

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

CRIMINAL APPEAL NO. AAU0061 OF1999S
(High Court Criminal Action No. HAA 018 of 1998S)

BETWEEN:

GRAHAME BRUCE SOUTHWICK

Applicant

AND:

THE STATE

Respondent

Coram:

Reddy, P
Kapi, JA
Sheppard, JA

Hearing:

Tuesday 18th February, 2003, Suva

Counsel:

Mr. Paul Greaney and Ms. Shayne Sorby for the Applicant
Mr. G.H. Allan for the Respondent

Date of Judgment: Friday 28th February, 2003

JUDGMENT OF THE COURT

This is an application for leave to appeal to the Supreme Court under s 122 (2) (a) of the *Constitution*.

The relevant facts for the purposes of the application may be summarized as follows. Mr Graham Southwick (Applicant) was jointly committed with a Mr Makrava to stand trial on several charges of alleged conspiracy to obtain money by false pretences.

Before their joint trial began in the High Court, Mr Makrava was separately charged and was acquitted on a charge of official corruption before Surman J on 21st June 1998. The facts in that trial were closely related to the facts proposed to be adduced by the prosecution in the joint trial.

On the 6th July 1999, counsel for the applicant and Mr Makrava made application to Pathik J. to stay the information against them. The evidence adduced by the applicant and Mr Makrava in support of the application was not disputed. Counsel for the State conceded that a fair trial was no longer possible on two grounds: (1) That certain documents uplifted by the police on a search warrant at applicant's business premises and the National Bank were missing and (2) that as a matter of law, the conspiracy charges against the applicant and Mr Makrava could not proceed in view of Makrava's acquittal. Upon this concession, Pathik J. on 7th July 1999 permanently stayed the trial of the case and discharged both accused.

On 13th July 2002, the applicant applied to Pathik J. for an award of costs under s 158 (2) of the ***Criminal Procedure Code*** (CPC) which provides:

"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 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."

In a reserved decision delivered on 19th November 1999, the Court dismissed the application in the exercise of its discretion in accordance with the proviso to s 158 (2) of CPC having regard to all the circumstances in the case.

The applicant then filed an appeal to the Court of Appeal. The ground of appeal was expressed generally:

“That the learned Judge wrongly exercised his discretion and reached his decision on grounds which were erroneous both in law and in fact.”

In support of the appeal, the applicant relied mainly on the submission that s 158 (2) should be read subject to the presumption of innocence under s 28 (1) (a) of the ***Constitution*** and the development of this right in Europe, England and Australia which recognizes the rule that costs should be awarded unless there is good reason for not doing so. He submitted that the proviso to s. 158 (2) is inconsistent with the presumption of innocence under the ***Constitution*** and as developed in other jurisdictions and therefore should be ignored or struck down in accordance with s 2 of the ***Constitution***.

The Court of Appeal devoted a major part of its decision to a preliminary point on its jurisdiction to hear an appeal from a decision of the High Court in respect of s 158 (2) of the CPC. The Court ruled that it had jurisdiction to entertain the appeal. This however is not a point taken on the application for leave to appeal before us.

On the merits of the appeal, the Court concluded that the case “fairly and squarely has to be considered in terms of s 158 (2) of the CPC”. The Court upheld the decision of Pathik J. in concluding that the applicant failed to discharge the onus under the proviso to s 158 (2) and dismissed the appeal.

The applicant has brought this application for leave to appeal to the Supreme Court under s 122 (2) of the *Constitution* which provides

“An appeal may not be brought from a final judgment of the Court of Appeal unless:

(a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or

(b)...”

It is not disputed that the applicant has to satisfy two matters before leave is granted:

1. The ground of appeal relied upon is one which is realistically capable of argument (*Soqonaivi v The State* (Criminal Appeal No. AAU0088 of 1997S) and
2. That the question raised is one of significant public importance.

The applicant contends that the Court of Appeal erred in failing to deal at all with the constitutional issues raised. As we read the decision, the Court of Appeal did not deal with the merits of these submissions. Counsel for the respondent has not submitted otherwise. We do not go to the detail of how the Court of Appeal arrived at its decision. For present purposes it is enough to say that, in the way the Court approached the matter, it did not deal with the question raised by the applicant of whether the proviso to s.158(2) of the CPC was inconsistent with the Constitution of Fiji.

Counsel for both parties argued the merits of the constitutional issues to some extent before us. We do not consider that it is appropriate for this Court in an application for leave to consider the merits where the Court of Appeal has not dealt with the issue. Whether the issues raised have any merit should be left to be dealt with by the Supreme Court. It is sufficient for the purposes of the leave application to find that valid issues were raised and the Court of Appeal did not deal with them.

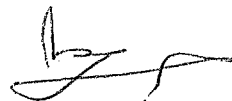
The next question is; whether, the question raised is one of significant public importance? There is no question that the constitutional arguments raised have far reaching consequences for the Director of Public Prosecutions and for the public especially persons who may be acquitted or discharged by the Magistrates Court as well as by the High Court on costs.


If the proposition advanced by the applicant is accepted by the Supreme Court, s 158 (2) could be declared invalid leaving a gap in the law.

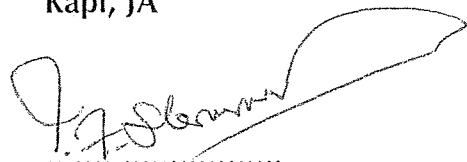
In the event that the proposition put forward by the applicant is rejected as having no merit, s 158 (2) would remain intact and the Supreme Court would then consider the proper meaning of the provision including the meaning of the word "charges", question of what is "reasonable costs" and the burden of proof. There is no authoritative determination of these issues by the Supreme Court.

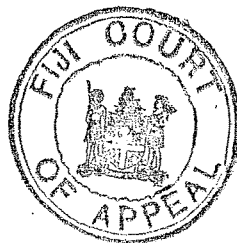
We would grant leave for the applicant to appeal to the Supreme Court on the constitutional and related issues raised and we certify these questions to be of significant public importance.

The applicant should now file a notice of appeal in accordance with Rule 4 of the *Supreme Court Rules* 1998.


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Reddy, P


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Kapi, JA


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Sheppard, JA



Solicitors:

**Howards, Suva for the Applicant
Office of the Director of Public Prosecutions, Suva for the Respondents**

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