HENRY ALI v STATE

COURT OF APPEAL — CRIMINAL JURISDICTION

REDDY P, BARKER and WARD JJA

7, 14 February 2003

[2003] FJCA 8

Criminal law — sentencing — appeals against conviction and sentence — civil offences contrary to the Army Act — whether the grounds for appeal by Appellant are sufficient to overturn the conviction — whether the verdict on both counts should be quashed — Army Act 1955 s 70.

Henry Ali (Appellant) was charged with committing five civil offences contrary to the Army Act 1955. One was the Murder of Waqavonovono and the others and Attempted Murder of the other four men. The Appellant was found guilty for Murder and Attempted Murder but not for the other three charges. He was sentenced to life imprisonment for the murder and 10 years concurrent for the Attempted Murder. He appealed against both conviction and sentence on 13 grounds.

Held — (1) It is not apparent why a field General Court Martial was initially convened but it is clear that the holding of a General Court Martial was the proper course in this case. A General Court Martial has the the power to try any person subject to military law for any offence tried by military law including the civil offences charged.

(2) The second ground questions the Judge Advocate's direction on inconsistent statements. The judge must not substitute for the evidence of a witness and the contents or substance of a statement made by him previously. The judge must either accept or reject his testimony but not substitute for that anything else he may he said on another occasion. This ground is not sufficient to allow the appeal.

(3) The third ground of appeal refers to the direction on attempt to murder. The judge's function is to ensure that the jury or assessors or the members of the Court Martial understand the law. It is not a time for learned dispositions on the law. His direction should render any unclear terminology clear and relate it to the evidence the jury is to consider.

(4) The fourth ground deals with the defences of provocation and self-defence. There was a direction given by the judge with regard to self-defence but nothing in the case of provocation. The court considered the strength of the evidence upon which the defence of provocation was based.

(5) No jury trial should be adjourned for any substantial period of time. It would not be a sufficient reason to quash the conviction and is not a ground of appeal. The verdict must be regarded as unsafe and unsatisfactory and there must be an order for a retrial.

Appeal allowed.

Cases referred to

Gyan Singh v R (1963) 9 FLR 105; *R v Lawrence* [1982] AC 510, considered.

A. K Singh for the Appellant.

K. Tunidau for the Respondent.

Reddy P, Barker and Ward JJA. In March 2000, the Appellant was a private in the Fiji Military Forces and was part of the contingent serving in Southern Lebanon with the UNIFIL force. On 15 March 2000, he was the appointed guard commander and, during the morning, changed the guards at location 1–23 (Sarafui). While mounting the guard, one of the guard members, Sapper Waqavonovono, questioned the Appellant and an argument commenced between the two men.

The result was that Waqavonovono picked up his weapon and helmet and walked towards the guard post, apparently discharging himself from guard duty. The Appellant followed and further oral exchanges occurred but, when Waqavonvono turned to face the Appellant, the latter fired a shot from the hip. It struck the other man who immediately dropped his weapon and helmet, turned to the wall with his hands behind his head and shouted, "Take cover". At this, the Appellant raised his rifle, took two steps nearer to the sapper and fired two aimed shots which killed him.

The Appellant then shouted in Fijian "Who else, that's one, who else?" and fired shots at Privates Baravilala, Nasalu and Naiyalatabua and Corporal Sigaveivola.

He was subsequently charged with committing five civil offences contrary to s 70 of the Army Act, 1955, of which one was the murder of Waqavonovono and the others, Attempted Murder of the other four men.

He was tried by general court-martial at the Officers' Training School at Vatuwaqa commencing on 6 July 2000 but adjourned on that day until 18 September 2000. The judge advocate was a High Court judge.

The court-martial sat for 7 days before adjourning to Lebanon where it sat for five more days in November 2000. The court returned to Fiji but did not resume until March 2001 in which month it sat for 15 more days.

The members of the court found the Appellant guilty of the murder of Private Waqavonovono and of the Attempted Murder of Corporal Siqaveivola but not guilty of the other three charges of Attempted Murder. He was sentenced to life imprisonment for the Murder and 10 years concurrent for the Attempted Murder.

He now appeals against both conviction and sentence.

The amended petition of appeal lists 13 grounds:

1. That General Court Martial duly appointed by the Commander of the Republic of Fiji Military Forces had no jurisdiction to preside over the said matter in Fiji or conduct the trial over the said offences incurred in Sarafui, South Lebanon.
2. That the Learned Judge Advocate erred in law and facts in not properly directing the General Court Martial on the Law regarding consistent evidence or statement of the witnesses in the trial.
3. That the Learned Judge Advocate erred in law in not properly directing the General Court Martial regarding the law in respect of Attempted Murder.
4. That the Learned Judge Advocate erred in law when he failed to addressed the General Court Martial on law of Self Defence and provocation in a simple terms that could have been understood by the General Court Martial.
5. That the President of the General Court Martial or that the General Court Martial erred in Law and breached the rights of the Appellants in not allowing him full disclosures in respect of all the witness that gave evidence before the General Court Martial.
6. That the Commander of the Fiji Military Forces and/or the General Court Martial failed to consider prejudice or allowed bias against the Appellant when it allowed Captain Navoti to prosecute the matter after he took summary of evidence on oath from all prosecution witnesses who evidence in the said General Court Martial.
7. That the President of the General Court Martial or that the General Martial erred in Law when it allowed Lt. Col. Aisake Mataikabara to give evidence in the General Court Martial when in fact he was appointed or assigned by the Commander of the Fiji Military Force or Presided in the Field General Court Martial.

8. That the President/or the General Court Martial erred in rule 55 and/or the procedure when it failed read the evidence back to the witnesses.
9. That the President and/or the General Court Martial erred in law and facts when it allowed witness to construct the scene without taking oath and/or that it had prejudice the Appellant with a fair trial.
10. That the President and/or the General Court Martial erred in law when he allowed the new rough sketch plan or the photographs to be tendered by a witness who had already given evidence.
11. That the President and/or the General Court Martial erred in law in falling to compel the witnesses to answer questions of the defence counsel.
12. That there had been unreasonable delay in completing the General Court Martial and as such the Appellant had been prejudice in not having a proper and fair trial within reasonable time.
13. That there had been a miscarriage of justice and or that there had not been enough evidence to sustain the conviction of Murder.

Before dealing with the grounds, we would mention one preliminary matter. Once the appeal was filed, counsel for the Appellant, Mr A K Singh, requested a copy of the Manual of Military Law from the Respondents. Having received no response, he applied to this court and, in November 2002, Smellie JA ordered the Fiji Military Forces to provide a copy. Despite two further letters from Mr Singh to the Director of the Army Legal Service in January 2003, no copy was supplied to him until the present session of the court had started.

We expressed our concern that an order of this court had been disregarded. Mr Tunidau for the Respondents explained that he had been abroad studying and the matter had been overlooked. This is not an adequate explanation. Proper and sufficient steps should have been instituted to ensure the case was properly conducted during his absence. We are grateful to Mr Singh for attending to his research with sufficient expedition to allow the appeal still to proceed at the fixed time.

Passing, now, to the grounds of appeal, the first ground, as we understand Mr Singh's submissions, is based on suggested bias by the court. The deceased was Fijian and the small number of Indian officers would mean the members of the court-martial were likely, as in fact happened, to be Fijians who, it was suggested, would be biased against the accused because he was an Indian. He could point to no evidence to support that contention and we do not consider there is any basis for it. Counsel suggested the case should have been tried by the UNIFIL command to avoid the court-martial being composed of Fijians or that the Appellant should have been tried by the Lebanon courts under the law of Lebanon. He could cite no authority for such propositions and could advance no reason for them apart from the fact that initial inquiries were carried out separately by both the Fiji and the UNIFIL forces.

Initially, a field general court-martial was convened but, following objection by the Appellant to the President and all the members of the court-martial and an indication that he wished to be represented by counsel of his choice who lived in Fiji, the field general court-martial was stopped and a general court-martial convened separately in Fiji. Having suggested there was no power to do that or alternatively, that once the court-martial was transferred to Fiji, the Appellant should have been tried in the civilian courts, Mr Singh conceded that the hearing in Vatuwaqa was properly convened and did not pursue any jurisdictional point. It was not apparent to us under what authority the field general court-martial was discontinued.

By s 23 of the Fiji Military Forces Act, the Army Act, 1955, (UK) shall apply with some alterations and exceptions that are not relevant to this appeal. Section 84 of the Army Act provides that any charge which can be tried by court-martial shall be tried by general or district court-martial. It is only if such a court-martial cannot be held without serious detriment to the public service that a field general court-martial should be held. Such should be regarded as an exceptional course. It is not apparent why a field general court-martial was initially convened but it is clear that the holding of a general court-martial was the proper course in this case. Section 85(1) gives a general court martial the power to try any person subject to military law for any offence triable by military law under the Act, including civil offences charged under s 70.

By s 70(1), a person subject to military law who commits a civil offence anywhere maybe tried by court martial and s 91 provides that the court martial may sit anywhere the convening officer specifies in the convening order.

Ground 1 fails.

The second ground questions the judge advocate's direction on inconsistent statements. It is found in two passages in the judge advocate's summing up:

> In the course of the trial a witness may have made statements inconsistent with the evidence he gave. I have to tell you two things about that matter. The first is that the statement that was put to him (and which he admitted was his) is not in any way part of the evidence at this trial, and you must put its contents out of your mind when you consider the evidence. The second is that the fact that he had previously made a statement which was inconsistent with his evidence if you are satisfied that he did so is a matter which you can take into account in considering his credibility as a witness
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> Naturally there will be inconsistent statements between the evidence in court and statement taken from witnesses shortly after the incident as in Book Summary of Evidence. You can accept whatever part of their evidence you wish to regard as the truth. Because of certain inconsistencies you cannot throw out the whole statement or the whole of their evidence in court. You can reject part and accept part.

With respect to the learned judge advocate, we find that direction confusing. The last two sentences in the second passage appear to conflict with the earlier passage. Neither do we consider it an adequate direction simply to explain it in relation to credibility. The judge advocate should warn of the inherent dangers of accepting the evidence of such a witness.

As was stated by this court in *Gyan Singh v R* (1963) 9 FLR 105 at 107:

> It is the duty of the trial Judge to warn the assessors … that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness; or, at least, that such evidence should be submitted to the closest scrutiny before acceptance.

The court accepted that the trial judge's direction, set out at 108, had been correct:

> In the absence of any acceptable, logical or compelling explanation, where a witness has on a previous occasion made a statement contradictory to his evidence, the only safe rule to apply normally is to disregard his testimony entirely as being too unreliable to place any weight upon it at all. If, however, such a witness gives an explanation or you are of the opinion that there is satisfactory or understandable reason for the previous contradictory statement … then, whilst you must obviously treat such evidence with considerable reserve and give it the most careful consideration, you are entitled to accept it and act upon it if you really feel convinced it is the truth … One thing you must not do … is to substitute for the evidence of a witness, the contents or substance of a

> statement made by him previously. You must either accept or reject his testimony … but not substitute for that anything else he may he said on another occasion.

We think that a similar direction to this should have been given in this case. Because of the total length of the court-martial where some witnesses gave evidence either in Fiji or Lebanon literally months before the summing-up took place, the judge advocate should have reminded the members of the court-martial of the principal instances of inconsistent statements.

On its own, we do not consider this ground is sufficient to allow the appeal but we shall return later to its effect in relation to the judgment as a whole.

The third ground of appeal refers to the direction on attempt to murder. The judge advocate sensibly commenced his direction by reading s 214 of the Penal Code. Having done so, it was his duty to explain any parts of the section that he felt may need clarification or explanation.

The judge's function in summing-up any case is to ensure that the jury or assessors or, in this case, the members of the court-martial, understand the law. It is not a time for learned dispositions on the law. His direction should render any unclear terminology clear and, if appropriate, relate it to the evidence the jury is to consider.

Unfortunately, having read the terms of s 214, the judge advocate went on to quote extensive passages from the published reports of three leading cases including, even, the citations. He then concluded by referring to the only aspect that had not been covered in those extracts that is the requirement that the members of the court-martial must be satisfied "he did an act which was more than merely preparatory to the commission of that offence". And concluded "it is for you to decide whether an act is or is not more than merely preparatory". That, we would suggest, is a matter upon which the members of the court may well have benefited from some further advice but received none.

However, taken as a whole we consider that the direction was sufficient. As with ground 2 we shall return to its effect on the summing up as a whole.

The fourth ground deals with the defences of provocation and self-defence. Both were raised at the trial and required a direction by the judge advocate.

His direction on self-defence was complicated and detailed. It included very lengthy passages from reported cases some of which were in language a layman could well find some difficulty in following on a single reading out aloud. Although the consequence of a finding of self-defence is stated in those passages, a clear explanation in the judge advocate's own words would have assisted the members of the court-martial far more. Later in his summing up, he did so and we are satisfied the direction was adequate.

The judge advocate's direction on provocation consisted principally of reading the terms of ss 203 and 204 of the Penal Code and was, in contrast to the direction on self-defence, commendably short, despite the inclusion of two short extracts from reported cases.

As with self-defence, he returned to the topic towards the end of his summing up and directed the members of the court clearly in his own words.

However, an omission from the direction on provocation causes us disquiet. At no point does the judge advocate mention that the prosecution must prove that the accused was not provoked. His earlier direction on the burden of proof did deal with the need for the prosecution to prove its case and the need for the accused to prove nothing but, where self-defence and provocation are raised, they require a clear direction on the burden of proof as it relates to those defences. With regard to self-defence, there was such a direction included, albeit somewhat

obscured, in the lengthy passages from other judgments but, in the case of provocation, there is nothing. We consider this a material omission, which could have lead the members of the court into considering the accused had to prove provocation. In the absence of such a direction, we cannot be satisfied that their verdict of guilty of Murder was based on a proper consideration of the evidence of provocation.

Counsel for the Respondents asked the court to consider the strength of the evidence upon which the defence of provocation was based. We are satisfied that there was a foundation in the evidence for the defence of provocation. It is not a proper function of this court to evaluate that evidence.

Ground 5 arises from the refusal of the prosecution at the hearing to disclose previous statements made by witnesses at a board of inquiry that had been held by the military authorities to investigate and report on the death. There is no dispute that the statements were not disclosed.

Counsel for the Respondents suggested that s 135(5) of the Army Act specifically prohibits such disclosure:

> Evidence given at a board of inquiry shall not be admissible against any person in proceedings before a court martial … other than proceedings … for an offence against section 70 … where the corresponding civil offence is perjury.

Rule 13 of the Board of Inquiry (Army) Rules, 1956, requires such evidence to be taken on oath but r 12 allows the court to receive evidence either orally or in writing.

We do not read the terms of s 135(5) as a general prohibition on the admission at a court martial of statements previously made at a board of inquiry. The subsection is to protect the accused by preventing the prosecution from using such statements against him. It does not prevent the defence from using them to challenge the evidence of witnesses called to give evidence against the accused.

Article 28(1) of the Constitution gives every person charged with an offence the right of access to witness statements if he or she so requests. We see no inconsistency between that provision and s 135(5) and, had there been, the provision of the Constitution should have prevailed. The statements should have been disclosed when requested by the defence. It matters not whether the evidence is in the form of written or oral statements.

We consider this was serious omission by the prosecution that may have impeded a fair trial.

We have already set out the timetable of this trial. Ground 12 suggests that the delay was unreasonable and prejudiced the accused. It has been stated many times that justice delayed is justice denied. Delay of cases in Fiji has frequently been the subject of adverse comment in this court.

In the present case, we do not feel there can be any complaint about the time it took to bring this matter before the general court martial. A period of two months for the preliminaries to be completed compares extremely well with many cases before the civilian courts. The first delay during the trial was the result of the decision to take the court to Lebanon. It appears that was agreed to be a necessary step by counsel and the judge advocate. In fact, considering the distance and the different circumstances at the scene, the whole exercise was achieved with remarkably little delay. The adjournment for three months from the return of the court to this country and the resumption of the trial was unfortunate but not, we consider, sufficient to make it unreasonable and in breach of Art 29 of the Constitution.

The risk to a fair trial occasioned by delay is principally the effect on the quality of the evidence. The recollection of witnesses necessarily dims and becomes less reliable. Equally, in a criminal case, every day which passes increases the uncertainty and anxiety for the person accused of the offence. These are the factors Art 29 seeks to avoid.

In the present case, the delays were during the trial itself. By the time the members of the court retired to make their decision, they were recalling evidence given by witnesses, including some of the critical eye witnesses, some seven months before.

No jury trial should be adjourned for any substantial period of time. The court should always be scrupulous in ensuring undue delays do not occur. Jurors and assessors and senior officers of the armed services give their time to the courts and they are entitled to know they will not be required to give more time than is strictly necessary. They are not necessarily experienced in retaining details in their minds for long periods and they should not need to do so in the average case. A lengthy break in the trial places them in the position of comparing the evidence of witnesses called at very different times. In the present case, the Appellant's evidence was separated by five months from that of the main prosecution witnesses but all required an equal assessment of credibility and reliability.

We accept that the nature of a court-martial, dealing with a case arising from a military situation, where, as here, the members are all serving officers means that the members are less likely to be affected in this way but we consider that the delay in the middle of the trial was regrettable.

Unfortunately, the problems revealed by grounds 4, 5 and 12 were compounded by the general manner in which the law in the case was summed up to the members of the court. It is part of the duty of the judge when summing up a case to direct the jury on the law and explain it in a way that ensures it is comprehensible to a layman. It is rarely necessary or desirable to go into legal niceties, unless an accurate explanation of the particular aspect of the law involved or the nature of the evidence in relation to that point in the case cannot be explained without it. It may be instructive to remember the words of Lord Hailsham LC in *R v Lawrence* [1982] AC 510 at 519:

> It has been said before, but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive more of obscurity than light … I feel sure the Court of Appeal were correct in their belief that the jury may well have been bemused with the effect of the summing up that their verdict was unsafe and unsatisfactory, and that, if only for this reason, the appeal must fail.

The final part of that passage referred as much to the inclusion in the summing up of a lengthy recital of the evidence and that does not apply in this case. However, we feel concern that the overall effect of the copious quotation from reported cases complicated rather than clarified the aspects of law the judge advocate was required to explain.

In itself, that would not be a sufficient reason to quash this conviction and, indeed, is not a ground of appeal but we feel considerable disquiet about the effect this may have had on the members of the court. Coupled with our decision on grounds 4 and 5 and the general comments we have made when dealing with grounds 2, 3 and 12, we feel the verdict must be regarded as unsafe and unsatisfactory and there must be an order for a retrial.

At the hearing of the appeal, we did not consider there was any merit in grounds 6–11 and 13. In view of the decision we have reached in this case, we do not consider it necessary to deal with the matters raised by the Appellant in relation to those grounds.

The verdict of the court below on both counts is quashed and we order there shall be a retrial before a differently constituted general court martial and a different judge advocate.

We do not consider that there would be any useful purpose served by ordering a complete rehearing of the evidence of all the witnesses. Having received the consent of counsel, we direct that, at the retrial, the record of the evidence taken at the earlier hearing shall be read into the record save for the eye witnesses and any witness the defence may seek to call or recall as a result of disclosure of the statements made before the board of inquiry. We do not consider there should be any reason to involve the taxpayer in the expense of taking the court abroad.

Appeal allowed.