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

CIVIL APPEAL NO. ABU0059 of 2004S
(High Court Civil Action No. 3 of 2001S)

BETWEEN:

MUNI LATA KUMAR

Appellant

AND:

COMMISSIONER OF POLICE

First Respondent

COMMISSIONER OF PRISONS

Second Respondent

ATTORNEY GENERAL OF FIJI

Third Respondent

Coram: Ward, President
Eichelbaum, JA
Gallen, JA

Hearing: Tuesday, 19 July 2005, Suva

Counsel: Dr. J. Cameron] for the Appellant
Mr S. Chandra]

Mr K. Keteca] for the Respondents
Mr J. Rabuku]

Date of Judgment: Friday, 29 July 2005, Suva

JUDGMENT OF THE COURT

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[1] The appellant seeks to recover damages from the respondents arising out of the death of her husband Corporal Raj Kumar on 8 August 2000. Corporal Kumar was a member of the Fiji Police. The facts of the case are not substantially in dispute, although some aspects have been the subject of submission, and we take them largely from the judgment of the Judge in the High Court.

The Facts

[2] On 19 May 2000 one George Speight aided by a number of heavily armed members of a unit of the Fiji Military Forces took over the Parliament of the Fiji Islands and in doing so took the majority of the members of the Parliament, including the Prime Minister, hostage.

[3] On the 29 May the President His Excellency Ratu Sir Kamisese Mara was forced to stand down. On 29 May the Commander of the Armed Forces took charge of what was described as the Interim Military Government of Fiji.

[4] On the 4 July there was a mutiny at Labasa and the army barracks were seized. On 6 July armed rebels seized Monasavu Power Station. On 19 July after the signing of an accord Speight and his supporters left Parliament and moved to Kalabo. On 26 and 27 of July members of the police and of the armed forces, using armed force, over powered Speight and his supporters.

[5] The Judge accepted that some days after Speight and his supporters took control of Parliament, and Members of Parliament hostage, there was a break out of prisoners from the Nabua prison.

[6] Among those escaping were three men one of whom was said to be a notorious criminal. There is no evidence on the material before us to indicate the circumstances in which this escape took place. There is nothing to indicate whether it was related in some way to the civil disturbances to which reference has been made or not. We regard it however as a reasonable assumption there was some connection between the two and in any event what occurred must be considered in relation to a background of great civil unrest.

[7] The three escaped prisoners, either on their own, or with others made their way to the Monasavu Dam which had been taken over by persons associated with Speight

and his Supporters. At some point it is accepted that the 3 escaped prisoners acquired arms including a pistol and 3 M16 rifles.

[8] A statement on which the Judge relied for background information also indicated that one of those prisoners, Alifereti Nimacere announced his intention of taking revenge when he learned Speight and his supporters had been overcome by armed force at Kalabo. For the purposes of this case however, nothing turns on this since there is no evidence that this expression of intention was known to any of the parties to these proceedings.

[9] On 19 May 2000 the President had made Public Emergency Regulations and on 2 July 2000 the Interim Military Government issued an Emergency Decree. The Judge took the view that the broad effect of what he described as very similar provisions, was to confer upon the police and the armed forces acting jointly, responsibility for maintaining law and order. No submissions were made to us contrary to this view. We have seen a copy of the Emergency Decree and accept it contemplates that the police and army both had responsibility in restoring law and order.

[10] During the course of the disturbances various road blocks were set up by the army, and the police, in some cases jointly and in others by the police or the army alone. These were established at strategic points throughout the country for the purposes of establishing that control at which the decrees were aimed.

[11] One of the road blocks so set up was Sawani an important junction between the Princes Road and the Sawani Serea Road which goes to the Monasavu Dam.

[12] Evidence at the hearing was given by a special constable who had reported for duty at Nausori Police Station on the night of 7 August 2000 at about 10.45 p.m. Corporal Kumar was there at that time and at about midnight Corporal Kumar told

the special constable, Mr Ali that they were to drive the police vehicle F25 to Sawani where they were to collect a police officer and take him to Navuso.

[13] On arrival at Sawani Corporal Kumar and Constable Ali were approached by an unnamed army sergeant who explained that he had received a report that a missing vehicle was in the area and was carrying armed Fijians. The Sergeant requested that he be driven to the Qiolevu road block.

[14] Corporal Kumar, Constable Ali and the Sergeant and 4 armed soldiers then drove to the Qiolevu Road and waited there for approximately an hour. There being no sign of the vehicles for which they were looking they decided to go and search, and using the police vehicle and an army van carrying 4 more armed soldiers, the whole party went some 6 km along the Qiolevu road where they came across a vehicle similar to that which had been reported missing.

[15] An army warrant officer left the vehicles to investigate. As he was doing so shooting commenced. The soldiers who were in the rear of the police vehicle jumped out and ran for cover. The driver was also able to get out but Corporal Kumar seems to have been sitting in the middle of the front seat and was unable to get out.

[16] It is not clear on the evidence but it appears that Corporal Kumar may have been injured at that time. Whether that is so or not on the facts accepted by the Judge, Alifereti Nimacere then appeared and went up to the police vehicle. He dragged Corporal Kumar out of the vehicle hit him several times with his weapon and then shot him dead as he lay on the ground in front of him.

[17] It is accepted that at all times Corporal Kumar and Constable Ali were unarmed, nor were they wearing any special protective clothing. The police in Fiji are not now and were not then armed.

[18] It seems that neither of the policemen were aware that shooting might occur until they arrived at Qiolevu when the warrant officer told them shooting was possible. It is on those facts that the appellant based her claim against the defendants.

The claim against the Commissioner of Police

[19] The claim formulated against the Commissioner of Police was in negligence and particulars were as follows:

(a) Failing to provide adequate protection from armed attacks such as bullet proof vests or helmet;

(b) Failing to provide competent Commander or Supervisor to encounter gun shots or attacks; (sic)

(c) Failing to provide the deceased with adequate or suitable protection by way of transport to carry out the work in safety especially protection of the vehicles used against the armed rebels or prisoners;

(d) Directing the deceased to carry out his duties when it knew or ought to have known that it was unsafe and dangerous for him to do approach and attempt to recapture armed rebels or the prisoners;

(e) Failing to take reasonable care to prevent the possible injury and threat to life from dangers of which it knew or ought to have known;

(f) Failing to provide a safe method of dealing with armed rebels or prisoners;

(g) Failing to provide and or maintain a safe system of working at the Police Station and or place of employment.

The Claim against the Commissioner of Prisons

[20] This claim was formulated in negligence and or breach of contract. The particulars are as follows:

(a) Failing to provide proper security and custody of the prisoners;

(b) Failing to recapture the escaped prisoners;

(c) Failing to exercise indirect and or direct control over the escaped prisoners;

(d) Failing to provide safe method of recapturing the prisoners;

(e) Exposing the deceased to a risk or injury or death which it knew or ought to have known. (sic)

(f) Failure to provide with adequate or suitable protection to enable the deceased to carry out the work in safety or to protect the deceased from possible gun shots;

(g) Directing and or requesting the deceased to carry out the said work when it knew or ought to have known that it was unsafe and dangerous for the deceased to capture armed civilians and or escaped prisoners.

In this Court Mr Cameron indicated that the claim in contract was not pursued and we do not refer to it further.

The Judgment in the High Court

[21] The Judge was well aware that the claims against both the defendants, the respondents in these proceedings, raised questions of considerable importance and difficulty and he carefully considered a number of relevant authorities.

[22] The Judge first considered the claim against the second respondent, the Commissioner of Police and did so with regard to the alleged negligence.

[23] He considered first whether or not a duty of care existed at all, in respect of Corporal Kumar, and noted that it was not at all clear on the facts before him who was in command of the operation during the course of which Mr Kumar met his death, nor what its precise objectives were . He noted that no breach of specific regulations had been shown to have occurred. After a careful analysis of the facts, in relation to the decisions to which he had already referred, the Judge came to the conclusion that the appellant had not shown that the Commissioner of Police owed a duty of care to Corporal Kumar in the circumstances of the case.

[24] The Judge went on to consider whether or not if a duty of care had existed there had been any breach giving rise to liability. He expressed the view that the case had been put forward largely on the basis of the maxim *res ipsa loquitur* although this had not been specifically pleaded. He considered that that particular evidentiary approach was inappropriate where the cause of death was known and he expressed the view that in any event there could be no complaint that an accident could have been prevented by taking enough precautions when the precautions advocated were wholly out of proportion to the risk. The Judge considered that the case against the Commissioner of Police failed.

[25] The Judge then considered the case against the Commissioner of Prisons. After referring to a number of relevant authorities he came to the conclusion that in the circumstances of this case the appellant had not succeeded in establishing any duty

of care on the Commissioner of Prisons to Corporal Kumar and noted that in any event there were no sufficient facts before the court to establish that either the escape or the failure to recapture the prisoners concerned had occurred in circumstances which established negligence against the Commissioner. He therefore dismissed the action and it is from that decision that the appellant now appeals.

The Grounds of Appeal

[26] The original notice of appeal relied upon three grounds which were by leave extended by the addition of a further six . These were as follows:

1. That the learned Judge erred in law and in fact in failing to consider negligence on the part of the Commissioner of Police whereby the said Commissioner failed to give specific instructions about armed rebels in light of the State of Emergency;

2. That the learned Judge erred in law and in fact in failing to consider the duty of care owed by the Commissioner of Prisons to the general public by which the Commissioner of Prisons did not provide security and custody of prisoners during the anarchy;

3. That the learned Judge erred in law and in fact in failing to consider that the circumstances in which the Corporal's death occurred had been the result of the breach of duty of care by the Respondents;

4. That the learned Judge erred in law and in fact in that he held that the first Respondent the Commissioner of Police, did not owe Corporal Raj Kumar ("the deceased"), a duty of care in the circumstances prevailing at the time of his death; and

5. That the learned Judge erred in law and in fact in that he held that even if the first Respondent had owed the deceased a duty of care in the circumstances that there had been no breach of that duty; when on the undisputed evidence before the Court the first Respondent had failed to issue instructions to police officers, including the deceased, that during the state of social and political instability prevailing at the time, they were not to engage armed insurgents but were to leave such operations to armed military personnel.

6. That the learned Judge erred in law and in fact in that he held that the second Respondent, the Commissioner of Prisons, did not owe police officers, including the deceased, a duty of care to ensure that, during the state of social and political instability prevailing at the time, they were not exposed to unreasonable risk by the escape of potentially dangerous prisoners, such as the prisoner, Nimacere, who shot and killed the deceased; when the second Respondent led no evidence as to the measures which he had taken to prevent such escapes, or as to the circumstances in which the escapes had occurred notwithstanding such measures; and

7. That the learned Judge erred in law and in fact in that he failed correctly to apply the inferences required by the legal principles subsumed under the maxim *res ipsa loquitur* in the light of the pleadings and the evidence before him; and

8. That the learned Judge made findings of fact based on matters which were not properly in evidence before him, or were not supported by such evidence as was before him.

The Claim against the Commissioner of Prisons

[27] It is convenient to deal first with the appeal in respect of the Commissioner of Prisons. The grounds of appeal which related to the Commissioner of Prisons were contained in grounds 2,3 and 6 and 7. It will be noted that in ground 2 the duty of

care was alleged to have been owed to the general public. In ground 6 this is extended to allege that there was a special duty of care in respect of police officers.

[28] The argument for the appellant may be summarized as contending that in the circumstances of near anarchy with the breakdown of law and order which existed in Fiji at that time, the Commissioner of Prisons had a duty to ensure that prisoners who might constitute a danger either to the public or to police officers did not escape, and it ought to have been foreseeable to the Commissioner of Prisons that this particular prisoner constituted a special danger bearing in mind the availability and use of arms in Fiji at the time, and in particular to a police officer who had continuing obligations to apprehend the prisoner concerned and return him to prison.

[29] We should say at the outset that this case presents particular difficulties because of the paucity of evidence before the Judge and before us as to the history and propensity of the prisoner concerned and the circumstances of his escape.

[30] The respondent took and takes the view that it was the obligation of the appellant to prove the case and no material was before the court whether by way of oral evidence or by the administering of interrogatories which gave any information as to the means of escape or the circumstances surrounding it. There was some indication that Nimacere was a notorious criminal with a record of escaping, but no detail was before the court to indicate the nature of his criminality or propensity of behaviour after the escape had taken place.

[31] The respondent contended that it was the obligation of the appellant to produce sufficient evidence to establish a duty of care and the breach of that duty. The appellant contended that in the circumstances of this case, and bearing in mind the break down of law and order which had occurred in Fiji at that time, it was the obligation of the Commissioner to ensure that a prisoner with a history of escaping such as this prisoner did not escape so that it was therefore open to the appellant to

contend that prisoners do not escape unless there has been negligence on the part of the authorities whose duty it is to retain them in prison.

[32] The appellant also contends that in the circumstances prevailing at that time the Commissioner of Prisons had a special duty of care towards the police officers whose duty was to apprehend escaped prisoners and return them to custody and that it was foreseeable that a police officer such as the deceased Corporal Kumar would be subjected to violence in the course of his duty to apprehend the prisoner concerned.

[33] It is our view that this is not a case where the circumstances give rise to an application of the maxim *res ipsa loquitur.* We do not think it is a necessary implication of an escape, that there has been negligence on the part of the authorities whose obligation it is to retain a prisoner in custody. It is certainly possible to think of circumstances where an escape occurs, as a result of negligence but it is equally possible to think of circumstances, particularly where there is a state of insurrection as there was in Fiji at that time, where no negligence occurred at all. Nevertheless if for the purposes of this case it could be assumed that escapes do not occur without negligence that does not of itself give rise to liability since the cases establish that any duty of care in such circumstances is limited by a number of considerations illustrated in the authorities to which we were referred.

[34] We are prepared to accept that a duty of care might exist on a Commissioner of Prisons towards persons who may be properly seen as in sufficient proximity to be likely to be injured or to sustain loss as a result of the escape of a prisoner. The leading case on prison escape is ***Home Office v. The Dorset Yacht Co***. [1970] AC1004. In that case a number of borstal boys were held on an island for rehabilitative purposes. The officers whose duty it was to retain them in custody allowed circumstances to occur as a result of which the boys made an escape during the course of which they commandeered one boat and damaged another. It was argued, as it has been in most of such cases there was no liability on the

authorities for the criminal acts of third parties. The House of Lords accepted that there was liability and in doing so stressed the foreseability of the escape in the circumstances and bearing in mind the confinement of the boys on an island and therefore foreseabiliy of their taking and damaging the boat as their only means of escape from the island. The facts which require emphasis are the foreseability of the behaviour and the close vicinity of the property which sustained damage, so there was a likelihood that such property would be placed at risk by an escape. The case is well known and it is unnecessary to cite from it the elucidation of principle which it contained.

[35] At this point there are advantages in returning to the concepts expressed by Lord Atkin in ***Donoghue v. Stevenson*** [1932] AC at page 580 H.L. (Sc.):

> ***"At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular classes found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.....***
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> ***So A.L. Smith L.J.: "The decision of Heaven v. Pender was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be***

bound to take care would know would be directly affected by his careless set. That this is the sense in which nearness or "proximity" was intended by Lord Esher is obvious from his own illustration in Heaven v. Pender of the application of his doctrine to the sale of goods. "This" (i.e., the rule he has just formulated) "includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property." I draw particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed. With this necessary qualification of proximate relationship as explained in Le Lievre v. Gould I think the judgment of Lord Esher expresses the law of England."

[36] It is instructive to note that the duty of care in general term is constrained by notions of proximity, ideas which can be related to either space or time. It is worth pointing out that in ***Donoghue v. Stevenson*** itself these concepts were in question since the ultimate victim, if harm had occurred, was distant in both space and time from the manufacturer. In addition however in the case of escaped prisoners there are further constraints which it is appropriate to take into account, in particular the general rule where one person is not responsible for the criminal acts of the another and the rather vague concept that where public responsibilities are in question there may be limitations imposed by the concept of public policy where the public welfare is at stake.

[37] A considerable part of the argument in this case centered on the decision in ***Godfrey v. The New South Wales*** No. 2 [2003 NZWS CT 275.] In that case a prisoner escaped from custody in Parkhurst jail in July of 1990. He was addicted to heroin and committed criminal acts after his escape designed to obtain the means to fund his addiction. In October 1990 he went into a news agency, in an area with which he was familiar, carrying a shot gun and demanded money. There was evidence to establish that as the result of being confronted with the shot gun the plaintiff went into labour and gave birth to a premature child who suffered from conditions which were related to his premature birth. In the Supreme Court after an examination of a considerable number of authorities, and academic commentary the Judge held that the prison authorities could be said to know that there was a risk that the particular prisoner would escape and that there was a risk of re-offending. He held that there was a duty to take reasonable steps to prevent harm to the plaintiff by controlling the opportunity of the prisoner to escape. The Judge noted that the defendant Commissioner ought to have known that, following his escape from gaol, the prisoner was very likely to go to the region of his mother's home and commit armed robberies and other offences in order to finance his addiction. He considered that predictions as to possible behaviour of the prisoner concerned gave rise to a foreseeable risk and this did not need to mean foresight of the particular event on which the claim was based. He concluded that he was satisfied that the defendant having special knowledge of the possibility of the prisoner escaping, his potential to re-offend and his capacity to exercise the right of control to minimize the risk, had breached the duty of care to the plaintiff.

[38] The defendant appealed to the New South Wales Court of Appeal where the decision was reversed. The Chief Justice placed an emphasis on what he described as established principle that there was no duty to control the criminal conduct of others except in very restricted circumstances. He analysed the decision in the Dorset Yacht Co. case and came to the conclusion that that case was authority for confining responsibility in the case of an escaped prisoner to actions in the vicinity of the place from which the escape was made. He did not consider that

foreseability was enough. Nor did he consider that an assumption of responsibility of an obligation to control took the matter further.

[39] The decision in the Court of Appeal would be sufficient, if we accepted it as having applicability in the circumstances of this case, to dispose of the claim against the Commissioner of Prisons. We are of the view however, that the decision is unduly restrictive of the principles expressed in the Dorset Yacht Co. case. We accept that the duty of care is confined in the case of an escaped prisoner, and we take the view that it may be confined in terms of vicinity and time. The extent however, must depend on the circumstances of the case. It is conceivable in our view that where particular propensity can be established to the requisite degree and is directed at a particular offence or a vulnerable person the duty may extend beyond the immediate vicinity of the prison and beyond the immediate time of the escape. Nevertheless the general concepts of a lack of responsibility for the criminal acts of others and the general thrust of authority to restrict liability in the case of escaped prisoners both lead to the conclusion that constraints of time and place will be strictly imposed and the liability will be much narrower than in cases where such constraints do not apply. In the circumstances of this case we consider that both time and distance are such that the attack on Corporal Kumar could not be said to have occurred sufficiently closely to the vicinity of the escape. Furthermore there are difficulties for the appellant in creating the necessary relationship between the Commissioner and Corporal Kumar. The cases make it plain that at least in the case of escaped prisoners there is no obligation to the whole world. There must be some distinguishing factor which makes the victim a likely and foreseeable target. In the Godfrey case it was argued that the propensity to commit the armed robberies and the likelihood that they would take place in a particular area were sufficient. That was not accepted by the Court of Appeal but even if it had been there is no evidence here to establish a propensity for violence towards any persons. The appellant contends, not unreasonably, that the Commissioner ought to have had in mind that there are obligations on members of the police to apprehend an escaped prisoner and that this sufficiently narrowed the class of those at risk to give rise to

liability. We do not accept this approach. Here there is no evidence of propensity to violence nor any evidence that the prisoner concerned presented a particular risk to members of the police let alone to Mr Kumar individually.

[40] We agree therefore with the conclusion to which the Judge in the High Court came with respect to the claim against the Commissioner of Prisons. The appeal against the Commissioner of Prisons cannot succeed and it must be dismissed.

[41] The claim against the Commissioner of Police needs to be considered quite separately. There can be no question of liability arising out of the identity of the escaped prisoner who carried out the killing in this case. Corporal Kumar was not engaged in an attempt to locate or apprehend the prisoner concerned as an escaped prisoner and there was nothing to suggest that the Commissioner of Police had any reason to believe he would be involved in any such activity.

[42] The appellant maintained however that what occurred must be considered against the background of what was happening in Fiji at that time and which was described by counsel as being one of a kind. We should say that the evidence with regard to the conditions in Fiji was scanty. Nevertheless we accept from the submissions of counsel on both sides, who relied on it for opposite purposes, that we are entitled to take judicial notice of the fact that armed disturbances had taken place and were continuing in Fiji, that people including one policeman had died as a result of the disturbances, and that police officers charged with maintaining civil order could expect to be confronted with situations which can only be categorized as dangerous and where firearms might well have been involved.

[43] In the case as originally argued the appellant contended that the Commissioner of Police must have been aware that there was a risk of police officers being confronted by armed persons who disputed their authority. That where this was so they ought to have been provided with protective clothing and perhaps with arms. Protective clothing would not have avoided the tragic result which happened in

this case and we think Mr. Cameron was right to abandon this ground as he formally did. Mr. Cameron put the appellant's case rather on a contention that against the background of the conditions to which we have referred, the Commissioner of Police had a duty of care to police officers under his command to ensure that they were not placed in a position of danger and in particular that they were not confronted with firearms since the police in Fiji then and now did not carry arms and were not in a position to deal with such confrontation with any degree of safety. He contended that the Commissioner ought to have provided and imposed rules which enabled police officers to avoid getting into such situations and which would have prevented Corporal Kumar from taking part in the exercise which led to his death.

[44] The respondent argued that the nature of the relationship between the Commissioner of Police and individual police officers was such that no duty of care arose and that as a matter of public policy it was inappropriate for a police officer to be entitled to claim in circumstances such as these against a commanding officer.

[45] The question of whether a duty of care exists between a police commander and officers under his command has been before the courts on a number of occasions. We accept that the nature of the relationship means that the nature of the duty of care must be considered in the light of that relationship which defines its scope but we do not doubt the existence of a duty of care in particular circumstances. We accept that one of the circumstances which limit the operation of the duty of care, but does not exclude it, is public policy. There are undoubtedly circumstances where the nature of the obligations which members of the police accept is such that they are exposed to risk and where it would be quite unreasonable that there should be a claim as a result. The cases also establish that where decisions have to be made in the heat of the moment or where on inadequate information an officer exposes a subordinate to risk he or she could not be subject to civil liability.

[46] We are prepared to accept therefore that a duty of care rested on the Commissioner of Police to ensure that Corporal Kumar was not exposed to unnecessary or avoidable risk where the nature and extent of that risk could be foreseen and precautions taken to avoid it. In this case Corporal Kumar appears to have been acting under an instruction of the military authorities not the police authorities and we were told as was the Judge in the High Court that the police and the military authorities were co-operating together in an attempt to restore and maintain law and order in a serious situation. The evidence before the Judge was clear that it was appropriate for Corporal Kumar to act on the request of the Sergeant from the military who asked him to transport soldiers to an area where it was believed armed persons constituted a threat towards which the military were responding. Mr. Cameron submits that it was the obligation of the Commissioner of Police to promulgate general instructions which would have had the effect of allowing Corporal Kumar to refuse the request made to him. It is difficult to see how any such instruction could have been formulated or appropriate. As members of the public sought police help they would no doubt have had to respond and in the circumstances of co-operation between the police and the military it would be quite unreal to have such a general instruction.

[47] In the circumstances of this case the evidence fell short of establishing that any commander could have foreseen the situation which developed. Corporal Kumar was involved in an exercise transporting armed soldiers and it would have no doubt been the assumption of all concerned that it would have been the soldiers who dealt with armed offenders. What happened to Corporal Kumar was appalling but it is difficult to see that it could have been a situation which could have been foreseen by the Commissioner of Police or one which any instructions to police could have avoided. With some reluctance therefore we conclude as did the Judge in the court below that while the appellant may have established a duty of care she had not established a breach of that duty sufficient to establish liability in the circumstances of this case.

[48] In his statement of defence the respondent contended, that the deceased was aware or ought to have been aware of the prevailing circumstances when the country was under emergency. Counsel for the appellants categorized this plea as one of *volenti non fit injuria*. In more modern terms it was a contention that the deceased was aware of the dangers to which he was exposed and voluntarily with full knowledge of those dangers accepted the risks to which they gave rise. We agree with the appellant that in circumstances of this case such a defence had not been made out and in the circumstances is entirely inappropriate. Corporal Kumar was no doubt aware from the comments made to him by the army authorities that there were armed persons in the vicinity and that he was involved with the group of soldiers in an attempt to locate them. That is the extent of his knowledge proved, and fell far short of establishing that he was aware of and accepted the risk which developed and as a result of which he lost his life. In any event the only evidence before the court makes it clear that Corporal Kumar was acting under instructions a concept which completely negates the element of voluntariness which cases decided under this now rather out of date defence required.

[49] Even if the risk to which Mr Kumar was exposed was foreseeable we think that in terms of the cases public policy requires that liability be negated. Corporal Kumar was engaged and co-operating with the army and in fact had a guard of eight armed soldiers, whose obligation it was to confront any armed persons who were encountered. The necessity to ensure public order is a significant responsibility of the police and could be affected if officers charged with obligations to ensure that public order was maintained or restored needed to look over their shoulders in general situations because of the possibility of some subsequent action for damages. The undesirability of this was considered in the Dorset Yacht case and illustrated further by the decision of May J. in ***Hughes v. N.U.M.*** [1991] 4 All ER 278. Corporal Kumar's death did not occur because he was deliberately and knowingly sent into a situation of danger which he was not prepared to meet. The situation which led to his death developed in a way which could not have been foreseen by

his senior officers and in our view it would be quite contrary to public policy to find in the circumstances of this case liability existed.

[50] It is therefore our conclusion that the claim against the Commissioner of Police cannot succeed and must be dismissed.

[51] In coming to the conclusions which we have we do not overlook the fact that Corporal Kumar carried out significant and dangerous duties in the best traditions of the Fiji Police. That cannot unfortunately give rise to an action for damages.

[52] The appeal is dismissed and in the circumstances the authorities may be prepared to accept that it is inappropriate for any order for costs to be made. If however an application for costs is pursued such application may be referred to us.

Ward, President

FIJI COURT OF APPEAL

Eichelbaum, JA

Gallen, JA

Solicitors:

Messrs. Maharaj Chandra and Associates, Suva for the Appellant
Office of the Solicitor General, Suva for the Respondents

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