ADDRESS BY THE DIRECTOR OF PUBLIC PROSECUTIONS, MR. CHRISTOPHER PRYDE, AT THE 19th ANNUAL ATTORNEY-GENERAL'S CONFERENCE HELD AT THE INTERCONTINENTAL RESORT AND SPA,

8 - 9 DECEMBER 2017

"ORDINARY PEOPLE OR JUDGES? JURY OR JUDGE TRIALS"

The Hon. Prime Minister, the Hon. Attorney-General and members of the Government;

The Chief Justice, The President of the Court of Appeal, Members of the Judiciary including the Chief Magistrate;

The Solicitor-General, Permanent Secretaries; Members of the Diplomatic Core;

Fellow Panellists, Participants, Colleagues, Ladies and Gentlemen

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Introduction

It is now nearly 25 years since the Beattie Report[1] concluded that the assessor system of trial in the High Court of Fiji should be retained and it is interesting to reflect that Fiji is somewhat of an oddity amongst common law countries by adopting and maintaining an assessor system for nearly 125 years and with very little change over that time. Can we conclude therefore that our current system is fit for purpose or is it time for a change? Have we moved on from the original

[1] Commission of Enquiry on the Fiji Courts (the Beattie Report), Government of Fiji, August 1994.

conditions that were thought to require its implementation? Should it be replaced by a jury system? Should it be introduced into the Magistrates' Courts? Or should it be dispensed with entirely in favour of judge alone trials? Before we discuss these questions, it is necessary to understand how we came to have our current system and to place it within Fiji's unique cultural and historical context.

History of the Assessor System in Fiji

As with most colonies established by the British Crown, the acquisition of sovereignty in Fiji was quickly followed by the introduction of British laws, conventions, and institutions which included, amongst other things, the mainstay of the British criminal justice system since Magna Carta, trial by jury and this found effect in Fiji's Criminal Procedure Ordinance of 1875 but with a proviso; trials before the Supreme Court (now the High Court) would be heard either by jury or by the Chief Justice sitting with assessors.[2]

Section 70 provided that where the accused or the victim was "a native or Polynesian Immigrant" those trials would be heard by the Chief Justice and assessors. This was extended in 1883 when the indentured labour system got underway to include any case where the accused or the victim was "a native of India, China, or a Pacific Island".[3]

The assessor system therefore became the norm in Fiji with jury trials being reserved for situations when the accused and victim were Europeans. Why was the distinction necessary? It appears that the British government assumed that a jury consisting of white settlers (at that time, virtually the only persons that would have qualified to sit as jurors) could not be relied upon to determine any

[2] Ordinance No. 23 of 1875, section 24
[3] Ordinance No. 8 of 1883

case involving a native Fijian (or other race) in a fair and impartial manner.[4] In other words, European settlers could not be trusted to put their prejudices to one side in deciding cases involving non-Europeans although, the judge, who would have also been European at the time, could presumably do so because his class allowed him to overlook such issues and stand above the fray! We often forget that class hierarchy, even more than race, greatly informed British thinking in the colonial period. In any event, jury trials were infrequent because they occurred only in very serious cases where all the protagonists were European[5] and trial by jury was abolished in 1961 in favour of the current system of trial by assessors.[6]

Why abolish the jury and not the assessor system? The reason given at the time appears to be similar to the reason given in the Beattie Report for retaining the assessor system; communities with mixed race populations tend to allow matters of prejudice to enter the equation too often and produce unjust results. In other words, people, can still not be trusted by their fellow citizens, to do right. Does this remain the case, or have we moved on? Is there a class prejudice operating here that says, as a lawyer, I can put prejudice behind me but I would not trust an assessor drawn from the public to decide the case fairly. Is the perception that people will decide a case on the basis of racial prejudice real or is it just simply presumed? After all, most jurisdictions these days are mixed communities and no one has seriously suggested abolishing the jury system in England, Australia or New Zealand in favour of an assessor system on the grounds the juries there cannot be trusted to act impartially. Perhaps we judge ourselves too harshly in Fiji.

[4] Peter Duff, The Evolution of trial by judge and assessors in Fiji, in The Journal of Pacific Studies, Volume 21, 1997, p. 191.
[5] ibid at p. 192
[6] Criminal Procedure Code (Amendment) Ordinance (No. 35 of 1961)

Fiji's Place in the World

With these observations in mind, you might be forgiven for thinking I am about to now engage in a passionate advocacy for the abolition of the assessor system in favour of a jury system. Well, I am not. In my view, the assessor system manages to capture the best features of a jury system whilst avoiding many of the disadvantages of the jury system. Instead of abolishing the assessor system we should be strengthening it and providing more opportunities for cases to be heard before assessors, including in the Magistrates' Court.

At this point however it may be appropriate to consider where Fiji's assessor system sits in terms of other comparable jurisdictions. Assessor systems are present in a number of civil law jurisdictions but here assessors are usually appointed as assistant judges who are legally trained and qualified rather than being drawn from the general population and are there to assist the judge on certain specialised matters.

One civil law jurisdiction recently however has begun experimenting with a system that blends elements of the common law jury system with the European lay assessor system. Under the *saiban – in seido* (lay judge) system in Japan, the bench is composed of three professional judges and six lay civilians chosen from the population at random. These mixed tribunals are charged with not only determining guilt but also the sentence to be imposed and decisions are based on majority vote although any valid verdict must include the votes of at least one professional judge and at least one lay assessor.

Interestingly, Japan's Judicial Reform Council stated that the rationale for introducing this mixed system in 2009 was (i) to "strengthen the democratic tendencies of the Japanese people and improve democratic governance within

Japan" and (ii) to help transform the collective consciousness of the Japanese populace from "being a governed object [to that of] a governing subject with autonomy and bearing social responsibility."[7]

We could make similar justifications for the use of juries or assessors in Fiji. The democratising effect the presence of a jury or assessors has on the criminal justice system is one of its most important and salient features and I will return to this point later.

In the common law world, although some jurisdictions such as India and Pakistan have abolished the jury system altogether most have retained the jury system. South Africa though is an example of a common law country that abolished jury trials in favour of an assessor system in 1969 for reasons similar to Fiji because of the issue of race and its perceived influence on outcomes in the courts.

Though similar, there are important differences. In South Africa, an assessor is "a person who, in the opinion of the judge, has experience in the administration of justice or skill in any matter which may be considered at the trial"[8] and so there is a practice of appointing advocates, magistrates, lawyers and legal academics to the role. (In Fiji these people are deliberately exempted from service.)[9]

Assessors are also used in the Magistrates' Courts whereas, in Fiji, assessors are solely used in the High Court and their role, though similar, is somewhat different to the role in Fiji. Whereas in Fiji, assessors give an opinion to the judge with the judge delivering the verdict (being the ultimate finder of fact), assessors in South Africa sit with the judge as members of the court and,

[7] see article by Bryan Thompson, Japan's Lay Judges and Implications for Democratic Governance, 11 May 2012
[8] section 145 (1) (b) South African Criminal Procedure Act
[9] s.206 Fiji Criminal Procedure Act, 2009

importantly, are co-finders of fact along with the judge. An interesting contrast which demonstrates the difference can be seen in the photograph showing a court in South Africa with the judge in the middle and the two assessors on either side in rather ornate judge-like chairs.

How does Fiji's Assessor System Compare to a Jury System?

Fiji's assessor system then is somewhat of an oddity amongst common law jurisdictions. How then does Fiji's assessor system compare to jury systems?

Assessors are empanelled like a jury and both defence and prosecution can raise an objection. Assessors are sworn in and they leave when issues of admissibility are being ruled on returning to hear only the admitted evidence and give an opinion on guilt or innocence after the judge has summed up. There are also far fewer of them, not less than 2[10], usually 3 but sometimes 5 as in fraud cases. In one case recently there were 7 although this is the exception.

Opinions (verdicts) do not need to be unanimous.

[10] s.203 Criminal Procedure Act 2009

When you compare this to a jury of 12 with unanimous decisions required (although majority verdicts are now entertained in some jurisdictions such as NZ), switching to a jury system would at a minimum ratchet up the costs per trial by 75%. The need for unanimity amongst 12 jurors also demands more time to reach a consensus than the deliberations of 3 assessors not required to agree with each other. Cost should not be a determining factor but with all things being equal, it is a compelling argument for retention especially when we have significant backlogs in the system. At present trials can take between 4 days and a month to complete depending on the complexity of the case before the High Court. Of necessity, a jury system will add anywhere between 1 to 7 days to this process and without the guarantee that a jury would deliver a more just outcome than a judge who is assisted by the opinions of 3 assessors.

There are two problems with the assessor system currently operating in Fiji.

First, although the judge must give cogent reasons for departing from the opinion of the assessors in writing and pronounced in open court, the judge is not required to give reasons for accepting the opinion of the assessors.[11] Whilst we are able to read the judge's summing up to the assessors and the judgment, we are only given insight to the verdict when the judge disagrees with the opinions of the assessors. In a jury trial however, the judge is expected to provide a full account of the facts, what he or she had found to be the facts, which witnesses he or she had believed and disbelieved and what his or her conclusions were. This is important because the deliberations of the jury are unknown to us. In Fiji however, if the judge and the assessors are in agreement, we are deprived of any insight as to how the judgment was arrived at because the judge directs himself or herself in accordance with the summing up. The

[11] s.237 of the Fiji Criminal Procedure Act, 2009

system lacks transparency at this level and can cause difficulties for an appellate court as was commented on in the court of appeal decision in *State v Sahib* in 1992.[12] The court commented that the judges Summing Up "does not provide an accurate ground on which to base (a) consideration of the Judge's decision."

Second, since the Magistrates' Court sentencing jurisdiction has increased over the years, convicted persons now receive longer sentences in the Magistrates' Courts but without the Magistrate having the benefit of the opinions of assessors. To compound this factor, we increasingly have indictable cases being remitted back to the Magistrates' Courts for trial. If an indictable offence requires a High Court trial due to the seriousness with which the legislature regards the offence and with the additional protection of a group of assessors, what is the justification for an indictable matter being remitted to the Magistrates' Court to be heard by a Magistrate without the benefit of assessors? If it is thought necessary in the one, why not the other? Perhaps it is time to consider introducing assessors on a limited basis in the Magistrates' Court when indictable matters are remitted down.

Juries or Judges?

Undoubtedly, indictable offences should be decided either with a jury or with assessors and a judge. I have not discussed the advantages of the judge alone trial because in my opinion the advantages of a jury or assessor system outweigh arguments for judge alone trials, even in complex fraud trials. There should be no case too complex for a capable judge to be able to adequately sum up the evidence and the issues to a jury or to assessors. If issues are adequately explained, there is no reason a member of the public would not be able to understand and give either an informed verdict or an informed opinion

[12] State v Sahib [1992] FJCA 24;AAU0018u87s (1992) (per Sir Moti Tikaram VP and Sir Kapi and Ward JJA) *obiter*

on credibility. If Steven Hawking can explain quantum mechanics to the layperson, a judge should be able to explain the elements of fraud to assessors.

I mentioned earlier the democratising effect the presence of a jury or assessors has on the criminal justice system as being one of its most important and salient features. By allowing ordinary citizens into the criminal justice system and allowing them a prominent role at the heart of the decision-making process, we ensure that local standards and values relevant in determining credibility remain and that the court system (to borrow from the vernacular) is kept real.

Courts should not be about class elites, they should be about participation and the assessor system allows the community a way into the heart of the criminal justice system. It allows the community to experience first-hand the workings of the criminal justice system. The public have an inherent interest in participating actively in the criminal justice system. The assessor system gives them the right to participate. They can be trusted to do the right thing.

Conclusion

Fiji's assessor system has operated well for 125 years and should continue to do so. It is cost effective, it guards against elitism, it keeps the community engaged, and it promotes democracy. In circumstances where indictable matters need to be referred down to the Magistrates' Court, it should be on the condition that the Magistrate will sit with assessors. This will require an amendment to the law to permit assessor trials on indictably remitted matters in the Magistrates' Courts. In instances where the matter is indictable but triable summarily, an addition to the election could be granted to the accused by allowing the accused person to elect either (i) trial by Magistrate sitting with assessors or (ii) trial by the Magistrate sitting alone. This option recognises that an offence that

is indictable but triable summarily is more serious than a purely summary offence. Summary trials would continue in the same manner, i.e. by a Magistrate sitting alone.

It has been 25 years since Fiji last formally examined the assessor system. Whilst I remain in favour of retaining the current system, it may be time to look more closely at some further improvements.

I thank you for listening to me and I wish you all the very best for the remainder of the Conference.

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