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

CRIMINAL APPEAL NO.AAU0033 OF 1998S
(High Court Criminal Appeal No.HAC 017 of 1997/S)

BETWEEN:

MISAELE KULAVERE

Appellant

AND:

THE STATE

Respondent

Coram: **The Hon. Sir Moti Tikaram, President**
The Rt. Hon. Sir Thomas Eichelbaum, Justice of Appeal
The Hon. Justice Kenneth R. Handley, Justice of Appeal

Hearing: **Tuesday, 10 August 1999, Suva**

Counsel: **Dr. J. Cameron for the Appellant**
Ms. R. Olutimayin and Ms. A. Prasad
for the Respondent

Date of Judgment: **Friday, 13 August 1999**

JUDGMENT OF THE COURT

On 6 May 1996 the appellant was involved in an exchange of blows with one Maika Nadumukuro. The latter fell backwards hitting his head on a concrete footpath. He was admitted to hospital with what were described in the summing up as grievous injuries and despite an operation to remove a blood clot died in hospital a few days later. Initially, the appellant was charged with murder, but later the Director of Public Prosecutions reduced the charge to manslaughter. At the trial, after a retirement of only a few minutes, the assessors returned a unanimous verdict of not guilty, on grounds of self defence. The Judge adopted their decision, and on 27 October 1998 discharged the appellant. The judge dismissed applications by the appellant for an award of costs under s.158(1) of the Criminal Procedure Code (cap 21) and for

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compensation under s.160. This appeal is against the order dismissing the two applications just mentioned.

According to the notice of appeal this is an appeal on a question of law, on the single ground that in dismissing the appellant's applications for costs and compensation upon his acquittal without reasons, the Judge failed to accord the appellant a fair hearing, in breach of his rights under s.29(1) of the Constitution. It is common ground that the Judge gave no reasons, simply saying that having given careful consideration to the applications, he refused them.

Under s.21 of the Court of Appeal Act (cap 12) a person convicted on a trial held before the High Court has the right to appeal against conviction on any ground involving a question of law alone. Since the appellant was not convicted, and this is not an appeal against conviction, Mr. Cameron accepted, as he had to, that s.21 did not give jurisdiction for the appeal. For the right to appeal Mr. Cameron relied solely on s.121(2) of the Constitution:

> ***"Appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any matter arising under this Constitution or involving its interpretation."***

Mr. Cameron's argument was founded on s.29 (1) of the Constitution, providing that "every person charged with an offence has the right to a fair trial before a court of law". In Mr. Cameron's submission the applications for costs and compensation were part of the trial, and the right to be given reasons for substantive decisions, he said, was an essential feature of a fair trial. Assuming, for purposes of discussion, that both propositions are correct, the question remains whether, in terms of s.121 (2), this is an appeal from "a ...judgment...in any matter

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arising under [the] Constitution or involving its interpretation".

The purpose of the subsection is plain. It is to ensure a right of appeal in matters where the High Court has made a decision which (to put it in popular rather than legal language) involves the Constitution. However, paying more precise attention to the language of the legislation, it will be seen that the right of appeal is in respect of a judgment *in a matter* arising under the Constitution or involving its interpretation. The matters before the High Court were applications for costs and compensation. The considerations to be taken into account on such applications are set out in sections 158 and 160 of the Criminal Procedure Code. In deciding such applications it is unnecessary to turn to any provision in the Constitution, or consider its interpretation.

We accept that the arguments Mr. Cameron has urged in *support of the appeal* involve the interpretation of the Constitution. If there was jurisdiction to entertain the appeal we would need to decide whether in terms of s.29 (1) of the Constitution the applications were made in the course of the trial, or whether the trial had concluded. If the applications were part of the trial the Court would have to decide further whether failure to give reasons infringed the appellant's rights under chapter 4 of the Constitution (Bill of Rights) and if so the appropriate remedy. None of these issues however arose in the applications before the High Court.

Language similar to that of s.121 (2) is found in section 76 of the Constitution of the Commonwealth of Australia and we are obliged to Dr. Cameron for providing references to case law on that legislation, Hopper v. Egg & Egg Pulp Marketing Board (Vic) (1939) 61 CLR 665; Attorney General (NSW) v. Commonwealth Savings Bank of Australia

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(1986) 160 CLR 315; James v State of South Australia (1927) 40 CLR 1; and R v. Commonwealth Court of Conciliation and Arbitration, ex parte Barrett (1945) 70 CLR 141. Interpretation of the Australian sections however raises a different issue, whether the matter *before the High Court* arises under the Constitution or involves its interpretation. In our case, we repeat, the issue is not whether *the hearing of the appeal* would include matters arising under the Constitution or involving its interpretation; undoubtedly it would. But the Court's power to deal with the appeal depends on the different question whether the judgment of the High Court was one "in any matter arising under [the] Constitution or involving its interpretation" and for the reasons given we are of the opinion it was not.

The point is underlined by the holding in Attorney General for NSW v Commonwealth Savings Bank of Australia at 327 that a cause involves the interpretation of the Constitution if the interpretation of one or more of its provisions is essential or relevant to the question of statutory interpretation arising. This cannot be said in respect of any issue in the applications before the High Court here. Or to adopt the language of Starke J. in Ex parte Walsh & Johnson; In re Yates (1925) 37 CLR 36, 130 no matter arising under the Constitution or involving its interpretation "was involved or entangled in the controversy" before the High Court.

While we agree with Dr. Cameron that a fair large and liberal interpretative approach is appropriate, the clear language of s.121 (2) precludes the result for which he has argued, that the issues before the High Court came within that section.

Accordingly the appeal must be dismissed for want of jurisdiction. We wish to add however that in a situation such as that before the High Court a Judge ought to give reasons.

Although there is no "inflexible rule of universal application" (R v. Awatere [1982] 1 NZ LR 644, 649 per Sir Owen Woodhouse P) the requirement to give reasons for judicial decisions has been described as a "normal", although not a universal, incident of the judicial process, Public Service Board of NSW v. Osmond (1986) 159 CLR 656, 667. We do not say that every dismissal of applications of the present kind necessarily requires any, let alone any extensive, statement of reasons; but in this case, where the appellant had undergone lengthy proceedings on a serious charge, we have no hesitation in saying that reasons ought to have been given. It

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is true that in the absence of any right of appeal some of the usual grounds why reasons ought to be given are inapplicable. Nevertheless, in a case such as the present it would be appropriate to supply them, so that the parties, particularly the unsuccessful party, can see and understand the basis of the decision, and so that confidence in the Court system is maintained, through publicly available grounds demonstrating that the decision has been made according to the relevant law and principles.

Orders

Appeal dismissed.

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Sir Moti Tikaram
President

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Sir Thomas Eichelbaum
Justice of Appeal

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Justice Kenneth R. Handley
Justice of Appeal

Solicitors:

Messrs. Gates, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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