We do not believe that the assessors could have been misled.

1.5A The learned trial judge failed to consider and direct the assessors as to the use to be made of the Appellants' good character.

This ground did not appear in the memorandum of appeal but we gave leave

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for it to be argued. It was a point not made at all at the trial and not considered by the learned judge.

Each of the Appellants gave evidence that they believed that what they did was lawful. The principal issue throughout was whether they genuinely held such a belief.

Each of the Appellants also gave evidence of his political experience and his contribution to the creation and development of the Republic. This evidence was used to their detriment to show that they must have realised that it would be necessary to obtain the support of the police and the VMF. It was the very basis on which they were convicted on the charge of incitement to mutiny.

In this situation, Mr Toomey argues that they were at least entitled to a strong direction from the trial judge as to "their service to the state and the character of which that spoke so eloquently."

Evidence of good character is relevant primarily as to credibility, but also as a matter to be weighed in the balance when considering whether a person of this character would be likely to have committed such an offence. (R v Bryant and Oxley (1978) 2 All E.R. 689). There is no general obligation on the judge to mention it in all cases. (R v Smith (1971) Crim. L.R. 531). It depends on the circumstances of each case.

But in a case which turns primarily on the question of credibility, an accused person is always entitled to claim the benefit of his good character to support his claim to be believed.

It was particularly important in this case. The Appellants' background of public service having been used against them, they were entitled at least to have the other side of the coin displayed; and to a direction that their character and experience could also be taken in their favour when considering the crucial question — whether to accept their repeated assertions about what they believed. It was not even considered. This was a serious omission.

We will consider the effect of this omission later.

The appellants attack their conviction on the count of seditious conspiracy on no less than 15 grounds. Some can conveniently be taken together.

2.1 The information disclosed no offence known to the law of Vanuatu; and

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2.2 The information contained words of definition of "seditious intention" different from the exclusive definition of those words contained in S. 63 (1) of the Penal Code.

The information reads:

" Statement of offence

SEDITIOUS CONSPIRACY – Contrary to Sect. 64 Penal Code Act No. 7 of 1981

Particulars of offence

(The Appellants) some time between 16th and 18th December 1988 in Vila, did enter into an agreement to carry into execution a seditious intention to overthrow the lawful government of Father Walter Lini."

A seditious intention is defined in S. 63, and includes:

(a) to bring into hatred or contempt, or to excite disaffection against, the Government of the Republic or the administration of justice;

(b) to incite the public or any persons or any class of persons to attempt to procure otherwise than by lawful means the alteration of any matter affecting the Constitution, laws, or government of the Republic;

and (f) to show disrespect towards the Government, or the flag, or the person of the President or the Prime Minister, of the Republic in such manner or circumstances as causes or is likely to cause a breach of the peace;

The information does not follow the precise wording of the Act. It does not have to.

Section 71 of the Criminal Procedure Code says that:

"Every ... information shall contain, and shall be sufficient if it contains, a statement of the specific offence ... with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

Section 74 (c) requires particulars of the offence to be "set out in ordinary language, in which the use of technical terms shall not be necessary."

The combined effect of these sections is that, provided the accused is clearly informed of the offence charged, and how he is alleged to have committed it, the information does not have to follow the precise terms of the Act; ordinary every day words may be used.

The offence charged is seditious conspiracy, which is clearly an offence known to the law of Vanuatu. Particulars of the offence show that each Accused

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conspired "to overthrow the lawful government". There can be no doubt what this phrase means. We agree with the learned trial judge, that it falls clearly within the definitions of seditious intention contained in section 63 (1) (a) and (b).

Even if this were not the case, the charge could have been suitably amended. We adopt the reasoning of Lord Bridge in R v Ayres (1984) 1 All E.R. 619 (at p. 626):

> "... if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence, but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed under the proviso must depend on whether, in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant."

We say with confidence that the appellants could not in any way have been prejudiced or embarrassed. These grounds of appeal fail.

2.3 The learned trial judge erroneously directed the assessors on the basis that the words used in the information were an accurate statement of what was necessary for the seditious conspiracy.

2.4 The learned trial judge misdirected the assessors on the words used in the definition of "seditious intention" in sub clauses 63 (1) (a) and 63 (1) (b) of the Penal Code Act.

We have already concluded that the words used in the information were a sufficiently accurate statement of what would constitute a seditious conspiracy. The judge adopted those words when directing the assessors and in our view he was correct to do so.

The learned judge directed the assessors as to the meaning of "seditious intention" in slightly different terms from those set out in sections 63 (1) (a) and (b). He used "encourage" when S. 63 (1) (a) says "excite", and where S. 63 (1) (b) says "incite". He paraphrased these sections in simple language. It is something which judges frequently and properly do when directing juries or assessors.

Section 63 (1) (a) refers to exciting "... disaffection against the Government ..." Mr Toomey complained that the judge did not tell the assessors what "disaffection" is. He did not need to. Disaffection is not a technical legal concept. It is a word in ordinary language and we do not think that any

further explanation of its meaning was required.

2.5 The learned judge erred in not requiring the Prosecution to elect what part or parts of the definition of "seditious intention" it relied upon as being satisfied by the evidence in the case, and directing the assessors accordingly.

This is another point which was not taken at the trial.

Section 64 creates the offence, which is to "... enter into any agreement ... to carry into execution a seditious intention." A seditious intention can fall into any one, and possibly more than one, of the six definitions given in Section 63 (1). This is a single offence which can be committed in alternative ways. As a matter of law, the Prosecution were not required to elect. However Mr Baxter-Wright when opening his case in the lower court made it clear that he relied on subsections (a), (b) and (f) and the defence knew what matters they had to deal with. In our view the direction as to the meaning of "seditious intention", though short, was adequate. It was much easier for a layman to understand than the full wording of those subsections.

2.6 The learned trial judge failed adequately to sum up to the Assessors the meaning and implications of the word "conspiracy".

2.7 He failed to direct the Assessors on the manner in which the Prosecution alleged the facts in evidence proved the existence of a conspiracy.

2.8 He failed to direct the Assessors on what alleged acts of the Appellants were said to be performed pursuant to, and as evidence of, the conspiracy charged.

There is no need to look beyond the words of Section 64 for the meaning of "conspiracy" for this purpose. It is stated to be an "... agreement between two or more people ..." That is exactly how the learned judge directed the assessors. It is difficult to see how such a clear definition could be improved upon. This is a statutory definition and it is not helpful to draw comparisons with the common law.

The other matter under this heading causes us more concern. Counsel for the defence at the trial, M. Louzier, argued in his closing address (transcript p. 155-6) that no agreement existed: "We say it also has a lack of the element in S. 64, that is the agreement"; and in relation to the events on Sunday morning: "... I

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am not sure what happened was a real agreement". He referred to Halsbury, 4th Edition Vol. 11 p. 44 where it states:

> "... It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose."

It was clearly part of the defence case that the Prosecution had failed to prove the existence of any agreement.

Faced with that submission, the learned judge directed the assessors (and later, in his judgment, himself) correctly as to what had to be proved; but said nothing about how it might have been proved. He appears to have taken it for granted that an agreement did exist, and made no reference in his direction to the assessors, or in his judgment, to what the agreement was alleged to be, or what was the evidence that it existed.

As to ground 2.8, the conspiracy charged was one single conspiracy between all the accused. M. Louzier (transcript p. 156–7) raised the issue whether there had been a series of separate agreements between Mr Sokomanu and each accused – more than one conspiracy. If this had been the case, the charge against all the accused jointly would have been bad, because in law "all must join in the one agreement, each with the other, in order to constitute one conspiracy" (R v Griffiths (1965) C App R 279).

These may not have been particularly strong arguments, in view of the evidence given. The learned judge appears to have thought so and to have given them no more thought. No reference to either matter appears in his direction to the assessors or in his judgment. Indeed in his judgment he states: "There is no dispute that the first six accused agreed to form an interim government to replace that of Fr. Lini. That agreement was certainly made and stated to be carried into effect on Sunday 18th by all those accused ..." He had apparently reached that conclusion, as had the assessors, without considering the defence argument set out above. We regard that as a material omission.

We will consider the effect of that omission later.

2.9 There was no evidence to support proof beyond reasonable doubt of the conspiracy charged.

2.10 (a) There was no evidence to rebut the sworn evidence of the Appellants that they believed what they were doing was lawful.

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(b) The learned trial judge misdirected the Assessors as to the effect which could be given to disbelief of positive assertions by the Appellants.

The Prosecution case was that the conspiracy was formed at the meeting at the Presidential palace on Sunday 18th December. Each of the appellants gave evidence that he believed that he was acting lawfully.

Mr Toomey argued that the learned judge directed the assessors, and himself, that if they did not believe what the appellants said about that, they could take their disbelief as positive evidence to the contrary; so that they could conclude, without any other evidence on the point, that the appellants did not believe that they were acting lawfully.

If the learned judge did say that, he is wrong. As Scrutton L.J. said in Hobbs v Tinling and Co Ltd (1929) 2 K.B. 1 (at p. 21):

" ... by destroying that evidence you do not prove its opposite. If by cross examination you prove that a man's oath cannot be relied on, and he has sworn that he did not ... (do something) ... you do not, therefore, prove that he did ... (do it) ... There is simply no evidence on the subject."

The Prosecution had to produce some admissible evidence that each of the Appellants had the necessary mens rea – knowledge that he was acting unlawfully because there still existed a government which had not been lawfully dissolved.

The Court did not believe the Appellants' assertions that they thought they were acting lawfully. That disbelief in itself proves nothing. We must look to see if there was other evidence on the point, which was capable of rebutting the sworn evidence of the Appellants. Clearly there was. It was circumstantial evidence. Issues of intention in criminal trials frequently turn on such evidence. Subject to what we have said about the effect of good character, it was proper to consider the circumstances of each individual, with his political and constitutional experience as spoken to by each in evidence. The court was entitled to assess the state of mind of each against that background. If such a finding of fact was based on that assessment and that alone, this court should not interfere. But we may if the finding was or may have been based on conclusions which it was not permissible to draw from the evidence.

We have read and re-read the direction to the assessors. Nowhere does it say in terms that if the assessors disbelieve the evidence of an accused they can

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therefore find as a fact that what he denied was true. But it has to be said that, without an appropriate warning and taking the direction as a whole, the assessors could well have drawn that conclusion. We cannot exclude the possibility.

2.11 The learned trial judge wrongly admitted evidence of an alleged telephone call by the Appellant Sope to the Secretary to the Clerk of the Parliament on 16th December, 1988.

2.12 The learned trial judge misdirected the Assessors as to the use which they could make of the evidence concerning the alleged telephone call.

This is another point on which no objection was taken at the trial. Evidence was given by the Secretary to the Clerk of Parliament, Marie Kalulu, that shortly after Mr Sokomanu made his speech in Parliament on Friday she received a telephone call from a man claiming to be, and whose voice she recognised as that of Barak Sope. The caller told her to tell the Speaker to stop proceedings because Parliament had been dissolved. Mr Sope denied making that call.

Mr Toomey argued that this evidence was wrongly admitted on 2 grounds:

(i) That it was hearsay. It was not. Evidence of the call was admitted for the purpose of showing that the call was made, and what was said; not to prove the truth of what was said.

(ii) That it was irrelevant to any issue.

To be relevant a fact does not have to be conclusive evidence on a point. It suffices if, taken on its own or with other evidence, it tends to prove a fact in issue – if it makes the existence of that fact more likely.

There are two issues to which this telephone call could have been relevant; whether there was an agreement at all; and if so whether Mr Sope was party to it. If believed, it showed that Mr Sope wanted to put into effect what Mr Sokomanu had tried to do. We think it was relevant and therefore admissible.

That evidence could not have been adduced for the sole purpose of discrediting Mr Sope. But once properly in, it was in for all purposes, including to discredit him generally if his denial that he made the call was found to be untrue. The learned judge was right to stress the importance of such a finding as this affected the credibility of the whole of Mr Sope's evidence, including his assertion that he believed he was acting lawfully.

If that were the only use to which this evidence were put, there would be no

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ground for complaint. But it wasn't. The learned trial judge went on to direct the assessors that Mr Sope "... has insisted to the Court that he was not involved in this whole business (by which he must mean: the alleged conspiracy) until Sunday morning. If you accept the evidence of Marie Kalulu, then Mr Sope's claim is not true." And later he said "You must ask yourselves whether ... (certain other evidence) ... together with the evidence of the telephone call, suggests that Mr Sope was far more involved and far earlier than he has told the Court." He gave a clear indication to the assessors that the telephone call could prove that Mr Sope was party to an agreement with Mr Sokomanu on the Friday.

With all respect to the learned judge, it proves nothing of the sort, and cannot do so. The fact that Mr Sope made the call proves only that at the time he knew what Mr Sokomanu had done, and supported it. Of course it gives rise to a suspicion, even a strong suspicion, that he was involved in a prior agreement. But criminal cases are not decided on suspicion. We have to say that the learned judge was plainly wrong, and that this was a damaging misdirection.

Again, we will consider the effect of this misdirection later.

2.13 The learned trial judge erred in law in leaving it open to the Assessors to find beyond reasonable doubt that the alleged telephone calls made to Jonas Cullwick were made on Friday 16th December, 1988.

Both Mr Sokomanu and Mr Sope were alleged to have made telephone calls to Mr Cullwick of Radio Vanuatu to seek air time for Mr Sokomanu. If proved, the calls would have shown that when they were made the two were working together. Mr Sokomanu said that the calls were made on Sunday. Mr Sope denied making any such call. Mr Cullwick thought it might have been Friday, but couldn't be sure. Mr Toomey says that in that situation the judge should have withdrawn the issue of when the calls were made from the assessors.

We don't agree. We think the judge was right to leave this issue of fact to the assessors, having given (as he did) a very fair direction as to the witness's uncertainty. Certainly no harm was done to the Defence case, because as appears from the judgment this call was treated as having been made on the Sunday – after the meeting between the appellants.

2.14 The learned trial judge continually misdirected the Assessors to the effect that the only question which decided guilt or innocence on this count was whether or not the Appellants believed their acts were lawful.

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The learned judge summed up and gave his judgment on the basis that there was no dispute about the existence and nature of the alleged agreement. As we have indicated earlier, we think that was wrong. But as will appear later we think that there was ample evidence to prove an agreement as alleged. The learned judge ruled that the purpose of the agreement was unlawful and we agree with him. In effect the only real issue on this count was whether or not the appellants believed their acts to be lawful. We do not find this to be a material misdirection.

There is a final ground on this count attacking the direction on the standard and onus of proof but we have adequately dealt with this matter under the general objections.

We pass then to Count 2: Incitement to mutiny, on which the assessors found all the appellants not guilty but the learned judge made a finding of guilty. The conviction is challenged on 8 grounds.

3.1 The learned trial judge exceeded his lawful power in substituting a verdict of "guilty" against each Appellant for the verdict of "not guilty" arrived at by the Assessors, because:

(a) his power to do so depended on the Assessors' verdicts being such as could not have been open on the evidence; and

(b) the verdicts of the Assessors were open on the evidence.

The law makes detailed provision for the system of lay assessors, as previously set out. Mr Toomey argues that there is some implied term that a judge may only depart from the opinion of the assessors in circumstances when their opinion would be regarded as perverse.

Assessors are creatures of statute. Their function and powers are clearly defined by Section 29 Courts Regulation Act and Section 180 Criminal Procedure Code Act. They are advisory only. They must give opinions. The decision is "vested exclusively in the Judge". The judge must take into account their opinion (S. 185 (2) Criminal Procedure Code Act). There is no obligation on him to accept it, although in practice he frequently does. The safeguard is that if he differs from their opinion he must say why. If it can be shown that he failed to take their opinion into account at all, this could be a good ground for appeal. Otherwise on appeal the court would test his reasons as if hearing an appeal from a judge sitting alone.

The relevant statutory provisions are unambiguous. We cannot imply restrictions which are not in the statutes. To accept Mr Toomey's submission

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would elevate the assessors to a status they do not hold in Vanuatu law.

3.2 The learned trial judge erred in law in holding that S. 33 of the Penal Code Act applied to the commission of a crime different in character, separate, distinct and removed in time from a principal crime.

On this count the Prosecution argued that Mr Sokomanu was guilty because he sent out the circular to the Police and the VMF claiming their allegiance; and the others were guilty because of S. 33 of the Penal Code Act, which states:

"Any accomplice or co-offender in the commission or attempted commission of an offence shall be equally responsible for any other offence committed or attempted as a foreseeable consequence of the complicity or agreement."

It is argued for the appellants that this section does no more than reflect the common law doctrine of joint enterprise, under which a person may be liable for further acts committed at the time of and as part of a principal offence if they were foreseen and by implication intended by him, but not for other offences remote in time or place.

We are not dealing with the common law but with a statutory provision. We must adopt the grammatical and ordinary sense of the words, unless that construction would lead to absurdity, or inconsistency with the rest of the statute. A literal interpretation of this section does not produce either of those undesirable effects. We must read it as it is, without any gloss derived from the common law. Any other offence committed as a foreseeable consequence of the agreement suffices.

For the purpose of this section, "foreseeable" could be read as requiring an objective test, so that if a reasonable person would have foreseen a certain consequence a conspirator would be liable for that consequence whether or not he actually foresaw it. This interpretation would conflict with the basic rule in criminal law that (in the absence of some specific statutory provision) a person is not guilty unless he actually foresees or intends a certain result. The test for the principal offence is subjective – what the accused in fact thought. The test for a consequential offence cannot be more strict. The accused is guilty under this section only if he actually foresaw that the commission of another offence was a necessary consequence of the original offence. That is the test which the learned judge applied.

3.3 There was no legal basis for the learned trial judge's finding that the Appellant Sope "was aware" that the crime charged was an "essential step",

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and so he was guilty on this count.

3.4 There was no legal basis for the finding of guilty against the Appellant Carlot.

3.5 (a) There was no evidence, on which the learned trial judge could find that the Appellants Sope and Carlot were parties to the alleged conspiracy before the morning of 18th December, 1988.

(b) The learned trial judge's use of the finding in (a) as basis for conviction on this count was without legal foundation.

The learned judge convicted Mr Sope and Mr Carlot on this count on his findings that "they were involved in this matter before Sunday 18th December" and that each of them "realised the need to obtain the loyalty of the forces and realised it would involve a persuasion away from their duty and allegiance to the Lini government for a mutinous purpose".

Assuming the conspiracy to have been proved, the test is whether each appellant actually did foresee, at any time before the circular letter was sent out, that a positive step would necessarily be taken – an approach to the Police and VMF to transfer their allegiance.

We agree with the learned judge that if somebody takes over the government of a country, he must have the support of the forces. Mr Sope said he knew that but "I did not think what would happen"; Mr Carlot said "I just never thought about that area". We now know that the commanders of the police and VMF had ignored a request by Mr Sokomanu to go to see him, so that it might be assumed that they remained loyal to the Lini administration. But there is no evidence that either Mr Sope or Mr Carlot knew that. There is the evidence of the telephone call made by Mr Sope on the Friday. We have already considered that. Apart from that, the evidence against both Mr Sope and Mr Carlot consists of their respective background and experience, and the fact that they attended the meeting on Sunday, accepted office apparently without surprise, and gave a press conference. We do not even know how they acquitted themselves when dealing with the reporters.

On its own that evidence creates a suspicion, even a strong one. But it does not prove beyond reasonable doubt that they did in fact contemplate the commission of this offence as a necessary consequence of their actions. There was a gap in the prosecution evidence. It was filled by disbelief, which as we have already said is not in itself evidence of anything factual,

The evidence of their previous involvement is based on the same circumstantial evidence. If we remove, as we must, the probative value apparently given to disbelief of their evidence, there is insufficient evidence to prove that Mr Sope and Mr Carlot were involved in an agreement before Sunday morning.

Suspicion, however strong, cannot be a substitute for proof beyond reasonable doubt. We find the conviction of Mr Sope and Mr Carlot on this count unsafe and unsatisfactory.

Ground 3.6 merely makes the point that if the alleged conspiracy is not proved, this charge must also fail. We agree.

3.7 There was no evidence that the appellant Sokomanu had committed the offence charged as principal.

Mr Toomey argued that the learned judge directed the assessors to consider the wrong question: did Mr Sokomanu intend to do something which might have an unlawful effect? rather than: did he intend to do something unlawful, knowing that it was unlawful?

We do not think this complaint is justified. The learned judge on many occasions posed the correct test, clearly expressed.

Finally on this count:-

3.8 The count was bad for duplicity.

Mr Toomey conceded that this was not his strongest point. We agree. In our view Section 60 creates one offence. It is sufficient if a person does one of the forbidden acts for either a traitorous or a mutinous purpose.

We have found a number of misdirections or omissions and we turn now to consider their effect. In fairness to the learned trial judge it must be said that many of the points were not taken, or only mentioned in passing at the trial; so that the defence presented to him was in some ways different from that argued before us. The trial judge has a difficult task, as Winn L.J pointed out in R v Kackikwu (1967) 52 Cr. App R 538:

> "It is asking much of judges and other tribunals of trial of criminal charges to require that they should always have in mind possible answers, possible excuses in law which have not been relied upon by defending counsel or even, as has happened in some cases, have been expressly disclaimed by defending counsel. Nevertheless, it is perfectly clear that this Court has always

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regarded it as the duty of the judge of trial to ensure that he himself looks for and sees any such possible answers and refers to them in summing-up to the jury and takes care to ensure that the jury's verdict rests upon their having in fact excluded any of those excusatory circumstances".

The statute gives little guidance as to how we should approach this matter. Section 207 (1) of the Criminal Procedure Code Act simply says that "... the appeal court may, if it considers that there is not sufficient ground for interfering, dismiss the appeal ...", or it may allow the appeal with various consequences.

What is "sufficient ground for interfering", and how is that to be assessed? We think that we should adopt the same approach as in other common law jurisdictions. If the trial court reaches its conclusion on the basis of admissible evidence, on which a proper direction is given on every issue, a court of appeal must acknowledge the immense advantage of the trial court in seeing and hearing the witnesses, and should only rarely intervene. If there was a misdirection in law, or a material irregularity, or the verdict is otherwise unsafe or unsatisfactory, an appeal court may intervene, but will not necessarily do so. If, despite the irregularity, the verdict would have been the same, there is not "sufficient ground for interfering". But if we feel that because of some defect (or a combination of defects) there is a real possibility that in their absence the verdict would have been different, then the appeal must be allowed.

This involves a subjective test, as was pointed out in R v Cooper (1968) 53 Cr. App R 82. Lawton L.J expressed the test concisely in R v Pattinson and Laws (1973) 58 Cr. App. R. 425: "... the problem for us on this evidence is this: have we got a lurking doubt about this case?" This "lurking doubt" led the Court of Appeal in R v Bracewell (1979) 68 Cr. App. R. 44 to quash a conviction despite all grounds of appeal having been individually rejected.

Where the issue is whether a particular inference can be drawn from proved facts, it is helpful to refer to the judgment of the High Court of Australia in Barca v The Queen: 133 C.L.R. 92 (at p. 104):

"When the case against an accused person rests substantially on circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused. To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be the only rational inference that the circumstances would enable them to draw".

These are the tests which we apply.

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So what is the overall and individual effect of these misdirections or omissions?

Ground 1.5 A: failure to refer to good character.

On its own we do not think that this omission would have affected the verdicts. We must accept the reality of the situation. All the appellants are public figures and well known. It is unlikely that specific reference to the favourable inference which might be drawn from good character would have altered any view which the assessors may have formed as to their credibility or propensity to commit these offences.

Grounds 2.7 and 2.8: failure to consider what facts could prove the alleged agreement; and failure to consider whether there was one agreement, or separate agreements.

We do not think that these omissions could have had any effect on the verdicts. On the evidence, it is clear that one single agreement was made between the appellants at the meeting on the Sunday morning. All were present together at the same time. Any other conclusion would have been irrational.

Ground 2.10 (B): The lack of clear direction as to the effect of disbelieving what the appellants asserted.

We cannot exclude the possibility that the assessors may have given undue weight to the fact that they did not believe some of the appellants' evidence, in particular when they said that they thought they were acting lawfully. We must therefore consider whether, had they relied solely on the circumstantial evidence which they were entitled to consider, they would have reached the same conclusion.

We apply the test approved in Barca v The Queen (ante). Was the conclusion that each knew that he was acting unlawfully the only rational inference that the circumstances would enable them to draw?

The learned judge directed himself and the assessors correctly as to what were the issues. In his summing up, and his judgment, he considered the circumstances and went on to list several from which conclusions adverse to the appellants might be drawn. He referred to the background and experience of each; the prior preparation of instruments of appointment and oaths of allegiance; and the way in which each behaved at that meeting, including the interviews with journalists. He did not put in the balance circumstances in their favour: the fact that Mr Sokomanu

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had announced publicly that he intended to form an interim government; that he had publicly stated that elections would be held in 2 months; that such elections so soon might be too soon for the infant party to which Mr Sope belonged – they might not be sufficiently well organised; that the ceremony on Sunday morning was done in the full glare of television publicity; that Mr Sokomanu had indicated in his circular to the police and VMF that if there was any dispute about the lawfulness of what he was doing the Supreme Court could make a ruling on it. Just to list these matters shows that there were circumstances which could have been found consistent with a genuine belief that the actions were lawful. They were not put in the balance. The learned judge made some play of the fact that Mr Sokomanu's actions contravened several separate provisions of the Constitution. We do not see that this takes the prosecution case any further. If he believed that he could override the Constitution at all, even in one respect, he would believe that he could override it in all respects. It does not make his asserted belief that he had that power any more unlikely, whether he breached one or twenty one separate provisions.

Had all these matters been taken into account, we cannot say with confidence that the court must have found that the only rational conclusion was that any of the appellants knew that he was acting unlawfully.

Ground 2.12: the direction as to the inference which could be drawn from Mr Sope's telephone call to Marie Kalulu.

We have found that evidence of this telephone call was admissible, but put to the wrong use. There was plenty of other evidence to prove the existence of an agreement; but the suggestion that it proved that Mr Sokomanu and Mr Sope were working together on the Friday was not justified and can only have had a very damaging effect on Mr Sope's defence.

The cumulative effect of all these matters is to leave us with a very real doubt – not just a lurking doubt – about the verdicts. If all the matters to which we have referred been put into the balance, we think it quite possible that the court would have reached different conclusions. We find the verdicts against each appellant on the charges of seditious conspiracy and incitement to mutiny unsafe and unsatisfactory. These verdicts are set aside. The remaining verdicts, relating to the taking of the oaths, stand or fall with the charge of seditious conspiracy and are also set aside.

There is no question of ordering a new trial in these circumstances. Each of the appellants is discharged.

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I regret to say that we have not been able to reach a unanimous decision. My colleague Goldsbrough J does not wish to give a dissenting judgment, but authorises me to say that he concurs with our findings as to the existence of each misdirection or omission, but does not share our conclusion that these might have affected the eventual verdicts.

Dated at Port-Vila this 14th day of April, 1989.

Mr Justice A. Amet	Mr Justice ~~G.~~ Martin	Mr Justice E. Goldsbrough
Court of Appeal Judge	Court of Appeal Judge	Court of Appeal Judge