IN THE COURT OF APPEAL, FIJI ISLANDS ON APPEAL FROM THE DECISION OF A FIELD GENERAL COURT MARTIAL

CRIMINAL APPEAL NO. AAU0006 OF2003S

BETWEEN:

JOVILISI SOVITA

Appellant

AND:

THE STATE

Respondent

Coram: Sheppard, JA
Tompkins, JA
Ellis, JA

Hearing: Monday 15th March 2004, Suva

Counsel: Appellant in Person
Mr. G. Allan for the Respondent

Date of Judgment: Friday, 19th March 2004

JUDGMENT OF THE COURT

This appeal from the decision of a Court Martial is brought pursuant to s.30 of the Republic of Fiji Military Forces Act (Cap 81) ("the Act"). Appeals lie only by leave. It is not clear to us whether leave has been granted. In case it has not we now grant it. The case is clearly one where leave should be granted especially as counsel for the State has consented to the appeal being allowed.

The matter was heard on 15th March 2004. We then made the following orders :

1. Appeal allowed.

2. By consent quash the conviction and sentence.

3. By consent quash warrant of commitment dated 6 December 2002.

4. The application made by the State for a new trial be dismissed.

The last of the orders was made over the opposition of the State. Each of these orders was pronounced on 15 March and had effect from that day. We said that we would publish brief reasons for them. What follows are those reasons.

The appellant was tried by a Field General Court Martial on 3 December 2002. The Court martial was held in Lebanon where Fiji forces were serving. It was held the day before the Fijian contingent to which the appellant belonged was due to depart for Fiji.

The appellant was sentenced on 3 counts of dangerous driving causing death, one count of neglect to the Prejudice of Good Order and Military Discipline and one count of Disobedience to Standing Orders. The appellant was sentenced to 3 years imprisonment concurrent on each of the counts of dangerous driving, to stoppage of $2,000.00 on the charge of neglect and was fined $200.00on the charge of disobedience.

On 15 March 2004 the appellant had served a little over 15 months of his prison term.

The appeal turned to questions whether there had been procedural errors in relation to the holding and conduct of the Court Martial. The appellant relied on a large number of procedural errors many of which were disputed by counsel for the State. But in its submissions both written and oral the State agreed that there were a number of procedural errors which should lead it to consent to the quashing of the convictions.

These may be summarised as follows:

1. There is no record of the concurrence of the convening officer to the acceptance of a plea of guilty. This requirement is mandatory unless a confirming officer confirms the finding notwithstanding the absence of concurrence of the convening officer if satisfied that it is in the interest of justice to do so. These requirements are found under rules made pursuant to s.103 of the Army Act 1955 (U.K) which is in force here by virtue of the operation of s.23 of the Act. Rule 95 of the United Kingdom rules provides that where a confirming officer confirms the finding of the Court, the confirmation must form part of the record of proceedings. No such confirmation appears on the record in this case.

2. Under rule 25(d) of the Rules a copy of the charge sheet was required to be served upon the appellant not less than 24 hours prior to the Trial. There is no charge sheet on the record.

3. The State was concerned at the time accorded the appellant to prepare his defence. The convening order for the Court Martial is dated 2 December 2002 and the Court martial was held the next day.

4. Under Rule 22 (1) (m) of the Rules the convening officer is obliged to ensure that the accused is given a proper opportunity to prepare his defense. It was not impractical to grant that opportunity. This Court regards this matter as particularly serious because it shows that there was a clear denial of natural justice.

5. There was no reason for convening a Field General Court Martial. The fact that the contingent was due to depart Lebanon on 4 December provides no such reason. A General Court Martial could have been convened when the contingent returned to Fiji. No Lebanese witnesses were called in the case so that no evidence would have been lost if the matter had been heard here.

6. Para 3.27, 3.28, 3.29 and 3.30 of the State's submission are as follows:

"3.27 The respondent accepts that a plea of guilty must be entered voluntarily and I this regard is concerned at the chronology presented by the appellant's submissions.

"A plea of guilty must be entered voluntarily. If, at the time he pleaded, the accused was subject to such pressure that he did not genuinely have a free choice between 'guilty' and 'not guilty', then his plea is a nullity (Turner [1970] 2 QB 321)

Blackstone's Criminal Practice 1997, paragraph D10.23, pg 1226

3.28 The respondent accepts that insufficient time was afforded the appellant in which to prepare a defence and that this could have influenced his decision to plead guilty as the appellant submits.

3.29 The respondent further accepts that any pressure arising from this may well have been exacerbated by the fact that he was unrepresented. The appellant claims to have been 'told or notified' by the convening officer to sign a waiver of counsel because none would available to represent him anyway. Through the Director Army Legal Services, the respondent has endeavoured to obtain an affidavit from the convening officer replying to this allegation. None has been forthcoming, however, the appellant's alleged understanding that lines of communication to Fiji, and hence to the Director Army Legal Services, had been severed supports his stated belief that he could not have obtained legal advice, let alone representation.

3.30 Whilst concerned that various factual allegations have been made by the appellant in submission, unsupported by affidavit, the appellant's claims to be concerned not to 'jeopardize the scheduled movement of troops homebound that day and subsequently result in additional burden and costs for the [battalion] and HQ RFMF' are, in the respondent's submission, understandable. It is accepted that this consideration may have been a further coercive factor in the appellant's decision to plead guilty. Moreover, the respondent submits that this could have been an unfairly coercive factor given that the alleged offending occurred on 19 October 2002 and the court martial was left to the day of withdrawal some 6 weeks later on 3 December 2002."

These speak for themselves.

There are other matters relied upon in the appellant's submissions which are not the subject of agreement. In the circumstances we do not find it necessary to deal with these. So far as the question of a new trial is concerned, we reached our conclusion for the following reasons:

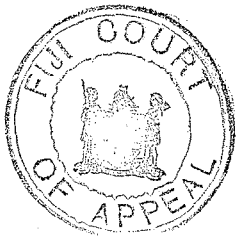
1. The appellant had served 15 months of a 3 years sentence. With remissions that sentence would have been reduced to 2 years. So the sentence was served except for 9 months.

2. Due to the various procedural errors to which we have referred the appellant has been wrongly imprisoned for 15 months. He must have suffered a great deal of physical and mental anguish. This case needs to finish in the interest both of the appellant and the State and indeed in the public interest.

3. There is a serious question in our minds whether on the material before us 3 years may have been excessive. If the sentence were reduced to, say 2 years the appellant would have served all but a month of that sentence.

4. There is also a question whether, if there were a new trial, any conviction may have been for negligent driving causing death rather than dangerous driving causing death. The facts before us suggest that the cause of this tragic accident may have been inattentive driving. That is a serious matter but would not usually fall into the category of dangerous driving.

In reaching our conclusion we have not overlooked the tragic consequences of this accident. But in a real sense the appellant, guilty or not, has served 15 months in prison. Considerations of fairness have led us to make the order we have. In broad terms the case is one where fundamental rules of natural justice have not been observed. Our orders correct the serious errors and omissions that were made but nothing can be done about the term of imprisonment that the appellant has served.



Sheppard, JA

Tompkins, JA

Ellis, JA

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions Suva for the Respondent

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