EMBARGOED

IN THE HIGH COURT OF FIJI
AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 16 OF 2006

BETWEEN:

SITIVENI LIGAMAMADA RABUKA

Applicant

AND:

STATE

Respondent

Counsel: Mr. P. Maiden, SC)
Mr. P. Sharma) – for the Applicant
Ms Tamanikaiwaimaro)

Mr. M. Tedeschi, QC)
Mr. R. Gibson) – for the State
Mr. A. Ravindra-Singh)

Date of Hearing & Ruling: Monday 20th November, 2006

RULING – MISTRIAL (2)

[1] The Ruling I am about to give is embargoed and is not to be published without my further permission. It is also given under the constraints of time after an important application by Mr. Maiden. Accordingly I reserve the right to perfect the judgment once it has been transcribed for me.

Background

[2] At the conclusion of evidence last week counsel for the accused was left in a position where he was to make enquiries of the Military concerning certain statements and records about these events recorded by a Military Tribunal conducted in 2001. Counsel went up to the Queen Elizabeth Barracks and together with the RFMF Staff Officer Legal reviewed the material. As a result of that review Mr. Maiden SC discovered documents that he says are relevant to these proceedings that were not disclosed to him. He makes an application for mistrial because of the late discovery of those documents.

[3] I have come to the firm conclusion that there is little point in attributing blame over that late discovery. Further, the reasons behind the late discovery are largely irrelevant. The simple fact is that at least one critical statement, that of the State's prime witness Colonel Seruvakula, was not 'discovered' by the Prosecution or the Defence until a matter of days ago. It is the Colonel's statement to this Military Tribunal as the one hundred and fifty-ninth (159^{th}) witness called to give evidence. I will call this document "Statement 159".

[4] The defence first saw the document last Saturday. Mr. Tedeschi for the DPP saw the statement for the first time today. Junior counsel for the State, Mr. Ravindra-Singh was called to give evidence. I accept his explanation for the late discovery of statement 159.

[5] He said that the Military originally claimed state immunity and privilege over the production of all these documents. There was apparently some informal co-operation between the Military and Police investigators concerning mutual access to witness information and some statements. However, I find as a fact that the RFMF never waived the State's immunity from producing the Military Tribunal's records.

[6] That this is so is underscored by the State's claim for immunity from production of these very same documents in unrelated civil proceedings. Those proceedings concern a claim for damages by the coup hostages against the traitor Speight and others. Those proceedings were coincidentally before me.

[7] I heard an application from one of the defendants for the production of these records. I ordered that they should be produced in that civil trial. The matter went to the Court of Appeal and my order was overturned (see HBC 191 of 2003 **Nairesh Kumar v RFMF & Others**).

[8] Consistent with that position when the Military were originally subpoenaed to bring these documents to court for this criminal trial they advised counsel for both the defence and the accused that they would claim privilege.

[9] At the start of the trial a subpoena against the responsible Military Officer Colonel Jackson was called but discharged by me after the defence advised they no longer wished to call him. I accept that at that time the defence accepted there was nothing of relevance in the records and accordingly did not want to waste time in a protracted privilege challenge.

[10] Mr. Tedeschi then decided, in pursuit of his wider obligations as prosecutor, to make a specific enquiry of the Military as to whether there were common witnesses as between this criminal trial and the Military Tribunal.

[11] This resulted in the Military producing three East-light folders of information and delivering them unannounced to the DPP's head office in Suva. The folders were placed on Mr. Ravindra-Singh's desk. I accept this was late on the 6th or early on the 7th of November. Senior counsel was advised of this and he then instructed his junior to review the material in the folders, identify any common witness statements and provide those to the defence. Mr. Singh attended to this duty as soon as he possibly could later that week. As a result of his review some further statements were provided to the defence.

[12] I find Mr. Singh was diligent in his duties. He checked each of these folders not once but on at least three occasions.

[13] What happened, however, was that he overlooked the content of an index to one of the folders. Contained in that index was Statement 159. However, statement 159 although

listed in the index was missing from the folder as delivered to Mr. Ravindra-Singh's desk. Accordingly, when he checked the folder it was not there to be found by him.

[14] Statement 159 was, however, found by Mr. Maiden during his search of the records last Saturday. There were other statements found as a result of this search but for the purposes of this mistrial application they are relatively unimportant.

The Law

[15] Under the common law the prosecution has an obligation to disclose material to the defence where it is necessary to satisfy the prosecution's duty of fairness in the conduct of a trial. Essentially this requires the supply of information as to material evidence but does not go beyond that obligation (cf **R v Quinn** [1991] 3 NZLR 146, a decision of the New Zealand Court of Appeal). It is also clear that if the information is not material it need not be supplied as the common law duty of disclosure is not absolute and relevant material can in some instances be withheld.

[16] Where the defence makes a particular line of enquiry known to the prosecution then in the interests of justice the State should assist by supplying any information it has that is relevant to that enquiry. In that regard I would place reliance on the principles discussed in **R v Hall** [1987] 1 NZLR 616 at page 628.

[17] As it relates to evidence relevant to the credibility of prosecution witnesses there is a common law duty on the State to disclose any significant material which may affect the credibility of that witness. This duty commonly focuses on the State's obligation to disclose the previous convictions of a prosecution witness as observed by Lord Justice Styne in **R v Brown** (Winston) [1995] 1 CR. APP. R.191 (upheld by the House of Lords [1997] 3 ALL ER. 769). In making his observations Styne LJ approved of the following statement from the late President of the New Zealand Court of Appeal Lord Cook of Thorndan in **Wilson v The Police** [1992] 2 NZLR 533 that:

> **"the test must be whether a reasonable jury or other tribunal of fact could regard it as tending to shake the confidence in the reliability of the witness".**

[18] The issue of disclosure concerning credibility in my view does not only apply to previous convictions but may be extended. As Styne LJ noted the test may be capable of being applied to other collateral material which could affect the credibility of a prosecution witness.

[19] In **The Queen v Chignell** [1991] 2 NZLR 257, the New Zealand Court of Appeal examined the question of the disclosure of information concerning a witness in circumstances where that information was at first instance withheld from the defence. The issue was whether the information revealed after the trial would have enabled the defence to mount a more effective cross-examination of the witness had it been revealed as part of the discovery process. The court concluded that although the defence had not been short on ammunition with which to attack the witness's credibility that ammunition had been only a fraction of what it could and should have been. The court concluded at 262 in this way:

> **"information which the jury could have regarded as having a significant bearing on witness B's credibility and which given the requests made and the undertakings offered in response should have properly been disclosed, was not made available to defence counsel. Having regard to the critical importance of the evidence of witness B to the crown case against Walker we are satisfied that there was a miscarriage of justice".**

[20] In **Downer v The District Court** (an unreported decision from the High Court at Auckland, 271/1995 dated the 29th of June 1995 by his honour Mr. Justice Fisher) his honour discusses disclosure prior to a preliminary hearing and he refers to the inherent powers of the High Court concerning the ordering of disclosure. He says at page 4:

> **"in a trial context courts have the power to order disclosure of those documents required by the defence in order to fully conduct a defended hearing. This includes all information that the defence ought fully to know about. For example facts reflecting adversely on the credibility of crown witnesses albeit subject to appropriate exceptions in the interests of justice".**

[21] At page 6 his honour relevantly described the object of disclosure in this way:

"The object of disclosure is to fairly inform the defence as to the facts and evidence which may be logically relevant to the proper conduct of the defence case".

[22] With respect I adopt these principles as currently stating the law in Fiji. In the short time available to me I have also re-read the only decision on disclosure in Fiji. **The State v Jamuna Prasad** [1995] 41 Fiji Law Reports at page 223. In that case his honour Justice Pain in dealing with a Magistrate's Ruling concerning disclosure took the opportunity to provide extensive guidance to prosecutors on the obligation to disclose.

Consideration

[23] Mr. Maiden submits the defence is incurably prejudiced. Even if Colonel Seruvakula was recalled counsel submits he would have to backtrack the cross-examination to such an extent as to make the defence case unintelligible. He is also concerned that the whole defence case theory may have to change. Counsel referred in particular to the opening of the learned prosecutor and the so-called "white knight" theory about the accused on the 2nd of November. This was an allegation against the accused that he bided his time on the 2nd of November 2000 so that he could give the appearance of heroism by coming to the rescue and trying to stop the mutiny. If he had known about statement 159 Mr. Maiden says he could have effectively neutralized that submission.

[24] Secondly, counsel refers to the question of the uniform in the back of the accused's car and evidence which I accept he has seen inside the military file that might place an entirely different light on actually what was inside the car at the time the accused is said to have entered the Queen Elizabeth Barracks on the 2nd of November 2000.

[25] Thirdly, counsel refers to the timing of phone calls. He submits that information from the folders would have assisted in identifying the location of the accused and Colonel Seruvakula when the calls were made.

[26] I keep in mind Mr. Tedeschi's submission to me that really what is required here is an assessment of whether the accused's fair rights have been incurably prejudiced by the failure to disclose. Mr. Tedeschi urges me to compare the content of the evidence to date with the content of Statement 159.

[27] In the short time available to me I have undertaken that task around topics of interest.

Number of Telephone Calls

[28] There were a number of passages of cross examination from Mr. Maiden that went to the number of calls that were made by the witness over the period of the 2nd of November. One passage I have noted from the evidence was this:

Question: How many calls do you say did you make to Mr. Rabuka or did Mr. Rabuka make to you on the 2nd of November?

Answer: I cannot recall the number of calls.

Question: (Counsel continued) Is the number 1,2,10 how many?

Answer: I remember taking three of the calls. Two at the QEB and one 5 minutes before I reached the head office.

[29] It is clear from statement 159 that in February 2001 the witness had a better recall not only of the number of calls that were made but the content of them. I find that if the defence had been armed with this statement they would have been able to more effectively cross examine Colonel Seruvakula on that issue.

[30] I am reinforced in that view by another passage from the testimony under cross examination that went in this way.

Question: So you got the call regarding that meeting at 1.15 and within say 3 minutes you say this is the first call from Major General Rabuka.

Answer: That's right, Sir.

Question: No doubt about it.

Answer: No doubt about it.

Question: And the next call was at what time you say you received from Mr. Rabuka. At least 5.00?

Answer: Sir between 5.00 - 5.30.

[31] On page 3 of statement 159 it is clear that a better perspective of the timeline of the phone calls that were received could have been available.

[32] Indeed the information on page 3 in my view when compared with the vodaphone telephone records makes more sense of the timing of the calls. So I find that better armed with that information counsel could have cross examined Colonel Seruvakula in a more effective way.

Content of the Telephone Calls

[33] The timing of the calls becomes insignificant, however, when you compare the content of the essential calls in statement 159 with the evidence. Statement 159 throws into sharp relief the witness's recollection in February 2001 about what was said by the accused to him.

[34] There is a passage in cross examination that goes this way. Counsel is making a suggestion to the witness.

Question: So I will suggest to you that time at 5.40pm Mr. Rabuka said to you words to the effect I am ready to assist you on the negotiation.

Counsel then said: those are my words not his but negotiation to stop the fighting. And that he was coming up to the base to be there to carry out negotiations to stop the shooting.

Question: Do you remember him saying that to you in the second call?

And the witness's emphatic answer: No Sir.

What did he speak to you about at 5.40 in your version?

Witness's answer: What I stated in my statement.

Question: Well what's that to the assessors please?

Answer: The reason the soldiers have taken over the QEB in the mutiny was that because they didn't agree with the leadership.

[35] That passage of cross examination when compared with what the witness said in the undisclosed statement 159 puts what the accused may or may not have said in a better light. In statement 159 the witness says that the accused was reporting to Colonel Seruvakula what his tavale had said to him. The conversation was put in the context of a third person report.

[36] It was Colonel Seruvakula's recollection in February 2001 that the accused said

"they have told me that the reason they are doing this is because they dislike the leadership in the RFMF. The soldiers don't like the leadership in the Army anymore and we should listen to the soldiers wishes. We should think of the soldiers and you should stop following people blindly. If the soldiers wish for the leadership to be changed then we should change it and if it is to be changed then do it now".

[37] I accept that the defence has proceeded in a way that does not accept that statement was made at all. However, the accused's criminal intent is nonetheless a live issue for the assessors. Armed with this information the defence could have examined Colonel Seruvakula about that particular statement in its context and I find that if they had been so armed they could have cross examined the witness more effectively.

The 5.40 Conversation

[38] Then there is the issue of the conversation at 5.40pm. The 4 minute and 22 second long conversation where there is discussion about attempting to negotiate a surrender. Colonel Seruvakula rejected that conversation took place.

[39] At the bottom of page 3 of statement 159 in the final paragraph Colonel Seruvakula not only tells the Military Tribunal he talked to the accused then but he puts into context the earlier statement, in my view, about changing the leadership and perhaps provides an alternative reason why the accused was at the QEB barracks during the mutiny or at least there is a reasonable possibility that such evidence might give an innocent context to his presence. That is important as if there are two inferences to be drawn from the one set of facts and there is a reasonable possibility that an inference favourable to the accused can be drawn then he has to have the benefit of that doubt. Cross examination in those circumstances about the way in which the conversation developed in my view was critical to the defence case.

[40] I mention two other passages. The first statement is made to the Tribunal in respect of the so called last conversation between the accused and Colonel Seruvakula. The dejected conversation that Colonel Seruvakula reported in his trial evidence included reference to the accused going home to drink grog. However, in statement 159 Colonel Seruvakula told the Military Tribunal that the accused said it was too bad that people had been killed and he was just going to go home and sleep and then he cut the line off.

[41] It is perhaps not a matter of much significance but the way in which the passage about the grog was lead in evidence was suggestive of the accused not caring about the fact that people might have been wounded or killed, he was just going home to drink grog to forget about it. Well statement 159, in my view, may have been used to neutralize that inference.

[42] Finally, counsel asked these questions:

Question: You mean that each of the inquiries you attended by the Military enquiring to the matters of the 19th of May and the 2nd of November 2000. You knew about those didn't you?
Answer: I was never summoned to attend the enquiry on the 2nd of November, Sir for some reason.

The question was pressed: You did give evidence before one didn't you.

Answer: Not for the 2nd of November the Board of Inquiry was for specific events and there was not one which there was for the 2nd of November.

[43] The witness's answer tends to indicate that he never made a statement about the events of the 2nd of November to the Military Tribunal. The whole undisclosed statement 159 seems to cut right across that assertion and may have gone to the witness's credibility.

[44] The New Zealand Court of Appeal in **Chignell (supra)** was considering on appeal a case of some significance. The court viewed the absence of material evidence for the defence to be of critical importance. The same situation applies here. I find that the material from statement 159 was of critical importance to the defence. Had it been disclosed it may have changed the nature of the accused's defence.

[45] The State have said in an effort to ameliorate any prejudice from this late disclosure that they would make Colonel Seruvakula available again and would not ask any questions leaving the defence free to make what they like of statement 159

[46] Mr. Maiden does not accept that course. I agree with him. I find that even if Colonel Seruvakula were made available the context of the cross examination would have to be so fundamentally changed and repeated as to make it ineffective. The assessors having heard one cross examination of the accused would then be confronted in a jigsaw approach with an extended cross examination on other matters that have only now come to light. I find this would be too confusing for the assessors to understand and would further prejudice the defence case.

[47] Accordingly, for these reasons I am going to grant Mr. Maiden's application. I declare a mistrial. However, I am not going to end the proceedings immediately because it occurs to me that there are subsidiary issues we need to deal with.

[48] There are practical issues such as when will the trial be able to be run again and there are issues of what should be done with the recording of the trial by Fiji Television. So before I conclude the trial and discharge the assessors I want those issues resolved. I am not going to formally discharge the assessors until tomorrow morning.

[49] I make a further order that this ruling or any part of my decision is completely embargoed and is not to be published. I invite counsel to have discussions with each other about when the trial can be re-set and then to meet with me in chambers tomorrow morning at 9.00am when we will discuss a resumed hearing date and deal with any subsidiary issues.

[50] I am also going to direct the Registry to get in contact with the Solicitor for Fiji Television and ask him to join us in chambers for part of that discussion only as regards to what should happen with the material that has been recorded in the first trial. I can indicate in that regard that my preliminary view is to exercise one of the conditions of the grant of coverage and recall all of the taped material and to ban broadcast of that material either until conclusion of the new trial or indeed indefinitely.

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Gerard Winter
JUDGE

At Suva
Monday 20th November, 2006