

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0071 OF 1997S  
(High Court Civil Action No. HBJ 0010 of 1997)

BETWEEN:

KEPUELLITOKO

*Appellant*

AND:

THE PERMANENT SECRETARY FOR  
EDUCATION & TECHNOLOGY  
THE SECRETARY FOR PUBLIC SERVICE  
COMMISSION

*Respondents*

Coram: The Hon. Sir Moti Tikaram, President  
The Rt. Hon. Sir Maurice Casey, Justice of Appeal  
The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing: Wednesday, 5 May 1999, Suva

Counsel: Mr. I. V. Tuberi for the Appellant  
Mr. S. Kumar for the Respondents

Date of Judgment: Friday, 14 May 1999

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JUDGMENT OF THE COURT

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On 23rd November 1997 Pathik J. gave judgment in the High Court at Suva refusing the appellant's application for judicial review of the second respondent's decision dismissing him from his post in the Public Service as a teacher, with effect from 10 March 1993. He appeals against the judgment. We will call the first respondent "the Education Department" and the second respondent "the Commission".

The appellant had been employed as a teacher since 1979 until his conviction by the Magistrates Court in October 1990 on three counts of raping a pupil, for which he was sentenced to two and a half years' imprisonment. His appeal against conviction was allowed, and he was discharged by the High Court on 23 May 1991. By letter dated 29 June 1992, the Education Department charged him with engaging in improper conduct in his official capacity likely to bring the Public Service into disrepute and to be prejudicial to the conduct of the Public

Service, contrary to Reg. 35(t) of the Public Service Commission (Constitution) Regulations 1990 ("the Regulations"). (In fact there was no Reg. 35(t).)

Particulars were given to the appellant alleging three acts of sexual intercourse during the course of his duties with the pupil named in the earlier criminal charges between October 1988 and May 1989. He was informed that the provisions of Reg. 41 applied, and in accordance with subcl (2) thereof he was requested to state within 14 days whether he admitted or denied the charges, and advised that he could give such explanations as would enable proper consideration of them. He was also warned that if he failed to state in writing whether he admitted or denied the charges, then pursuant to subcl (3) he would be deemed to have admitted them, and that one or more of the penalties specified in Reg. 51(1) might be imposed on him by the Commission. These ranged from reprimand to dismissal.

The appellant did not respond to this letter. His Lordship recorded that he was dismissed by letter dated 15 March 1993, and that in its letter of 25 February 1997, the Education Department advised the appellant that the Commission at its meeting of 5 February 1997 had approved his dismissal under Reg. 51(1)(a) of the Regulations, effective from 10 March 1993; and that he be paid the remuneration he would have received if he had continued to serve as a teacher from 12/10/90 to 9/3/93. His teaching post had necessarily come to an end with his conviction and his solicitor wrote unsuccessfully to the Education Department seeking his reinstatement in July 1991 and August 1992. After his dismissal in 1993 the appellant approached the Ombudsman, again unsuccessfully, and he wrote to the Commission in July 1996 to the same effect, followed by a letter from his solicitor, also to no avail.

Numerous grounds were advanced in support of the application for judicial review. His Lordship dealt first with what he regarded as the main thrust of the appellant's argument based on Reg. 53 reading:-

*"53. An officer acquitted of a criminal charge in any court shall not be dismissed or otherwise punished in respect of any charge of which he has been acquitted, but nothing in this regulation shall prevent his being dismissed or otherwise punished in respect of any other charge*

*arising out of his conduct in the matter, unless such other charge is substantially the same as that in respect of which he has been acquitted."*

It was submitted that the appellant was immune from dismissal or punishment because the convictions brought in respect of the same conduct has been quashed and the appellant should be regarded as having been acquitted. His Lordship rejected this submission, holding that the regulation applied to an acquittal, not to a discharge in these circumstances: and that the respondents were entitled to bring the disciplinary proceeding in which they had complied with the relevant regulations, so that no question of a breach of natural justice arose, as alleged in the first ground of the appellant's motion for relief. He summarily rejected the remaining grounds couched in very general terms which he saw as overlapping and devoid of merit.

In this Court the appellant advanced no less than 12 specific grounds of appeal, summarised in his counsel's submission under the following headings:-

I. "Autrefois Acquit and Convict"

This is really a submission based on the operation of Reg.53 above, in which counsel argued that His Lordship was wrong in refusing to recognise the appellant's discharge on appeal as an acquittal. We were not given the full text of Fatiaki J.'s appeal judgment but it seems clear that he allowed the appeal essentially because of the unsatisfactory nature of the trial, as noted in the following extract cited by Pathink J.:-

*"In the light of the several "irregularities" that occurred in the appellant's trial and having regard to the misdirections of the trial magistrate in relation to the corroborative evidence the appellant's conviction must be considered unsafe and unsatisfactory.*

*The appeal is accordingly allowed, the convictions quashed and the appellant discharged."*

Acquittal is ordinarily understood as a finding of "not guilty" after a trial. Lord Sumner observed in Crane v Public Prosecutor [1921] 2 AC 299, 332 that "Acquittal implies that a true legal trial has been had. Here there has legally been none at all, but only the semblance of one, a mis-trial, which does not count." In that case there was a fundamental defect in the indictment whereas in the present instance a proper trial was commenced, but it miscarried because of deficiencies in the way it was conducted and there were perceived difficulties with corroboration, making the verdict unsafe.

Under s.319 (1) of the Criminal Procedure Code [Cap.21] the High Court on appeal could confirm reverse or vary the decision of the magistrates' court, and could order a new trial. It was also entitled to make such other order in the matter as might seem just, and by such order exercise any power which the magistrate's court might have exercised. Under s.215 of the Criminal Procedure Code the latter court could either convict or acquit the accused, or make an order for his discharge (either absolute or conditional) under the provisions of s.44 of the Penal Code, applicable in cases where a person is found guilty but it is inexpedient to inflict punishment.

The appellant is accordingly in a situation in which Fatiaki J. did not exercise the power the magistrate's court possessed to acquit him, but quashed the conviction and simply ordered his discharge. While technically this was not a verdict of acquittal, we think that in reality it was intended to have that effect, and that in the interests of justice it should be treated as such for the purposes of Reg.53. This was evidently the view of the Education Department in issuing the disciplinary proceedings alleging different conduct from that charged in court.

Assuming the appellant had been acquitted of the charges of rape, the proviso to Reg.53 still allows him to be dismissed or punished in respect of any other charges arising out of his conduct in the matter, unless they are substantially the same as the criminal charge. The disciplinary charges alleged only improper conduct in his official capacity, in having sexual intercourse with the pupil in the course of his duties. While the acts of intercourse are no doubt the same as those in the rape charges, lack of consent was an essential element in the latter, whereas it was irrelevant to the disciplinary charges. This difference is fundamental in law,

leading to the conclusion that the charges brought by the respondents are not "substantially the same" as the criminal charges, and that the prohibition in Regulation 53 is inapplicable. Accordingly the grounds of appeal based on that Regulation must be rejected.

2. Breach of Natural Justice

As noted above, the letter of 29 June 1992 detailing the charges referred to a non-existent Reg.35(t), clearly a mistaken reference to the correct Reg.36(t). Counsel's attempt to construct a breach of natural justice out of this obvious error as ground 3 of the appeal was quite misplaced. Apart from the fact that Reg.36 was mentioned in the opening paragraph of the letter, the appellant could have been under no illusion about the reality of the charges being made against him, and about what he had to do to answer them. We see no merit in this ground.

In additional ground 1 under this heading of breach of natural justice it was claimed that the respondents did not comply with the relevant regulations and that the appellant should have been given the opportunity to be heard on the question of guilt and penalty. As to non-compliance, the appellant submitted that his failure to respond to the charges should not have been taken as a "deemed" admission of guilt under Reg.41(3), because his plea of 'not guilty' to the rape charges, and his subsequent appeal against conviction, should have been a warning to the respondents that he was not admitting the disciplinary charges. But those were different matters and could not reasonably be seen as a reflection of the appellant's attitude to the disciplinary charges. Along the same lines it was submitted that letters sent by him to the respondents indicated his denial of the charges. They were annexed to his affidavit in support of the application for leave to bring judicial review proceedings, and did not form part of the court record. We have examined them, and find they were concerned with his re-instatement to his teaching position after his successful criminal appeals and did not address the separate disciplinary charges.

In dealing with those charges the Commission was faced with a situation in which the complainant had given evidence of intercourse at the trial, and the appellant did not respond to that allegation put to him in the letter charging him, notwithstanding its warning

of the possible consequences of silence. He explained in his affidavit that he had not answered the letter because his solicitor had advised him the charges were defective and contravened Reg. 53. We find this explanation difficult to believe, and it affords no justification for ignoring the clear warning in the letter about the consequences if he failed to respond. He must have been well aware of the risks of doing nothing, and has only himself (and perhaps his legal advisers) to blame for the respondents' conclusion that in the absence of a reply he must be deemed to have admitted the charges. The Commission was therefore entitled to proceed on that basis, and we see no error of law or procedure calling for the court's intervention in the way the appellant's guilt was decided, nor any breach of natural justice.

The position was different in Permanent Secretary for Public Service Commission v. Epeli Lagiloa (CA38/1996; judgment 28 November 1997) relied on by the appellant, where it was held that the officer should have been heard on the question of guilt because the Commission mistakenly believed he had not denied the offence in his letter responding to the charge. Nor does Permanent Secretary for Public Service Commission v. Lepani Matea (CA 16/1998; judgment 29 May 1998) help the appellant because it dealt with a different procedure under Reg. 54, where the court found there was a right to be heard on the issue of guilt.

However, we are satisfied in the light of the principles accepted in those authorities that the appellant should have been given the right to make submissions on penalty. But having regard to the gravity of his misconduct with a young pupil by her teacher and the gross breach of trust involved, no reasonable employing authority could do otherwise than dismiss him. Accordingly we are satisfied that in respect of this failure, the court would inevitably exercise its discretion against granting the relief sought.

### 3. Bias of trial Judge

This allegation arises because of His Lordship's criticism of the appellant, and of his failure to deal with some of the grounds raised in support of the judicial review application. He was scathing about the way they were expressed, and we think his comments were largely justified. Those in question comprised a collection of broad generalities which told the court

nothing about any real causes of complaint which might underlie them. His Lordship's views about the appellant were robustly expressed, but having regard to the circumstances, we do not think he went beyond what reasonable people would regard as fair comment of the appellant's behaviour. Bias justifying interference by this Court has not been established.

Result:

The appeal is dismissed, with costs and disbursements to the respondents of \$1,000.

*M. Tikaram*

Sir Moti Tikaram  
President

*M. Casey*

Sir Maurice Casey  
Justice of Appeal

*I. R. Thompson*

Justice I. R. Thompson  
Justice of Appeal

Solicitors:

Tuberi Chambers, Suva for the Appellant  
Office of the Attorney General Chambers, Suva for the Respondents

