21269 STAFF SERGEANT MAIKELI KAUMAITOTOYA and 3 Ors v COMMANDER, REPUBLIC OF FIJI MILITARY FORCES and 2 Ors

HIGH COURT — CIVIL JURISDICTION

PATHIK J

6 August 2003

[2003] FJHC 62

Defence — courts martial — Application for declaratory order — trial within reasonable time — Constitution of the Republic of the Fiji Islands s 41(1) — Constitutional Redress Rules rr 3(1), 3(2) — Republic of Fiji Military Forces Act (Cap 81) s 25 — The Army Act 1955 s 86.

Applicants were arrested, detained and charged with Treason, Mutiny and Other Offences. They had been detained for almost 30 months and a court martial was convened. They sought a declaration that their respective constitutional right to have their cases determined within a reasonable time by a Court of Law has been breached.

Held — (1) The declaration sought would serve no useful purpose since the Applicants were brought before a properly convened General Court Martial (GCM).

(2) The Applicants will not be immediately released even if a declaration was made since it was the discretion of the GCM to release or not to release the Applicants.

(3) The issue for the court's determination had shifted to the GCM and it would be well within its powers to deal with the "long detention" matter at the trial of the action. The granting of "declaration" sought will tantamount to court giving legal advice or "advisory opinion" which is not the function of the court and as stated in Naidu's case granting a declaration will have "no practical consequence or utility".

Application disallowed.

Cases referred to

27066 CPL Metuisela Railumu v Commander, Republic of Fiji Military Forces HBM 0003/2003S; *Rev Yabaki v President of the Republic of Fiji* Civ App No 61/2001J; *Richard Naidu v The AG* Civ App No 39/1998; *Turner v Pickering* (1976) 1 NZLR 129, considered.

S. Valenitabua for the Applicants.

A. Mohammed for the 1st Respondent.

K. Keteca for the 2nd and 3rd Respondents.

Pathik J. This is the applicants' motion dated 17 January 2003 seeking a number of "declarations", but only item I of the motion is pursued and it reads as follows:

I. A Declaration that the Applicants' respective constitutional right to has their cases determined within a reasonable time by a Court of Law have been breached.

Background facts

The Applicants are members of the Republic of Fiji Military Forces (RFMF) and are currently detained at the Military Police Detention Centre at Queen Elizabeth Barracks in Nabua, Suva. They were arrested and detained in November of 2000 and were then charged with Treason, Mutiny and Other Offences in connection

with the events of 19 May 2000. Their charge reports are dated May 2000. As of May 2003, they had been detained for almost 30 months. A court martial for the Applicants was convened on 20 March 2003, although they claim that Judge Advocate was not present and President and Members of the court martial were not sworn in.

Issue

The issue for court's determination is whether the court ought to make declaration sought as in item I referred to hereabove particularly now that the Applicants are already before the General Court Martial.

Consideration of the issue

As ordered, helpful written submissions have been filed by counsel and I have given due consideration to them.

(i) Convening of court martial

The General Court Martial (GCM) was convened on 20 March 2003. If it was not properly convened then it is or was for the Applicants to raise it in the proceedings at the GCM. Lt Col Mohammed is quite right when he submitted that the Convening Order has not been challenged by the Applicants. Also it has not been suggested that the Commander of the Republic of the Fiji Military Forces was not authorised to issue the "Convening Order".

The jurisdiction of the court martial is derived from s 25 of the Republic of the Fiji Military Forces Act, Cap 81 (the Act) and s 86 of the Army Act 1955 which is the Manual of Military Law.

In regard to the absence of Judge Advocate, this was evidently not raised by the Accused or the prosecution. It was then adjourned by consent of all counsel to 16 May 2003.

The Applicants I find have been brought before a properly convened GCM on 20 March 2003. Hence the declaration sought would serve no useful purpose.

(ii) Making a declaration

It is for the court to decide whether or not its discretion should be exercised in favour of granting declaratory relief and to determine whether that relief will serve some useful purpose. If it does not serve a useful purpose then it is difficult to see what reason can there be for granting the relief. In the case of *Richard Naidu v The AG* (Civ App No 39 of 1998), the Fiji Court of Appeal stated "there are ample authorities for the proposition that the courts will not give advisory opinions nor will they resolve an issue where that resolution will have no practical consequence or utility". In *Turner v Pickering* (1976) 1 NZLR 129 at 141, Casey J said "that it was clearly established that the power of the court to make a declaratory order is discretionary and this discretion will not be exercised in the Plaintiff's favour unless the declaration may be of some utility".

In the case of *Rev Yabaki v President of the Republic of Fiji* (Civ App No 61 of 2001), Davies J stated at 4 that the High Court of Australia had taken the stand that declaratory relief should be directed to the determination of legal controversy and should not be granted where the declarations would produce no foreseeable consequences for the parties.

On the above authorities, it is in the discretion of the court to make such a "declaration" as sought by the Applicants in this case. However, it is questionable as to the utility of the "declaration" and one only wonders as to its purpose.

The Applicants are under the jurisdiction of GCM since 20 March 2003. I agree with Lt Colonel that even if a declaration is made, it will not result in the applicants being immediately released. Now the matter is in the hands of the GCM to release or not to release the applicants.

5 I agree with Lt Colonel that the Applicants' remaining in detention for the duration of the court martial is a matter for the GCM and their release from detention, as the Respondent say, could only be by way of a bail application to that court but no such application has been made when the GCM sat on 20 March 2003.

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(iii) Consideration of s 41(1) of the Constitution

This application is made under the provisions of s 41(1) of the Constitution of the Republic of the Fiji Islands (27 July 1998) (the Constitution). Section 41(10) authorises the Chief Justice to make rules with respect to the practice and

15 procedure of the High Court (including rules with respect to the time within which applications are to be made to the High Court). Accordingly, High Court (Constitutional Redress) Rules 1998 (Legal Notice No 113) were made.

Rule 3(1) of the Constitutional Redress Rules provides that an application to the

20 High Court for redress under the said s 41(1) may be made by motion supported by an affidavit claiming, inter alia, a declaration, which the applicants have done. The Rules further state (r 3(2)) that the application "must not be admitted or entertained after 30 days from the date when the matter at issue first arose". It is to be noted that this 30 days rule was declared "unconstitutional and therefore

25 invalid" by *Jitoko J* in *7066 Cpl Metuisela Railumu v Commander, Republic of Fiji Military Forces*. (Habeas Corpus Action No HBM 0003 of 2003S) on 14 March 2003.

(iv) Trial within a reasonable time

30 It is the Applicants' submission that they were not brought to trial within a reasonable time between the date of arrest and the date on which the General Court Martial commenced. As of May 2003, the Applicants were in detention for about 30 months.

The Respondents submitted, inter, alia, that the Applicants were brought before

35 a properly convened General Court Martial on 20 March 2003. The Respondents further submitted that the constitutional guarantee that a trial take place within a reasonable time after a person has been charged, must be balanced with the community's right to expect that persons charged with criminal offences are

40 brought to trial. It was further submitted that this balancing process is even more important when the crimes relate to such serious public order offences as treason, mutiny and those similar offences with which the applicants have been charged.

In the present circumstances, now that the GCM had been convened on 20 March 2003, and hearing has already commenced while this application was still

45 pending, the Applicants amended the reliefs sought by withdrawing all but one, namely, item I, referred to hereabove. The situation that prevailed before the Convening of the Court Martial was the same as in the case of *Cpl Metuisela Railumu* (above). There His Lordship noted with concern stating:

> the Applicants have been in detention awaiting trial for some 25 months as of today. No
> 50 country that calls itself civilised let alone democratic, can possibly allow this situation to continue.

Conclusion

Since the making of the application, the situation now is that the applicants are properly before the General Court Martial. The issue for the court's determination has shifted to the GCM and it would be well within its powers to deal with the "long detention" matter at the trial of the action. Hence the matter before me has become a non-issue.

Furthermore, it is also to be realised that, bearing in mind the principles governing the making of "declarations" for the reasons given hereabove, the granting of "declaration" sought will tantamount to court giving *legal advice* or "advisory opinion" which is not the function of the court and as stated in *Naidu's* case (above) granting a declaration will have "no practical consequence or utility".

Therefore, in the exercise of the court's discretionary powers in this regard, the application for a declaratory order referred to hereabove is refused. Each party to bear his own costs.

Application disallowed.