

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU0038 OF 2007
*(On An Appeal from the High Court, Suva
in Civil Action No. HBM 90 of 2006)*

BETWEEN : THE REPUBLIC OF FIJI MILITARY FORCES &
TWO OTHERS
Appellants

AND : EMOSI QICATABUA & SEVEN OTHERS
Respondents

AND : THE FIJI HUMAN RIGHTS COMMISSION
Amicus Curiae

Qoram : John Byrne, J. A.
Daniel Goundar, J. A.
Jocelyne Scutt, J. A.

Counsel : K. Tuinaosara for the Appellants
F. Vosarogo & Ms B. Malimali for the Respondents

Dates of Hearing : 8th, 15th February 2008
Date of Judgment: 12th September 2008

J U D G M E N T
of Byrne J. A.

[1] The Respondents were convicted and sentenced by Courts Martial
for offences relating to the take-over of Fiji Parliament in May 2000

and/or mutiny at Queen Elizabeth Army Barracks in November 2000. They were sentenced to various terms of imprisonment. They appealed against their sentences to the Court of Appeal which ruled that Section 30 of the Royal Fiji Military Forces Act, Cap. 81 did not permit appeal against sentences.

- [2] The Respondents then began an action for Constitutional Redress under Section 41 of the Constitution in an attempt to challenge the validity of Section 30 of the RFMF Act. Section 41 is part of Chapter 4 of the Constitution which is entitled, Bill of Rights. Sub-section (1) states that if a person considers that if any of the provisions of the Chapter has been or is likely to be contravened in relation to him or her, that person may apply to the High Court for redress. The action came before Singh J. in the High Court on the 27th of April 2007 and he gave Judgment on the 22nd of May 2007 holding that the words "*and sentence*" must be read into Section 30 of the RFMF Act. The Judge held that Section 30 was unconstitutional in that it did not allow any soldiers convicted by Court Martial to appeal their sentences to the Court of Appeal. Although in the papers relating to this appeal the Republic of Fiji Military Forces and the Commissioner of Prisons, and the Attorney-General and Minister for Justice are named as Appellants, no submissions were received in this Court from either the Commissioner of Prisons or the Attorney-General and Minister for Justice. In fact in the High Court the Commissioner of Prisons and the Attorney-General and Minister for Justice both supported the arguments of the Respondents and submitted that there was a lacuna in Section 30 the RFMF Act and invited the High Court to remove it by reading in the words previously mentioned.

[3] It is appropriate to set out here Section 30 which reads:

“A person convicted by a court martial may, with the leave of the Court of Appeal, appeal to that court against conviction provided that the leave of the court shall not be required in any case where the person convicted was sentenced by the court martial to imprisonment for ninety days or more or to detention for ninety days or more”.

[4] The Appellant RFMF has filed six grounds of appeal against the decision of Singh J. but these may be conveniently reduced to the following:

1. The Judge erred in holding that he could read words into Section 30 when the present case was one seeking constitutional redress.
2. He erred in failing to give any or any sufficient weight to the fact that the Respondents had been convicted of the most serious military offence the maximum sentence for which is life imprisonment and therefore he should have directed the relevant authorities to make the necessary change or changes.
3. He failed to take into account or give due consideration to the fact that a Court might not be the best forum to determine appeals from General Courts Martial because only Parliament was the correct forum to overhaul the military justice system in this country.

4. The Judge erred in failing to consider and take into account:
 - a) Military procedures and customs;
 - b) The suitability of the Fiji Court of Appeal to deal with Court Martial Appeals;
 - c) The need to have the matter properly debated and scrutinised by legislators.

5. That the Attorney-General or his Chambers should make a Presidential Promulgation reflecting the wishes of the Court as this is the method adopted by the Interim Government to make laws.

[5] At paragraph 34 of his Judgment the Judge acknowledged that:

“The real problem lies in deciding where interpretation ends and amendment begins. The line between the two is very thin indeed. The Courts in our modern age take a purposive and more liberal attitude towards interpretation which in some cases may be considered as intruding into the realm of the legislature”.

[6] His Lordship referred to Schacter -v- The Queen & Ors. [1992] 93 D. L. R. (4th) where the Supreme Court of Canada held that a Court may in appropriate circumstances read words into a statute. This was a paternity case under the Canadian Charter of Rights and Freedoms.

[7] As will be seen later in this Judgment I do not consider that this is one of those appropriate circumstances to read in the words allowed by Singh J.

[8] Singh J. also quoted Lord Nicholls of Birkenhead in Re. S. (Care Order Implementation of Care Plan) [2002] 2 A.C. 291 at P31 who, in considering the dividing line between interpretation and amendment stated that:

“A meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the Court is not equipped to evaluate”.

[9] As general statements of the law I do not dispute the statements by the Supreme Court of Canada and Lord Nicholls of Birkenhead but I remind myself that in any case a Court must consider the factual realities of the case before the Court. Both Schacter and Re. S. dealt mostly with child care and benefits or welfare scheme issues. They were not concerned as we are in this case with issues involving the rights of members of an organisation like the military who have and rely on different sets of rules solely to serve the unique status and operations of the Republic of Fiji Military Forces.

[10] In Schacter, Lamer Chief Justice of Canada in a very comprehensive judgment dealing with reading in and severance said:

“While the Courts are guardians of the Constitution and of individuals’ rights under it, it is the Legislators’ responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution’s requirements. It should not fall to the Courts to fill in the details that will render legislative lacunae constitutional”

[11] Lamer C. J. then concluded at p19 letter (e):

“These cases stand for the proposition that the Court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making ad-hoc choices from a variety of options none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the Courts”.

[12] La Forest J. in agreeing with the Chief Justice stated at p35 letter (b):

“The simple fact is, as I noted before, that it is for Parliament and the legislatures to make laws. It is the duty of the Courts to see that those laws conform to constitutional norms and declare them invalid if they do not”. Shortly after this the Judge said:

“Reliance should not be placed on the Courts to repair invalid laws”.

[13] This Court has on three occasions ruled that as the legislation stands at this time there is no right of appeal to sentences given by a General Court Martial. In Private Pauliasi Vakacereitai & Ors. – v- The Commander Republic of Fiji Military Forces – Criminal Appeal No. AAU004 of 2005, a group of soldiers appealed their sentences from a General Court Martial. The then President of this Court, Ward P. stated in response to arguments by counsel for the Appellants:

“He suggests that a finding of guilt results in a conviction and so that word can be implied into the section. From there he suggests that, as a conviction makes the convicted person liable to be sentenced, that can also be inferred. Ingenious though the argument is, I cannot accept it is correct. Where there is no ambiguity in the wording of a statute, the Court must give the words their natural meaning. Parliament must be taken to have intended that meaning and the Court has no right to change it. To do so would be to assume a legislative rather than an interpretive role” (emphasis mine).

He then said:

“It is undeniable that the Court has, beyond those statutory limits, inherent jurisdiction to control its own proceedings and prevent abuse of process; Aviagents Ltd. -v- Balstravest Investments Ltd. [1966] 1 WLR 150. Such inherent jurisdiction is necessary to ensure the Court can do justice to the parties appearing before it. It does not extend to a power to increase its statutory jurisdiction”.

[14] It has to be said however, and Singh J. noted this, that Ward P. also expressed grave misgivings about the availability of appeal against sentence to soldiers convicted and sentenced by Court Martial. He said in the penultimate paragraph of his Judgment:

“Clearly the establishment of special military laws and courts is a necessary consequence of the special nature of military service and the need for strict and constant discipline means that many offences regarded as minor in civilian society must be treated more seriously in the armed forces. Consequently, the Court of Appeal may not be considered the most suitable body to review the severity, as opposed to the propriety, of sentences passed by Courts Martial but, whichever is the appropriate body, it would be in accordance with the spirit of the Constitution to provide a right of appeal to an independent tribunal against sentence in cases tried under the RFMF Act”.

[15] Section 30 was also considered by Scott J. A. in Mosese Vakadralla -v- The State AAU20 of 2004 who found that non-availability of appeal against sentence was a most unfortunate lacuna in the law. He requested a copy of his Judgment to be forwarded to the Solicitor General and the Fiji Human Rights Commission no doubt in the hope that the legislature would rectify the gap.

[16] Despite the statements of Ward P. and Scott J. A., Singh J. disregarded them and read words into the legislation.

[17] His Lordship noted that the section had remained unamended and considered that there were two possible courses of action open to him - namely either a declaration of incompatibility or to read the words "*and sentence*" into the legislation.

[18] Declaration of Incompatibility

Singh J. considered that he had the power to make a declaration of incompatibility considering the broad language of Section 41(3) of the Constitution which reads:

"The High Court has original jurisdiction:

- a) To hear and determine applications under sub-section 1;*
- b) To determine questions that are referred to it under sub-section 5;*
- c) That sub-section concerns references by a subordinate Court for the opinion of the High Court".*

[19] Singh J. considered that if he did not grant a declaration there would be a constitutional dead-end. With respect I do not agree. If there would be a constitutional dead-end then in my view it is not for a court to remedy it but for the Parliament after debate to make the necessary amendments. In my Judgment it is not an answer to the problem posed in this case to say that if since December the 5th 2006 and for some unknown period into the future there is no Parliament then a court may assume the role of Parliament in attempting to remedy a situation thought by some people to require change.

[20] It is important to remember as I said earlier, that the Respondents have been convicted of one of the most serious offences known to the law, mutiny. Once upon a time conviction by Court Martial for this offence resulted in the death penalty, which is an indication of how seriously governments at that time regarded mutiny. It is in one sense the military equivalent of treason and indeed, it may be both.

[21] In the end, considering the current political situation in Fiji with no prospect of immediate parliamentary sittings, a declaration of incompatibility would serve no purpose and would be meaningless and so His Lordship opted for the device of Reading In. In paragraph 31 of his Judgment he recognised that this was the bolder route and appears to have accepted, as present counsel for the Appellant submitted to him, that this would amount to the court legislating, which, as before Singh J., and before us, Mr Tuinaosara says the Court should not do.

[22] In my Judgment it is important not to be moved by what I respectfully term emotional arguments, such as, with respect to learned counsel for the Respondents, we have received here.

[23] It must be remembered that the object of military law is two-fold. First, it is to provide for the maintenance of good order and discipline among members of the army and in certain circumstances among others who live or work in a military environment. This it does by supplementing the ordinary criminal law of Fiji and the ordinary Judicial system with a special code of discipline and a special system for enforcing it. In my opinion such special provision is necessary in order to maintain in time of peace as well as war, and overseas as well as at home, the operational efficiency of the armed force. It is for this reason that acts or omissions which in civil life may amount to no more than breaches of contract (like failing to attend work) or, indeed mere incivility (like being offensive to a superior) become in the context of army life punishable offences. The second object of military law is to regulate certain aspects of army administration, mainly in those fields which affect individual rights. Thus, there is provision relating to enlistment and discharge, terms of service, forfeitures of deductions from pay and, billeting. Often in practice, however the term "*military law*" is used with regard to its disciplinary provisions rather than its administrative ones.

[24] In Peni Naduaniwai -v- The Commander Republic of Fiji Military Forces - Miscellaneous Case No. HBM 32 of 2004, Winter J. referring to the Judgment of L'Heureux-Dubé J. in R -v- Genereux 22 [1992] 88 DLR (4th) 110 said:

“Her Honour focused on the military nature of the tribunal upholding that it was not appropriate to apply civilian criteria to evaluate the validity of a General Courts Martial. Her Honour considered that the three essential conditions identified by the majority could not always be applicable to every tribunal. In a strongly worded dissent for a jurist well known as a champion of Human Rights, Her Honour’s contextual approach to constitutional interpretation on this issue is one with respect that I adopt as it is particularly relevant to the provision I have just discussed from the Fijian Constitution, She said: “When measuring the General Court Martial against the requirements of the Charter, certain considerations must be kept in mind. Among those considerations are that the armed forces depend upon the strictest discipline in order to function effectively and that alleged instances of non-adherence to rules of the military need to be tried within the chain of command”. These cases arise in a context of military tribunals convened under Fijian law and sufficient weight must be given to that context in deciding whether or not a breach of a given right or freedom might occur. Her Honour observed, and I agree, that a right or freedom may have different meanings in different circumstances. I accept as a principle that the constitutional standards applicable in the civilian system of justice for assessing an independent and impartial tribunal

*are wholly inapplicable to measuring trial by
General Court Martial”.*

- [25] In my Judgment the remarks of Winter J. are very apposite to this case. It would seem with respect that Singh J. has ignored the realities of the military disciplinary system by placing too much emphasis on the constitutionality of the section in question. The legislation in my view could not be clearer and the purpose of those who enacted it is also quite clear, that there was to be no appeal against sentence.
- [26] It is true that the British, Australian and New Zealand Parliaments have amended their Court Martial legislation to make it more in accordance with what are seen to be the Human Rights desires and aims of which we hear almost every day. Of course, the law should not stand still and thanks to both the common law down the centuries and Parliaments, virtually since Magna Carta, it has not done so but, and I consider that a very important but, in my view this amendment, if it is to be effected, must be made by Parliament. It is also necessary to note that under the system of military discipline the emphasis is on speedy, effective and quick justice. The reality as far as military service is concerned is that cases can not be allowed to drag on and divert attention from the military mission a unit may be sent on.
- [27] We were informed in argument that in England now, a country I might add with a population of over 60 million, there are approximately eight Court Martial appeal tribunals consisting of Judges of the High Court and Court of Appeal in England. England's population is not only much higher than that of Fiji but

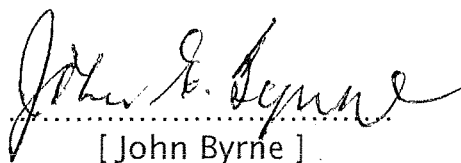
its budget is also far higher than will ever be necessary for Fiji, at least in the foreseeable future.

[28] I note the suggestion of a General Court Martial appeals court here. I do not doubt the sincerity of those who support the establishment of such a Court but I say this should not be done without properly scrutinising its suitability for this country and its army. I say that it is wrong to attempt to make the Constitution of this country a panacea for all ills. There is an old Latin maxim *Festina Lente* which means, hasten slowly. In my view changes of the magnitude sought to be effected to section 30 deserve no less than debate in Parliament. This was certainly done in Britain and New Zealand and Australia and in our view it must be done here.

[29] It is no answer to say that because there is presently no Parliament any amendment may be made by Promulgation. To do so would be merely an act of expediency for which I can find no justification in the law in the present circumstances.

[30] For these reasons I grant the appeal but make no order for costs. There will be Orders accordingly.





[John Byrne]
JUDGE OF APPEAL

At Suva

12th September 2008