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

MISCELLANEOUS APPEAL NO. 009 OF 2004
(High Court Miscellaneous Case No. HBM 32 of 2004)

BETWEEN: **PENI NADUANIWAI** *Appellant*

A N D : **THE COMMANDER, REPUBLIC OF FIJI MILITARY FORCES**

1st Respondent

A N D : **THE STATE**

2nd Respondent

A N D : **FIJI HUMAN RIGHTS COMMISSION**

Amicus Curiae

Coram: **Ward, President**
Barker, JA
Scott, JA

Hearing: **Thursday 1st March 2007**

Counsel: **V Vosarogo for appellant**
A Rokomoti for respondent
U Ratuvili (Fiji Human Rights Commission) as amicus curiae

Date of Judgment: **Friday 9 March 2007**

JUDGMENT OF THE COURT

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[1] The appellant was a member of the Republic of Fiji Military Forces (RFMF) and, in 1990, was deployed to the First Meridian Squadron, also known as the Counter Revolutionary Warfare Unit (CRW). Following the armed takeover of Parliament in May 2000 and the overthrow of the Labour Party-led coalition government, he and a number of other members of the CRW were charged with various offences including mutiny. The Commander of the RFMF ordered the convening of a General Court Martial to try them.

[2] Prior to the commencement of the trial by the General Court Martial, the appellant filed notice of motion seeking constitutional redress under section 41 of the Constitution. He sought declarations that his rights to a fair and impartial trial in accordance with section 29(1) of the Constitution and international human rights law were likely to be breached if he was tried by court martial under the laws of Fiji. He further sought an injunction ordering the General Court Martial to cease or that its proceedings be stayed until such time as a tribunal, properly established by law, be initiated to hear the charges brought against him.

[3] The application was heard by Winter J on 30 August 2004 and he delivered a lengthy and carefully-reasoned judgment on 6 September 2004. The learned judge traversed a considerable range of issues relating to the High Court's jurisdiction in respect of courts martial, the requirements of section 41 of the Constitution, questions of sovereignty and the incorporation of amendments to the English Army Act 1955 into the military law of Fiji in addition to the principal question of the appellant's rights to a fair trial under section 29(1) of the Constitution.

[4] It is only necessary to refer to two of his conclusions.

[5] The learned judge found that the Republic of Fiji Military Forces Act has incorporated the provisions of the English Army Act, 1955, and its subsequent amendments by a legitimate drafting technique of incorporation by reference. He considered many recent cases from other jurisdictions which have modified what

might be called the traditional process of trials by military courts but concluded that he could not say the appellant's rights to a fair and impartial trial under section 29(1) of the Constitution were likely to be breached if he was to be tried under military law by a General Court Martial. The application was dismissed.

[6] It is necessary, however, to move on to a consideration of events subsequent to the judgment of Winter J. An appeal was lodged, although the date on which that occurred is not apparent on the papers before this Court. However, before it was filed and on the strength of the finding by Winter J, the military authorities commenced a General Court Martial against 58 members of the CRW on 10 November 2004. The appellant faced three charges. He was represented by counsel and his plea of guilty to the first charge and not guilty to the other two was accepted by the prosecution.

[7] On 17 November 2004, he made a lengthy personal statement in mitigation to the court. He apologised for all he had done and sought forgiveness. He spoke of his training and the effect it had in terms of obedience to orders and he concluded with an eloquent recital of the consequences of the case on his family. That was followed by a careful address by his counsel which included calling a character witness.

[8] The appellant was sentenced to five years imprisonment and the sentence was confirmed by the President on 16 December 2004. If he receives the usual remission, he will be released in the first half of 2008.

[9] The Court asked the Legal Aid Commission to represent the appellant and Mr Vosarogo has filed carefully prepared submissions. Counsel summarises the grounds of appeal as:

-Right to fair trial entrenched under section 29 of the Constitution; in all likelihood is not possible with the present structure of the General Court Martial

-The General Court Martial has inherent structural flaws which do not permit fair trial

-Validity of the General Court Martial and its processes are not lawfully recognised under the Constitution.

[10] These were arguable and unresolved grounds at the time the appellant first lodged his appeal but Mr Vosarogo now faces two insurmountable hurdles.

[11] First, he has submitted that the recent amendments to the English Army Act cannot and do not apply to Fiji and that the procedures for General Court Martial breach the human rights provisions of the Constitution. He cites a number of authorities in support of the last proposition from England, Canada and the European Court of Human Rights.

[12] However the appeal has been overtaken by the appeal to this Court of *Barbados Mills and others v The State*; Crim App AAU 35/04, 16 August 2005. In that case the Court considered a number of authorities including those cited by the appellant and the judgment of Winter J in the present case. The Court concluded that amendments to the English Act were properly incorporated by reference and, on the strength of the overseas authorities, found that the procedures under the Army Act and, consequently, under the RFMF Act did indeed breach the constitutional rights to a fair trial.

[13] The *Barbados Mills case* was not appealed to the Supreme Court and this Court should not overrule its own earlier decision made such a short time ago. Having heard counsel nonetheless, we see no reason to question our decision that the amendments have been validly incorporated into the law in Fiji and that the procedures adopted thereby breached the constitutional requirement for a fair trial. In respect of the second limb, Mr Vosarogo does not seek any remedy that the *Barbados Mills case* has not provided.

[14] The second hurdle is that the trial, which the appellant sought to stay by his application before Winter J, was held and completed. No further challenge was made and the appellant was convicted and sentenced on his own plea. This Court cannot now stop or stay those proceedings. Consequently, the matters he raised in respect of a suggested a breach of his constitutional rights by the General Court Martial are now moot.

[15] The effect of an appeal becoming moot was considered by the Court in _Rev Akuila Yabaki and others v The President of the Republic of Fiji Islands and another_; Civ App ABU 61/01, 14 February 2003.

[16] In the judgment of the majority it was stated:

> "…the issues raised in the declarations sought by the appellants [are] now moot. In other words, there was no live issue upon which the opinion of the Court needed to be given and that any decision on this Court would be in the nature of an advisory opinion. …
>
> The appellants had the undoubted right to appeal to this Court under section 121(2) of the Constitution because the final judgment of the High Court involved interpretation of the Constitution. But contrary to counsel's submission, the mere fact of their having an unassailable right to file an appeal does not oblige the Court to consider an appeal on the merits when the subject matter of the litigation has become moot. In that event, a moot case may be considered on appeal only in the very limited circumstances described below.
>
> Section 121(2) of the Constitution does not give an unrestricted power to any concerned citizen to seek an advisory opinion on a constitutional matter. The only right to an advisory opinion is that conferred on the President by section 123 of the Constitution to seek the opinion of the Supreme Court on constitutional matters in stated situations. Even the recent line of authority on standing for declarations in public interest cases shows there is normally to be sought from the Court a ruling on the legality of something live: either the Court is asked to declare illegal something which is to happen or to declare illegal something which has happened in circumstances, usually, where a return to the status quo is feasible, even though inconvenient."

[17] That case involved a question of public law but the same restrictions apply in this case. Had this appeal been heard before the court martial took place, we have no doubt the appellant would have been successful in overturning the decision of Winter J on the same ground that the appeal succeeded in the *Barbados Mills case*. However, the trial of the appellant and his acceptance of the jurisdiction of the court martial preclude him now from obtaining any remedy because the matter is moot. Any order now would be purely academic; see Mason J in *Church of Scientology v Woodward* [1980-82] 154 CLR 55, 62.

[18] Finally, by section 30 of the RFMF Act, the right of appeal from a court martial is limited to an appeal against conviction. The appellant cannot, therefore, appeal against sentence. This Court has referred before to the injustice and probable unconstitutionality of that provision but it remains unchanged.

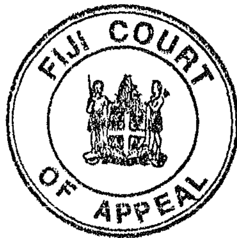
[19] This Court can do no more than dismiss the appeal and confirm its finding in the *Barbados Mills case*.

[20] The appeal is dismissed.

Result

The appeal is dismissed.

Ward, President



Barker, JA

Scott, JA

Solicitors:

Legal Aid for the appellant
Director of Public Prosecutions Office for the respondent
Fiji Human Rights Commission as amicus curiae