IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0063 OF 2019
[High Court at Lautoka Case No. Civil Action 08 of 2016]

BETWEEN : **THE COMMANDER OF THE REPUBLIC OF FIJI MILITARY FORCES**

1st Appellant

: **ATTORNEY GENERAL OF FIJI**

2nd Appellant

AND : **SALASEINI DENARAU**

Respondent

Coram : **Dr. Almeida Guneratne, P**
E. Basnayake, JA
V. Dayaratne, JA

Counsel : **Mr J Lesivakarua and Mr A Rabuku for the Appellants**
: **Mr E Maopa for the Respondent**

Date of Hearing : **3rd November, 2022**

Date of Judgment : **25th November, 2022**

JUDGMENT

Almeida Guneratne, P

Undisputed Background Factual Content

[1] The Respondent, as Administrator of the estate of late Serevi Vananalagi, an employee of the 1st Appellant, while working at the Navy Workshop in Walu Bay died as a result

of an explosion. A Board of Inquiry (the Board) having been constituted by Order of the Chief of the Navy to inquire into the incident as provided by the Army Act (1955) and/or Regulations made thereunder, "*the Board*" issued a Report (BOIR) with its recommendations. The said Report thereafter became the "*subject of discovery*," after which, the Respondent instituted action against the Appellants in the High Court claiming negligence on their part for breach of their common law duties and the provisions of the Health and Safety of Workmen Act (1996) (that is, for breach of their statutory obligations).

[2] The said action having commenced, the 1st Appellant had raised an "*objection*" to the said BOIR being admitted in evidence citing (a) "*national security*" concerns on the basis of Section 131(2) of the Constitution of Fiji; (b) on the consideration of "*ensuing discipline in the forces*" (based on Section 23 of the Fiji Military Forces Act) read with Section 135(5) of the Army Act (1955) which states that:

> *"Evidence given before a BOI shall not be admissible against any person in proceedings before a Court martial, Commanding Officer or Appropriate superior authority, _ _ _"*

Re: The Contentious aspects that arose thereinafter

[3] I shall begin by referring to the said "*objection*" referred to in paragraph [2] above and the ensuing "*Ruling*" made thereon by the learned High Court Judge.

The Ruling

[4] In his ruling, the learned Judge referred to the judicial thinking reflected in an English decision of the King's Bench Division in the year 1916 wherein it was said:

> *"The foundation of the rule is that the information (emphasis is mine) cannot be disclosed without injury to the public interests, and not that the documents are confidential or official which alone is no reason for their non-production: the general pubic interest is paramount to the interests of the suitor."*

(vide: **Asiatic Petroleum Co. Ltd –v- Anglo-Persian Oil Co. Ltd**, [1916] 1 KB 822, Swinfen-Eldy, L.J.

[5] Having thus referred to the said judicial observation, the learned High Court Judge proceeded to hold that, "*the Report*" in question was admissible having opined that:

> *"I accept that there are many aspects of the Fiji Military pertaining to national security which will be sensitive and documents relating to such operations would, quite justifiably, attract immunity and privilege in the interest of national security. However, I do not see how a Report of a Board of Inquiry relating to the death of A/Cpl. Vananalagi is remotely a matter of national security."*

[6] While I express total agreement with the High Court Judge's reasoning I postpone some reflections and comments I felt inclined to make flowing in consequence thereof in the context of the Constitutional provisions of Fiji.

[7] Thus, getting back to the main focus of the present appeal, I proceed to address the same on several issues which I shall consider and deal with seriatim.

1. The Ruling referred to above (paragraphs [4] to [5] of this judgment

[8] That Ruling was clearly an interlocutory ruling. No leave to appeal was sought against it from the High Court or by way of a renewed application from this Court.

2. Even if that aspect was to be ignored, (as a procedural statutory bar), nevertheless, the 1st Appellant having acquiesced in the trial that proceeded to thereafter, could the 1st Appellant re-visit that issue of the High Court's Interlocutory ruling?

[9] I do not think so for the following reasons:

(a) It is not as if the High Court merely adopted the BOI Report and the contents contained therein (including the oral depositions). A full trial was conducted by the High Court where three (official) witnesses gave evidence as to the incident in question.

(b) At the conclusion of the trial, the High Court found on "*a balance of probabilities*" that, negligence on the part of the 1st Appellant had been established and awarded damages and incidental reliefs as well.

(c) The grounds of appeal urged do not challenge those findings of the High Court.

(d) In the result, the present appeal before this Court is an attempt to re-invent the wheel all over and/or to turn back the clock, the 1st Appellant, having in fact failed to seek an interlocutory appeal as observed by me earlier.

An Interim pause before I proceed to make my determination in this appeal

[10] That pause is on account of what I said in paragraph [6] above on which I felt I should take the opportunity to comment even briefly as follows.

Freedom and Right to Information

Re: On and in the public interest

[11] Section 25(1) of the Constitution of Fiji decrees that:

> *"Every person has the right of access to (a) information held by any public office; and _ _ _"*

[12] It is true that, Section 25(2) imposes limitations thereto "*by law."*

[13] However, in my view, those limitations taken in the context of the facts of the instant case I could not see, how they could have been brought under the concepts of "*state privilege*" linked to "*National Security*" as well, which brought to my mind the necessity for the Fijian legislature to enact a Right to Information Act taking in the "*concept of the public interest override,"* perhaps by creating a Right to Information Commission as in several countries including India and Sri Lanka in whose constitutions sovereignty of the people

is accorded the paramount status just as much as in Fiji. (vide: Pre-amble and Sections 1, 2,(3) 4(b) and 6(b)) of the Fijian Constitution.

The Pacific Region Link to Fiji

[14] It is also relevant in the circumstances that, Australia and New Zealand both being countries in the Pacific Region with whom the Republic of Fiji have strong geographical and jurisprudential links or ties, have long had advanced access to information frameworks.

[15] Having made that pause, I now proceed to discuss and determine on the merits of the appeal on the basis of the written submissions filed and the oral submissions made at the hearing of the appeal.

A prefatory statement before I embark on such discussion and determination

[16] At the outset, I feel no constraint in saying that the ensuing discussion which I would put down to being as a matter of public interest, the ensuing determination would go no further than that, in as much as, I would be proposing my orders in dismissing the appeal on the merits (the allegation of negligence on the part of the Appellants both on the basis of breaches on their common law and statutory duties).

The Respective submissions made by Counsel and discussions thereon

[17] Learned Counsel for the 1st Appellant submitted that:

(a) The workman who suffered injuries while on duty and died was due to the negligence of his employer (the 1st Appellant) on the basis of the witnesses evidence led at the trial which he was not challenging. Also the award of damages made by the High Court. Both those issues have not been put in issue in Appeal.

(b) However, Counsel submitted that, after that fatal accident which the said workman suffered, a Board of Inquiry was constituted under the Army Act of 1955 to investigate and, it was the ensuing Report that followed, which he had objected to being received as being admissible evidence, in as much as, the said inquiry being an internal matter within *"the Army*" it was not liable to be disclosed.

[18] At this point I make the observation that, the objection to the said BOI Report had been raised at the commencement of the trial before the High Court, which objection had been overruled by the learned High Court Judge who had proceeded to trial and eventually found negligence on the part of the 1st Appellant employer and awarded damages as recounted earlier by me.

[19] That order being clearly "*interlocutory*" whether on "*the application*" or the "*order test,"* on account of the fact that, the 1st Appellant had paid the moneys awarded in the case the Respondent's counsel Mr. Maopa did not spend labour on that score.

The Respondent counsel's submission in Reply

[20] Mr Maopa, in his brief counter submitted, understandably, his client having got judgment the issue of the BOI Report and its admissibility was of no relevance to him.

[21] Having thus, given my mind to the said respective submissions I proceed to make my determination as follows.

[22] As a prelude to that, I also gave my mind to the submission made by learned Counsel for the 1st Appellant based on *"the class privilege evidence*" concept.

The "*Class Privilege Evidence*" Concept

[23] That is, claiming privilege on the ground that documents belong to a class which the public interest required to be withheld from production. That is not because the particular

documents were themselves secret but merely because it was thought that all documents of a kind should be confidential. Counsel appeared to argue that a BOI Report would belong to such a class of documents. If such reports are subjected "to disclosure it is bound to open the flood gates _ _ _(counsel argued,) _ _ _ *"official reports of many kinds would not be made fearlessly and candidly _ _ _"*

[24] It is this very argument relating to "*class claiming*" that came to be rejected in England by the House of Lords in **Conway v. Rimmer** [1968] AC 996 reversing an earlier trend set by **Duncan v. Cammell, Laird & Co. Ltd**. [1942] AC 624.

[25] The question then is, what should the Courts of Fiji follow? Should it be the law that prevailed in England in 1942 or the new trend after 1968?

"***O Tempora O Mores"***

[26] Cicero's said exclamation is brought to my mind here.

[27] Writing for the Court of Appeal of Fiji, I certainly prefer to be progressive rather than be archaic and be labelled as subscribing to judicial anachronism for which reason, I adopt the thinking in **Conway v. Rimmer** (supra) and consequently reject the "*class document privilege*" argument.

[28] Consequently, I felt obliged to address and respond to some jurisprudential issues that I felt necessary to address in the public interest.

A Court of law will not act in vain

[29] That is the broad inveterate principle established in jurisprudence.

The principle allied to that broad principle

[30] That is, that:

A Court of law is there to do justice to parties, the end objective being that no injustice visits either party.

[31] Regarding that principle as the decisive test, what injustice has the Appellant suffered when the High Court, in its judgment held that, the BOI Report was admissible?

[32] Furthermore, no national security concerns were even remotely connected, (in as much as), the BOI Report was in regard to a workman who was killed due to the negligence of his employer, (1st Appellant).

Determination

[33] The findings of negligence on the part of the 1st Appellant (the employer) by the High Court have not been put in issue in this appeal. Thus, those findings in law became *"fact accompli*."

[34] The ruling on admissibility of the BOI Report having been made by the High Court at a preliminary stage, thus it being an interlocutory order, there was no leave sought against the same in the High Court itself or before this Court.

[35] Apart from all that, in the 1st Appellant's submissions made before this Court was that, in general, making admissible a BOI Report could be prejudicial to "*the public interest*" and/or "*National Security*." I took note of the fact that the learned High Court Judge took cognizance of the particular circumstances of the instant case as revealed from the evidence on record, (where the Appellant's complaint was to the admissibility of the BOI Report and not to the evidence given by the witnesses (which established the negligence of the Appellant's in relation to the workman-respondent) and therefore, I could not see any reason to fault the learned High Court Judge's approach to the case for determination before him.

Conclusion

[36] For the aforesaid reasons, while I do say that, there could be an appropriate case where a BOI Report could be regarded as being inadmissible, the present case is certainly not one where the High Court could have been faulted for holding that the impugned Report was not inadmissible.

[37] Accordingly, I proceed to propose my orders as follows.

[38] Before parting with this judgment I make the observation that the 2nd Appellant (the Attorney General) (as appearing in the caption) did not enter an appearance on his behalf in the appeal.

[39] **Proposed Orders**

1. That, the Appeal be dismissed.
2. That, the Appellant is liable to pay costs of this appeal in a sum of $1,500.00 to the Respondent within 21 days of this Judgment.

Basnayake, JA

[40] I agree with the reasons and orders of Court of Almeida Guneratne, P.

Dayaratne, JA

[41] I agree with the reasons and conclusions of Dr. Almeida Guneratne, P.

Orders of Court

1) The appeal is dismissed.
2) The 1st Appellant is ordered to pay a sum of $1,500.00 as costs to the Respondent within 21 days of notice of this Judgment.

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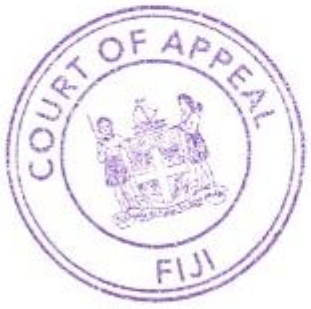
Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL



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Hon. Justice Eric Basnayake
JUSTICE OF APPEAL

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Hon. Justice V. Dayaratne
JUSTICE OF APPEAL