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

CRIMINAL APPEAL NO. AAU 0002 OF 2002S
(High Court Criminal Case No. HAC 14 & 15/1998)

BETWEEN:

THE STATE

Appellant

AND: RAMESH PATEL

Respondent

Coram: Reddy, President
Tompkins JA
Ellis JA

Hearing: Tuesday, 4th November 2002, Suva

Counsel: Mr. P. Ridgway and Mr. V. Vosarogo for the Appellant
Mr. D. Sharma for the Respondent

Date of Judgment: Friday, 15 November 2002

JUDGMENT OF THE COURT

Introduction

The applicant has applied for an extension of time within which it may appeal or give notice of intention to appeal against an order for costs made by Surman J in favour of the respondent in Case No HAC 014/98.

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Factual background

It is not necessary for the purposes of this appeal to set out in detail the long and tortuous course that these proceedings have taken up to the bringing of this application. The following are the principal events.

Charges were brought by the State against the respondent arising out of events alleged to have occurred between May 1994 and February 1995. After certain amendments, two indictments were presented dated 22 and 25 October 1998. They alleged fraudulent conversion of property involving various sums of money alleged to have occurred between the above dates. This application concerns the indictment HAC 014/98 date 25 October 1995.

The respondent applied for an order that the three counts in the indictment be stayed. That application came before Surman J who, in a decision delivered on 27 October 1999 granted the application in these terms:

> ***" Not without hesitation, but adopting what I believe is a common sense approach to a decision which is entirely for my discretion. I have decided that the proceedings on the three charges relating to Mr. Patel and listed in the indictment dated 25 October 1999 should be stayed. Not to be proceeded without leave of the Fiji Court of Appeal."***

In HAC 016/98 dated 22 October 1998, the respondent pleaded not guilty. The State conceded that it had insufficient evidence to substantiate its case, with the result that the respondent was acquitted and discharged.

The respondent applied for costs in respect to both indictments. That application came before Surman J. He commenced his decision (which is undated but was presumable delivered shortly after the decision of 27 October 1999):

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"Subject to the provisions of section of 158 (2) and (3) of the Criminal Procedure Code (Cap 21) the awards of costs to the defendant (M Patel) following the conclusion of these two cases are a matter for my discretion.

I set out below the brief reasons for making the orders for the prosecution to pay the defendant's costs in each instance. (The current precise amount of the costs has yet to be decided)."

In the reasons that followed, relating to HAC 014/98, the judge referred to the absence of two witnesses, Mr Lovell and Miss Lal, both of whom were in the United States. The prosecution were not intending to call Mr Lovell, but accepted that Miss Lal was required to prove its case. The prosecution had sought a 4 month's adjournment, but that application had been refused when the stay order was made. The Court had since been advised that she was not willing to attend Court in Fiji. The judge concluded that the proceedings had been unnecessarily prolonged, entitling the respondent to costs.

He reached a similar conclusion in respect to HAC 016/98. We need not detail the reasons, since the State does not seek to challenge the award of costs in favour of the respondent on that indictment.

There followed a long period of Court appearances before different judges and the Deputy Registrar and correspondence between the solicitors acting for the respondent and the office of the Director of Public Prosecutions. On 16 August 2001 the respondent delivered to the Director bills of costs in taxation form in respect of both indictments totaling $197, 618.69. The solicitors for the respondent were urging the Director to settle the costs claim, the Director was seeking further particulars, some of which were supplied. It also challenged the jurisdiction of the Court to make the costs order.

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We need not detail this lengthy correspondence and numerous calls before the Deputy Registrar. Nothing was achieved. Finally, on 17 January 2002, twenty six months after the stay and costs orders were made, it filed its notice of appeal and application for leave to appeal out of time.

Is leave required?

It was submitted on behalf of the applicant that leave was not required. This submission was based on subs 3 (3) of the Court of Appeal Act as inserted by s 4 of the Court of Appeal (Amendment) Act No. 13 of 1998. That section provides:

> (3) Appeals lie to the Court as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court.

We accept, as was held by this Court in *Graham Southwick v the State* CA No AAUOO16/1999 at 8, that an order for payment of costs is a final judgment given in the exercise of the original jurisdiction of the High Court. There is therefore an appeal to this Court as of right pursuant to s 3 (3) of the Act.

The applicant further submitted that s 26 (1) of the Act does not apply to appeals under s 3 (3). Section 26 (1) provides:

> 26 (1) Where a person convicted desires to appeal under this Part to the Court of Appeal, or to obtain leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of Court within 30 days of the date of conviction or decision. Except in the case of conviction involving sentence of death, the time, within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Appeal.

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It was the applicant's submission they that there is no corresponding provision prescribing time limits within which notice of an appeal brought under s 3 (3) of the Act must be given. An appeal, it submitted, under that subsection is not subject to limits as to time. Consequently no extension of time is required and the application for leave should be treated as a notice of appeal to be listed for hearing on the merits before the Court of Appeal.

The words "or decision" at the end of the first sentence of the subsection were added by s 6 of the Court of Appeal (Amendment) Act No 38 of 1998. The applicant submitted that this was a "cosmetic" change, since, in the case of appeals from the High Court in its appellate jurisdiction under s 22, s 26 applied *mutatis mutandis,* pursuant to ss 22 (8), so the 30 day time limit applied without the amendment.

The legislature, in making this amendment, must have done so for some purpose. Such an amendment cannot be regarded as only "cosmetic". We note that the Court of Appeal (Amendment) Act No 13 of 1998, which inserted subs 3 (3), was enacted on 20 April 1998. The Court of Appeal (Amendment) Act No 38 of 1998, which inserted the words "or decision" in subs 26 (1), was enacted on 17 September1998. We can only assume that the legislature came to realise that the amendment in No 13 gave a further right of appeal without any time limit imposed. So it later enacted the further amendment in No 38 with the intention of introducing a time limit to a subs 3 (3) appeal. By making the amendment it was clearly intended that the time requirement was to apply to a decision as well as to a conviction. We see no reason why such a decision should not include a final judgment from which there is an appeal under subs 3(3). We appreciate that this result does not seem to harmonize with the opening phrase of subs 26(1) referring to "Where a person convicted. . ." But on the other hand it is difficult to accept that

the legislature intended, following these two amendments, that there should be a right of appeal from a final judgment of the High Court without any time requirement for the giving of the notice of appeal. That would be a bizarre consequence contrary to the due administration of justice.

For those reasons we conclude that subs 26 (1) applies to an appeal under subs 3 (3) with the result that in this case the applicant requires leave to appeal out of time.

Should leave to appeal out of time be granted?

The principles or criteria to be applied were considered by the Court of Appeal in New Zealand in *R v Knight* 1995 15 CRNZ 332 at 338. Relevant to whether the application should be granted are:

> ***". . .the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for the delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown."***

The principal ground of appeal advanced is that the judge had no jurisdiction under subs 158 (1) of the Criminal Procedure Code (Cap 21) to make an order for costs. Counsel for the respondent accepted that this is so. He submitted that the Court had an inherent jurisdiction to make an order for costs on an interlocutory application such as the present. We examine subs 158 (1) and the inherent jurisdiction submission later in this judgment. For present purposes it is sufficient to say that, for reasons we there set out, we consider that there are strong if not convincing grounds that can be advanced in support of the appeal.

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The length of the delay is substantial. A delay of 26 months from the making of the order can only be regarded as excessive. The reasons for the delay of this magnitude are unconvincing. The applicant advanced as reasons the departure from chambers of two counsel involved in the proceedings, the events of 19 May 2001 and the resulting demands on the resources of the chambers. Mr Ridgeway acknowledged that another factor was the lack of appreciation by counsel that the costs order may have been made without jurisdiction. None of these reasons can justify a delay of this magnitude.

The granting of leave and the determination of the appeal is unlikely to have any impact on others. It may aid in the administration of justice by determining an issue on which there has been some judicial uncertainty.

Mr Sharma fairly acknowledged that there had been no prejudice to the respondent by the delay in giving the notice of appeal, except possibly to the extent that, if the appeal were to fail, the respondent has been kept out of a substantial amount to which he would have been entitled – a factor that could be remedied by the award of interest.

We have given careful consideration to each of these factors. We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant. Accordingly we extend the time for the giving of the notice of appeal to 17 January 2002, being the day on which the notice of appeal was filed.

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The merits of the appeal

Both counsel accepted that if we granted the application to extend the time for the giving of the notice of appeal, it was appropriate that the Court should determine the appeal on the merits.

Subsection 158 (2) of the Criminal Procedure Code provides:

> 158-(1) It shall be lawful for a judge of the [High Court] or any magistrate who acquits or discharges a person accused of an offence, to order the prosecutor whether public or private, to pay to the accused such reasonable costs as to such judge or magistrate may seem fit.

In giving his reasons, the judge commenced by saying "Subject to the provisions of section of 158 (2) and (3) of the Criminal Procedure Code (Cap 21) . . ." It is not entirely clear whether by that phrase he meant that the order he was about to make was made pursuant to the subsections, but it seems most likely that that is what he intended.

What, however, is clear beyond doubt is that the subsection applies only to the situation where the judge or magistrate "acquits or discharges" an accused. It does not apply where the Court has ordered a stay of proceedings. Where that has occurred there is no statutory authority for the award of costs against the prosecutor.

The respondent submitted that the Court has an inherent jurisdiction to make an order for costs where a proceeding has been stayed. Mr Sharma relied particularly on the judgment of Pain J in *R v Rokotuiwai* (31 March 1998 HAC0009 of 1995).

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In that case the accused sought costs from the prosecutor following an interlocutory application to amend following a late decision by the prosecutor to proceed with a charge of murder where the original indictment charging murder had been reduced to a charge of causing grievous harm. Pain J accepted that he had no jurisdiction to make an order under subs 158(2) as this was only an interlocutory application – the accused had not been acquitted or discharged.

Pain J held that the Court had an inherent jurisdiction to make an order for costs when it is equitable to do so to ensure the effective administration of justice between the prosecutor and the accused. This power, he considered, was complementary to and cumulative upon subs 158 (2). Although he referred to a number of authorities relating generally to the inherent jurisdiction of the Court, he did not refer to any authority in support of the proposition that the Court had an inherent jurisdiction to award costs in the course of a criminal proceeding.

This Court considered Pain J's judgment in *Southwick* (above) at page 16 of the unreported judgment:

> ***"Pain J's judgment was restricted to interlocutory costs in criminal cases. If there is anything in his judgment implying that after determination of criminal proceedings there is an inherent jurisdiction to award costs, then this Court is not prepared to follow this first-instance decision.***
>
> ***The common law position that no costs are allowable is well known and demonstrated by such cases as R v Judge Kimmins ex parte Attorney-General (1980) Gd R 524,525 and Templar v R (1992) 1 Tas R 133, amongst many others. Unless and until there is some statutory regime about criminal costs, the Court's hands are tied. Maybe there should be an amelioration of its rather jejune provisions."***

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The grant of the application to stay the proceedings is not a final judgment. It does not determine the proceedings. It does not say whether the accused is guilty or not guilty. As we note later, it is open to the State or the respondent to apply to the High Court to vary or discharge the stay order. Accordingly, the order for a stay must be regarded as an order made on an interlocutory application in criminal proceedings. Hence, in determining this appeal, the Court must consider whether the decision of Pain J in *Rokotuiwai* is correct.

The general principle that at common law the Crown, or in Fiji the State, cannot be liable to pay costs in a criminal proceeding is founded on the Royal prerogative and has long been recognized. In *re Powell* (1894) 6 Q.L.R. 36, 38 Griffiths CJ said:

> ***"There is no doubt that it is at common law a prerogative right of the Crown not to pay costs in any judicial proceeding, and that this prerogative of the Crown will not be held to be taken away by statute except by express words or necessary implication."***

In *Templar v the Queen* (1992) 1 Tas R 133, Crawford J, delivering the principal judgment in the Court of Criminal Appeal , said:

> ***"According to Kenny's Outlines of Criminal Law (1952) 515, the common law knew nothing of costs and when they were first introduced by statutes the Crown was not mentioned which, according to the author, was "an omission which Blackstone elevates into rules, that it is a prerogative of the Crown not to pay costs, and that it would be beneath its dignity to receive them. Hence, as criminal proceedings were technically at the suit of the Crown, no judgment for costs could be given in them""***

On these authorities, we are in no doubt that it is the law in Fiji that the Court has no jurisdiction to award costs against or in favour of the State, except where the jurisdiction to do so is expressly conferred by statute. Nor do we consider that there can be any basis for a distinction between interlocutory and final proceedings. The rule applies to both. It follows that the decision of Pain J in *Rokotuiwai* is not correct and should not be followed.

For these reasons we are satisfied that the costs order made by Surman J in HAC 014/98 was made without jurisdiction. Accordingly the appeal is allowed and the costs order is quashed. There will be no order as to costs.

We should record our view that the power to award costs in subs 158 (2) of the Criminal Procedure Code is unduly limited. The Court should have the power to award costs in circumstances additional to where there has been an acquittal or discharge. The lack of such power can result in an injustice. We therefore recommend that a review of the section be undertaken.

The terms of the stay order

Surman J, when making the stay order, added "Not to be proceeded without leave of the Fiji Court of Appeal." We were advised from the bar that this is a term commonly inserted into stay orders in the High Court.

The Court of Appeal is a court created by statute. Its jurisdiction is prescribed by the statute that created it. Its criminal appellate jurisdiction is set out in Part IV of the Court of Appeal Act. There is nothing in that Part or elsewhere in

the Act that gives to this Court the power to determine an application to discharge or vary an order for stay made in the High Court. Accordingly, we conclude that the above term is of no effect. It follows from this conclusion that, as the stay order is an order made on an interlocutory application, it is open to either party to apply to the High Court to vary or discharge it.

Reddy, President

Tompkins, JA

Ellis JA

Solicitors:

Office of the Director of Public Prosecutions, Suva for the Appellant
Messrs. R. Patel and Company, Suva for the Respondent

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