

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

CRIMINAL APPEAL NO. AAU0024 OF 2003
(High Court Criminal Appeal NO. HAC0011 of 2005)

BETWEEN:

TIMOCI SILATOLU AND JOSEFA SOQULU NATA

APPELLANTS

AND:

THE STATE

RESPONDENT

Ms A. Prasad for applicant/respondent
A. K. Singh for respondents/ appellants

Hearing: 21 and 23 February 2006

Ruling: 23 February 2006

RULING

This appeal has been set down for hearing on 28 and 29 February 2006.

By a letter dated 10 February 2006 and received in the registry on 13 February 2006, the respondent seeks a deferment of the hearing for one week on the ground that the amended grounds of appeal and submissions of the appellants were filed out of time in respect of the timetable set despite a subsequent amendment by this Court to assist counsel for the appellants. Additionally, it points out that overseas counsel has been instructed to represent the State and he was not available until 6 March, the date to which the deferment was sought.

Previously, by notice of motion filed on 27 January 2006, the appellants had also sought leave to adduce further evidence at the hearing of the appeal. Both matters were listed for hearing in chambers on 21 January 2006 - an earlier date not being possible because appellants' counsel was abroad as he had previously advised the court would be the case.

This appeal is against conviction and sentence for treason in March 2003. The first notice of appeal was filed in July 2003. Since then it has been delayed largely for administrative reasons which do not need to be canvassed here but during which the, until recently unrepresented, appellants have filed lengthy letters and documents setting out numerous grounds of appeal.

One reason for the delay was the requirement that the appellants, by then serving prisoners, should pay for the record of the proceedings which runs into more than 3,000 pages of typescript. At the July sitting of the Court of Appeal, an application, under section 30 of the Court of Appeal Act, to have counsel assigned was granted; [*AAU 24/03, 15 July 2005*].

It took some time to identify counsel of sufficient experience acceptable to the appellants. Mr Singh was not counsel in the lower court and has had to familiarise himself with a lengthy case. It has undoubtedly required a considerable amount of time in order to prepare the appeal for hearing.

The appellants have reason to feel the appeal proceedings are taking far too long and they have expressed more than once their anxiety to have their appeals heard. The respondents have also acknowledged the need for expedition and the preparations for the appeal have been marked by a sense of co-operation by the two sides whereby little objection has been taken on procedural grounds and a very tight timetable imposed and, as stated above, eased for the benefit of the appellants.

On 7 December 2005, the Court ordered that amended grounds of appeal were to be filed by 10 January 2006, the appellants' submissions by 30 January 2006 and the respondent's submissions within 28 days thereafter.

On 10 January 2006, counsel for the appellants sought leave to extend the time for filing the amended grounds to 16 January 2006 and this was granted. Despite the extension, they were not filed until 23 January 2006. The submissions were filed closer to the time ordered, on 1 February 2006, but still late; leaving the respondents less than the time ordered to file its submissions.

After hearing counsel at the hearing on 21 February 2006, I adjourned to allow counsel for the appellants to take further instructions with regard to the application to call fresh evidence and to decide which if any grounds of appeal he was proposing to withdraw.

At the resumed hearing, Mr Singh repeated his strong opposition to the adjournment and advised the Court that he was withdrawing the motion to call fresh evidence and, in consequence, withdrew grounds 9, 14, 15 and 27. He sought to add that the reason for this was to ensure the appeal could proceed on Tuesday. I was concerned that this could leave the appellants feeling that they had been forced to abandon some grounds for expediency but, following another short adjournment to speak to his clients, Mr Singh unreservedly withdrew the application and those grounds on the basis that recent authority in this Court meant he no longer considered there was any substance in those grounds. He confirmed his clients' understanding and agreement.

One other matter must also be mentioned. From the time he first accepted the case, Mr Singh has advised the Court that he is the defendant in a criminal trial which has, for many months, been fixed to start on 6 March 2006 and his acceptance was subject to that. He has now instructed overseas counsel to represent him and his witnesses have been warned for that date. This Court has not enquired about the nature of the case but has been advised that the trial is expected to be completed in about two weeks and also that, if there is a conviction, there may be serious professional consequences for Mr Singh. This could mean that a deferment of the hearing of this appeal beyond that trial may prevent Mr Singh from continuing to represent these appellants.

Ms Prasad points out that the delay in filing the grounds and the slight delay in filing the submissions has left the State with insufficient time to prepare its case. The

unavailability of overseas counsel also means also that fresh counsel may have to present the appeal. She has been given the junior brief but has not prepared it as she would have done if she had been expecting to argue the case in court. I understand her apprehension but would point out that the role of junior counsel includes the duty to take over a case should leading counsel be indisposed and it should be prepared with that eventuality in mind.

She also suggests that the withdrawal today of some grounds of appeal has prejudiced the respondents because it has resulted in unnecessary work. I do not consider that is a reasonable ground.

Mr Singh suggests that the numerous submissions by the appellants over the last months have forewarned the State of the nature and extent of the appeal. He tells the Court that the grounds now being pursued, with the exception of ground 19, have all been predicated in those documents. I accept that would have indicated the general thrust of this appeal but I do not accept that the State should or would have started to prepare its response to an appeal before the appeal is listed for hearing.

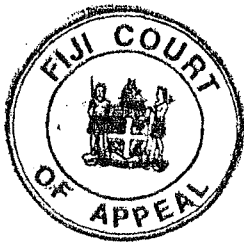
Mr Singh also points out that junior counsel appearing for the State at the trial is present in Fiji. I do not consider this Court can assume he is available for the case just by his presence in the country.

The issue of the availability of overseas counsel for the respondent can be disposed of shortly. The trial date was fixed at the call-over on 1 December 2005 and the timetable was set a few days later. Undoubtedly, the failure of defence counsel to adhere to the timetable prejudices the respondent to some extent but I cannot accept Ms Prasad's suggestion that the appellants' delay was a sufficient reason for delaying the instruction of counsel. Prudence would dictate that, where any senior counsel is to be retained, it should be arranged immediately the date for the hearing is fixed. In this case, it appears he was not instructed until later by which time he could not appear on the fixed date. In those circumstances he should not, with respect, have accepted the instructions and the respondent should have looked for counsel who would be available.

I appreciate that the allegations of a lack of impartiality of the Director of Public Prosecutions could have been the cause of an eleventh hour decision to instruct overseas counsel. That would have been understandable but, if it was the reason for such late instruction, it is no longer relevant to this appeal.

Applications of this nature are always difficult. Justice relates to both sides. I appreciate that the shortness for time is likely to put pressure on the respondent more than the appellants but I am not satisfied that the grounds for this application are sufficient to grant the adjournment.

The application is refused and the hearing shall start as listed on Tuesday, 28 February 2006 at 9.30am.



A handwritten signature in cursive script, appearing to read "Gordon Ward".

[GORDON WARD]
President
FIJI COURT OF APPEAL

23RD FEBRUARY, 2006