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

CRIMINAL APPEAL NO. AAU0061 OF 1999S
(High Court Criminal Case No.18 of 1998)

BETWEEN:

GRAHAM SOUTHWICK

Appellant

AND:

THE STATE

Respondent

Coram: Reddy, P.
Barker, JA
Davies, JA

Hearing: 25 February 2002, Suva

Counsel: Messrs. J. Stewart, Q.C., P. Greaney for the Appellant
Mr. P. Ridgway for the Respondent

Date of Judgment: 1 March 2002

JUDGMENT OF THE COURT

Introduction

On 7 July 1999, Pathik J. in the High Court ordered what he described as a "permanent stay" of criminal proceedings brought against the appellant and a Mr Makrava as joint accused. He also ordered that they be discharged. They had been committed for trial following a Preliminary Enquiry before the Chief Magistrate on 7 October 1998 at which oral evidence was given for the prosecution. The several charges against both accused, in very general terms, alleged a conspiracy to obtain money by false pretences. On 21 June 1998, before the joint trial of the appellant and Mr Makrava began, Mr

Makrava had been acquitted before Surman J. and assessors on a charge of official corruption. The facts in that trial were closely related to the facts proposed to be adduced by the prosecution in the joint trial. Counsel then appearing for the prosecution took the view that, as a matter of law, the conspiracy charges against the appellant and Mr Makrava jointly could not proceed in view of Mr Makrava's acquittal. If the facts of the two cases (i.e. the official corruption charge against Mr Makrava and the conspiracy charges against him and the appellant) were significantly interrelated, then this Court cannot understand why no application had been made by the prosecution for the two trials to be consolidated and heard together. Apparently, Mr Makrava had been committed or trial by a Magistrate without a preliminary hearing and on "the papers" on a "hand up" basis. The appellant had an oral preliminary hearing before commital. Mr Ridgway was unable to advise any reason why such an application had not been made by counsel then appearing for the prosecution.

A further complication occurred at the start of the joint trial when the prosecution was unable to produce some critical documents which had been seized by the Police from the appellant. They had apparently been lost in the system. In all these circumstances, counsel for the prosecution advised the Judge that he was agreeable to a "permanent stay" of the proceedings as sought by counsel for both accused.(i.e. Mr Stewart QC for the present appellant and Mr G.P. Shankar for Mr Makrava).

The Judge then said, according to the Record supplied by him:

> *"I endorse the remarks of both Mr Stewart and Mr Shankar that Mr Schuster has performed his function as a prosecutor remarkably well bearing in mind the facts and circumstances of this case.*
>
> *Fair trial and justice is all one looks to in any criminal trial and I must say that on the facts and circumstances of this case and the dificulties likely to be encountered by the prosecution Mr Schuster's approach to the matter was the only approach open to him. I therefore in the exercise of the court's inherent power supported by authorities referred to by counsel, I grant a permanent stay of the trial of this case and therefore the information would be marked "Stayed" on the ground that the continuation of the case would constitute a misuse of the process of the Court and a fair trial was not possible." The Judge then said that both accused were to be discharged.*

The note of the Judge's ruling made by senior counsel for the appellant is to the same effect, save that counsel recorded the Judge saying after the reference to Mr Schuster the additional words "in a case fraught with difficulties right from the beginning." Mr Ridgway was unable to confirm or dispute whether counsel's note was correct. The Court is prepared to accept the correctness of the note prepared by Mr Stewart QC but does not think that the additional words he recorded have much bearing on the decision that has to be made.

The appellant applied on 13 July 2002 to Pathik J. under s.158(2) of the Criminal Procedure Code (CPC) for an award of costs in favour of the appellant. Including the fees of senior counsel from England, the total costs claimed by the appellant, as at July 1998 amounted to $F582,577.77.

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After hearing argument, Pathik J. issued a reserved decision on 19 November 1999 declining to make any order for appellant's costs under s.158(2). He considered that the prosecutor had had reasonable cause to commence the prosecution of the appellant and that, therefore, the Judge was unable to make an award because of the proviso to the subsection. S.158(2) of the Criminal Procedure Code ('CPC'). S.258(2) reads as follows:

> ***"It shall be lawful for a judge of the Supreme Court or any magistrate who acquits or discharges a person accused of an offence, to order the prosecutor either public or private, to pay to the accused such reasonable costs as to such judge or magistrate may seem fit:***
>
> ***Provided that such an order shall not be made unless the judge or magistrate considers that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the same."***

Jurisdiction for Appeal

On 18 February 2002, the Respondent filed an application to dismiss the appeal for want of jurisdiction. This application was considered by the Court at the commencement of the hearing and full argument was heard on it. The Court then went on to hear the merits of the appeal as a time-saving measure, in the event that it were to find jurisdiction to hear the appeal on merits.

Counsel for the Respondent submitted, primarily,that the only right of appeal to this Court in criminal cases is given to a person who has been convicted in the High Court. Such a person can appeal against conviction and/or sentence under s.21 of the

Court of Appeal Act. Since there was no trial, there could not have been a conviction. As a subsidiary argument, counsel maintained that there had been no jurisdiction for Pathik J. to award costs since the appellant had been neither acquitted nor discharged and that a 'permanent stay' was neither an acquittal nor a discharge.

Counsel for the appellant submitted that s.121(2) of the Constitution provided a right of appeal. The Constitution was engaged in this case because the granting of costs to an accused person discharged from a trial was a necessary corollary to the constitutional right to a fair trial enshrined in s.29(1) of the Constitution.

Counsel for the appellant further submitted that s.3(3) of the Court of Appeal Act conferred a right of appeal from final judgments of the High Court in the exercise of its original jurisdiction and that Pathik J's decision was such a judgment.

S.121 of the Constitution provides as follows:

S.121(2) of the Constitution

> *"(1) The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by law.*
>
> *(2) 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.*

> *(3) The Parliament may provide that appeals lie to the Court of Appeal, as of right or with leave, from other judgments of the High Court in accordance with such requirements as the Parliament prescribes."*

The Court considers that s.121(2) of the Constitution does not give a right to appeal to this Court from a decision of the High Court refusing an award of costs under s.158(2) of the CPC. The Court follows its decision in *Kulavere v. The State* (judgment 13 August 1999, Criminal Appeal AAU0033 of 1998).

Counsel for the appellant there had claimed as does counsel in this case that the case involved s.29(1) of the Constitution which mandates the right to a fair trial; the Court (Tikaram P, Eichelbaum and Handley JJA) said at p.3-4 of the unreported judgment:

> *"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 (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."

S.3(3) of the Court of Appeal Act

The Court in Kulavere made no reference to s.3(3) of the Court of Appeal Act - possibly because counsel for the appellant there appears to have made

no reference to it.

S.3(3) which was enacted in its present form in 1998 It reads: *"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."*

Independently of s.121(2) of the Constitution, and of the sections of the Act about rights of appeal against conviction and sentence, this subsection would confer a right of appeal in the present case if

a) Pathik J's judgment was "final" and

b) It was given in the exercise of the "original jurisdiction" of the High Court.

Despite Mr Ridgway's careful submissions to the contrary, the Court considers both these criteria fulfilled.

Pathik J's judgment was clearly not an interlocutory one. It was dispositive of the issue before him i.e. the statutory application for costs: in that sense, it was final.

The expression "original jurisdiction" is used of the High Court in s.3(3) in contradistinction to the expression "appellate jurisdiction" used in s.3(4) of the Court of Appeal Act. Pathik J. was exercising the original jurisdiction of the High Court conferred

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on it by s.158(2) of the CPC. That criterion under s.3(3) is established.

At the conclusion of the hearing, this Court invited counsel to consider the question of whether a permanent stay of criminal proceedings was a "final judgment". Counsel for the appellant advised that they were unable to find any authority on this point. However, counsel for the respondent filed helpful submissions based on Australian authority.

In *The Australian Electrical Electronics Foundry & Engineering Union Western Australia Branch & Ors. v. Hamersley Iron Pty Ltd.* [1998] WASCA 79, the Full Court of the Supreme Court of Western Australia reviewed the authorities on the point whether a permanent stay or an order for dismissal of a civil action for abuse of process was a 'final order.' Some of the comemnts referred to a stay of criminal proceedings as can be seen from the following extract from the judgment of Malcolm, C.J.:

> ***"An order that an action be dismissed or permanently stayed as an abuse of process would be a final order if it finally determined the rights of the parties: Bozson v. Altrincham Urban District Council [983] KB 547 at 548 per Alverstone LCJ: Paul v Nominal Defendant (1966) 117 CLR 427 at 443 per Windeyer J; Licul v Corney (1976) 50 AIJR 439: Port of Melbourne Authority v Anshun Pty Ltd. (1981) 147 CLR 589; Carr v Finance Corporation of Australia Ltd (1981) 147CLR 246; Sarafi v Parke Davis Pty Ltd. (1982) 149 CLR 147; and Biala Pty Ltd v. Mallina Holdings Pty Ltd [1989] 2 WAR 381 at 387-388 per Malcolm CJ. In Tampion v. Anderson (No 2) [1983] VR 829 it was held that an order dismissing or permanently staying an action as an abuse of process was not a final judgment or a decision on the merits. Smith J (with whom Pape and Crockett JJ agreed) said at 830-831 that:***

"....it has long been established by authority that an order dismissing an action as an abuse of process or as vexatious, and an order permanently staying an action on such grounds, should not be regarded as falling within the expression 'final judgment.' I refer to the cases of Jones v Insole (189) 64 LT 703; Charles Bright & Co Ltd. v River Plate Construction Co. Ltd. (1901) 17 TLR 708; Re Page [1910] 1 Ch 489; and Hunt v. Allied Bakeries Ltd. [1956] 1 WLR 1326; [1956] 3 All ER 513. It may be added that the case last-mentioned was referred to with approval in Salter Rex & Co v Chosh [1971] 2 QB 597; [1971] 3 All ER 865, and that Page's Case was referred to - and apparently with approval - by the High Court in Pye v. Renshaw (1951) 84 CLR 58 at p 77; [1951] ALR 880 and by Taylor J in Hall v. Nominal Defendant (1966) 117 CLR 423 at p 440; [1966] ALR 705.

It is true that there are statements of general principle relating to this matter to be found in the cases, and in recent judgments too, which are difficult to square with this line of authority. But the Court has not been referred to, and is not aware of, any case in which it has been specifically decided, that orders of the present kind now under discussion are 'final judgments' for present purposes."

That case was concerned with the question whether an order dismissing an action for abuse of process was a "final judgment" in rule 2(a) of the Order in Council dated 23 January 1911 relating to appeals to the Privy Council. If it was not, leave to appeal was necessary. Leave was refused. An application to the Privy Council for special leave to appeal against the refusal of leave was dismissed in Tampion v. Anderson [1974] 48 ALJR 11. Lord Kilbrandon said at 12-13 that the decision of the Full Court was in accordance with a consistent line of English authority going back to Price v Phillips (1984) 11 TLR 86 and the matter was put beyond doubt in Hunt v. Allied Bakeries Ltd. [1956] 1 WLR 1326 by the Court of Appeal.

Malcolm CJ observed in relation to criminal proceedings:

"In Leece (1966) 86 A Crim R 494 at 503 per Gallop and Hill JJ the Full Court of the Federal Court considered but did no finally decide whether an order staying a prosecution on an indictment was a final or an interlocuory order. In the absence of argument, it was considered undesirable to decide whether that case should be distinguished from Port of Melbourne Authority v Anshun Pty Ltd. (No1). In the meantime, in R v Edelsten (1989) 18 NSWLR 213 it was assumed that an order for a permanent stay of criminal

proceedings on the ground of an abuse of process was an interlocutory order. Applications made prior to the trial of a matter were to be regarded as intelocutory applications."

The criteria in civil cases on the question whether a permanent stay of proceedings on the grounds of abuse of process seem, from Malcolm CJ's analysis, to depend on whether the order finally determined the rights of the parties. The fewer authorities in the criminal area indicate that a stay of criminal proceedings is an interlocutory order.

A stay of criminal proceedings, like a stay of civil proceedings, is not a judgment of the Court adjudicating on the merits of the proceedings. It does not say whether the accused is guilty or innocent. It merely provides that a fair determination of that question is not possible. It must be a necessary corollary of the stay order that the accused is freed from his obligations to attend Court and to honour bail terms. But, theoretically at least, it would be possible for the prosecution to apply to vary or discharge a stay order. For example (and this is not what occurred in this case) there might have been some fraudulent conduct by either prosecution or defence which caused the Judge to make a stay order per incuriam. It is not beyond the bounds of credibility that a stay order tainted by fraud could be lifted and the accused brought back to answer the charge. The Constitution in s.28(1)(k) provides that a person may not be tried again for an offence for which he/she has been acquitted or convicted. But the accused person in a stay situation has been neither convicted nor acquitted. The stay may be made for reaons unconnected with guilt or innocence. Therefore, in the Court's view, there is no final judgment constituted by the order for stay, permanent or otherwise.

The Court queries the use of a stay of criminal proceedings in a jurisdiction such as Fiji where both substantive criminal law and criminal procedure are governed by statute. Authorities on stay come mainly from jurisdictions where the criminal law is not codified. Most "code" jurisdictions have specific provisions for the filing of a stay by the responsible law officer - eg. S.379 of the Crimes Act 1961 (New Zealand) and s.114(4)(c) of the Constitution of Fiji. One wonders why, if the prosecution was as hopeless as counsel then acting for the State appeared to think it was, why the Director of Public Prosecutions did not act under s.114(4)(c). However, this Court is not in a position to consider any jurisdictional point about a stay and assumes, for the present case, that Pathik J was right to make the order of stay.

Is the order for costs consequent upon a stay, a final order? It is not made under any inherent jurisdiction, as is the stay order, since, at common law, there is no jurisdiction to award costs in criminal causes. The jurisdiction is purely statutory. The decision therefore must be seen as a final decision on an application made by the appellant pursuant to a statutory right.

The appellant had been discharged. He sought under s.158(2) an order for reasonable costs. Notwithstanding that the order for a stay was interlocutory in nature, the order dismissing the application for costs was a judgment which finally disposed of the appellant's application under s.158(2).

Accordingly, the Court is of the view that s.3(3) of the Court of Appeal Act gives the appellant a right of appeal.

Because the Court accepts for the purposes of the case that a stay was properly ordered, there is nothing in the submisison that the appellant was not "discharged". The argument for the Respondent was based on a decision under the New Zealand statutory regime for costs in criminal cases. Williams J in D -v- R (unreported, High Court of New Zealand. New Plymouth T3/96, 24 September 1997) held that costs were not claimable by an accused under that regime where the trial had been stayed by the Solicitor-General pursuant to a s.379 of the Crimes Act 1961, a power akin to the power of the DPP under s.114(4)(c) of the Fiji Constitution. Pathik J. specifically said that the accused were 'discharged'. The Court accepts that situation which is in contradistinction to the accused being acquitted. S.158(2) of the Criminal Procedure Code ('CPC') gives the right to apply to costs, to those who have been either acquitted or discharged.

Merits of Appeal

The Court therefore considers the appeal on its merits. Pathik J held that the prosecution had reasonable grounds to bring the proceedings and that therefore he had no power under s.158(2) of the ('CPC') to award costs, bearing in mind the proviso to the subsection. There was no suggestion that the prosecutor had unreasonably prolonged the proceedings and that the second situation envisaged by the

proviso applied. The Judge recorded a submission from counsel for the appellant that the charges stayed should have been included in the case faced by Mr Makrava. That probably should have happened but the failure to consolidate the charges does not mean that there were no reasonable grounds, initially, to bring charges against the appellant in 1996.

Pathik J was unhappy with the attempt by counsel for the appellant to discuss the charges in detail as a means of showing there had been no reasonable grounds for bringing the proceedings. Pathik J noted that no evidence had been heard at the trial and that counsel's comments were necessarily untested. The Judge placed reliance on the fact that there had been a Preliminary Inquiry before a magistrate who had decided that there was sufficient evidence to send the accused for trial. There had been cross-examination of prosecution witnesses. At no stage of the preliminary hearing was the question of unreasonableness raised. The Judge cited with approval the dictum of Chilwell, J in R -v- AB (1974) 2 NZLR 425, 431:"I would take a lot of convincing that it is the Crown's duty always to adduce a perfect case". The Judge referred to Australian authority and to an out-of-date English Practice note. With respect to him, those references were unhelpful since the case fairly and squarely has to be considered in terms of s.158(2) of the CPC.

The onus of proving that the prosecution had no reasonable grounds for bringing proceedings must rest on the applicant under s.158(2). Essentially, what Pathik J. decided was that the onus had not seen discharged. There was an indication that the proceedings were brought reasonably from the decision of the magistrate to commit for

trial, a decision which whilst not conclusive on this point, nevertheless was relevant because the magistrate had heard oral evidence from prosecution witnesses who had been cross-examined.

This Court is in no better position than Pathik J. So far as evidence is concerned, counsel once more sought to go through the various charges with a view to indicating their weaknesses and the unlikelihood of convictions thereon. It must be said however, that the unlikelihood of convictions must have been strengthened by the absence of the crucial documents and the acquittal of Mr Makrava. Neither of these events were known when the prosecution was commenced. In the Court's view, it is of little relevance to the enquiry into the conduct of the prosecution when commencing proceedings to discuss, as did Pathik J, whether the accused had brought the proceedings or their continuation on himself by raising abuse of process or unreasonableness at a late stage. Likewise, it is irrelevant to this crucial enqiury whether the prosecution should have consolidated the joint trial of the appellant and Mr Makrava with the trial of Mr Makrava alone.

Accordingly the Court considers that the grounds for an award of costs had not been made out and Pathik J. was correct in declining the application under s.158(2).

Right to Costs at Common Law

Counsel for the appellant submitted that the appellant was entitled to costs

at common law following the decision of Pain J. in the High Court in R v. Rokotuiwai (31 March 1998 Criminal Case HAC0009 of 1995).

In that case, Pain J awarded interlocutory costs in a criminal proceeding in what he called 'unique case' involving a serious error or omission by the prosecution which should have been avoided. The learned Judge based his ruling on 'inherent jurisdiction' which was complementary to and not in conflict with s.158(2) of the Criminal Procedure Code which is a specific provision for costs after final determination of the case.

Pain J's judgment was restricted to interlocutory costs in criminal cases. If here is anything in his judgment implying that after determination of criminal proceedings there is an inherent jurisdicion to award costs, then this Court is not prepared to follow this first - instance decision.

The common law portion that no costs were allowable is well-known and demonstrated by such cases as R v Judge Kimmins, ex-parte Attorney-General, (1980) Qd.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. S.158(2) of the CPC does not provide the broad discretions found in other jurisdictions. Maybe there should be an amelioration of its rather jejune provisions.

But, despite Pain J's judgment cited above, this Court cannot find any jurisdiction to award costs other than s.158(2) in the circumstances where, as claimed by the appellant, the accused person has been discharged from criminal proceedings. The Court does not read s.3(3) of the CPC as justifying a costs award after discharge other than one made in accordance with s.158(2).

Quantum of Costs Claimed

Although it is not necessary to consider the quantum of any costs award in view of the Court's decision that s.158(2)'s criteria have not been met, the Court

nevertheless makes observations on quantum for the benefit of future cases.

The amount claimed, $582,000, was enormous by Fiji standards. Costs have to be assessed for their reasonableness, not by the standards of the country where counsel practises but by Fiji standards. A fee for counsel on a per diem basis would be usual in Fiji. Whilst a party is entitled to counsel of his/her choice and to seek to obtain the best possible defence at his/her expense, an award of costs in Fiji would have to reflect not the expenditure incurred but an sum commensurate with the fees paid to counsel in a developing economy such as Fiji.

The appeal is dismissed. No order for costs is made.

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Hon. Justice J R Reddy
President

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Hon. Justice Ian Barker
Justice of Appeal

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Hon. Justice Daryl Davies
Justice of Appeal

FIJI COURT OF APPEAL

Solicitors:

Howards, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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