IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0021 OF 2002S
(High Court Criminal Action No.HAC004 of 2001S)
CRIMINAL APPEAL NO. AAU0058 OF 2002S
(High Court Criminal Action No. of HAC 004 2001S)
CRIMINAL APPEAL NO. AAU0019 OF 2001S
(High Court Criminal Action No. HAC005 of 1999S)
CRIMINAL APPEAL NO. AAU0005 OF 2002S
(High Court Criminal Action No. HAC009 of 2001S)
CRIMINAL APPEAL NO. AAU00012 OF 2002S
(High Court Criminal Action No. HAC 009 of 2001S)

BETWEEN:

PECELI MASIDOLE
MOSESE SETAREKI
NANISE WATI
LEONE LAUTABUI
SEMESA ROKO

Applicants/Appellant

AND:

THE STATE

Respondent

Coram: Smellie, JA
Davies, JA
Penlington, JA

Hearing: Wednesday, 5th November 2003, Suva

Counsel: Ms M. Waqavonovono for the Applicants/Appellant
Mr. P. Ridgway for the Director of Public Prosecutions
Dr. S. Shameem for Fiji Human Rights Commission
Ms N. Basawaiya for the Attorney-General
Ms G. Phillips for Fiji Law Society

Date of Judgment: Friday, 14th November 2003

JUDGMENT OF THE COURT

In each of these five matters, the applicant is an appellant in this Court against his or her conviction and sentence for murder. Each applicant seeks an order under s.30 of the

Court of Appeal Act 1990 that the Court assign counsel to him for the purposes of the preparation and conduct of the appeal.

The Court of Appeal Act provides, inter alia:

Section 30

"30. The Court of Appeal may at any time assign counsel to an appellant in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the Court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid."

Section 32

"32. – (1) On the hearing and determination of an appeal under this Part no costs shall be allowed to either side.

(2) The expenses of counsel assigned to an appellant under this Part and the expenses of any witness attending on the order of the Court of Appeal or examined in any proceedings incidental to the appeal, and of the appearance of an appellant when in custody on the hearing of his appeal or on any proceedings preliminary or incidental to the appeal, and all expenses of and incidental to any examination of witnesses conducted by any person appointed by the Court for the purpose, or any reference of a question to a special commissioner appointed by the Court, shall be defrayed out of the Consolidated Fund up to an amount allowed by the Court but subject to any provision as to rates and scale of payment made by rules of Court."

On the hearing of these applications, Ms M. Waqavonovono, an officer of the Legal Aid Commission, appeared for the applicants. Ms N. Basawaiya appeared for the Attorney-General of the State of Fiji. Mr P. Ridgway, for the Director of Public Prosecutions, of the State of Fiji. Dr. S. Shameem appeared for the Human Rights Commission, Ms G. Phillips appeared for the Law Society of Fiji.

The circumstance which has given rise to the applications is that the Legal Aid Commission, ("the Commission') which was established by the Legal Aid Act 1996, has encountered such a shortage of money that it has decided not to fund litigation in the Court of Appeal. An affidavit by Mr Ronald Prasad, executive Officer of the Commission, set out the following facts, inter alia:

> *"The LAC has been fraught with funding difficulties in recent years. It receives funds from a small government grant and interest from lawyers' trust accounts ("Legal Aid Fund"). The latter monies were to be used to pay the fees in cases which were briefed out to private legal practitioners and other administrative expenses. The Government grant would be used for payment of a core staff and related costs of the LAC.*
>
> *The Government grant allocated for the LAC has been in the vicinity of $250,000 per annum. This was increased to $300,000 for 2003.*
>
> *The funds received from the Legal Aid Fund Trustees totaled $98,841.62 in 1998, $85,068.81 in 1999, $48,133.08 in 2000 and $23,229.27 in 2001. This source of funding had completely dried up for 2002 and nothing has been received nor do we expect to receive any monies from the Trustees of the Legal Aid Fund for this year.*
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> .....
>
> *Given its current workload, the LAC has found it impossible to appear for eligible applicants in appeal cases before this Court. There are also only two in-house counsels with sufficient experience to appear in this Court.*
>
> *Previously, appeal cases were almost all briefed out to private practitioners because the monies received from the interest of lawyers trust account ("the Legal Aid Fund") were available for payment of their fees.*
>
> .....
>
> *Of the balance of approximately $242921.07 in its Trust Account (as of 31st July, 2002), the following commitments have been made:-*
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> |---|---|---|
> | *(i)* | *Brief fees to private practitioners for years 1998-2002* | *$48,075.00* |
> | *(ii)* | *Salary and associated costs of 2 lawyers at the Senior Legal Officer level for 2 years (Oct. 03 – Oct.05)* | *$160,608.96* |

The remainder of the monies in its trust Account is committed for administrative and other emergency cost on staffing. There is a policy decision by the Board that utilization of the Trust Account monies are to be spread over 3 years.

On 8th August 2003, the Management Board of the LAC decided that due to the commitments mentioned in para.20 herein, no further brief-outs would be made to outside counsels.

For these reasons, it is presently impossible for the LAC to take on briefs or brief out to outside counsels in appeal cases before this Court until such time as its financial position improves dramatically.

.....

The LAC also has an obligation to represent eligible applicants for legal aid in the lower Courts under the Act where the bulk of its clients appear and for which legal aid resources have to be distributed and utilized equitably.

I believe that it would be a regressive step for the LAC and the majority of the impoverished community it serves in Fiji, if the services that it currently provides in the lower Courts, especially in family and matrimonial cases, are suspended in order that it meets its constitutional and statutory obligations in the higher Courts.

The proposed budget for 2004 would not provide for increase in staffing that would permit the LAC to represent the applicants who have applied and are eligible for legal aid in this appeal.

In the circumstances, it is not in a position to pay the fees of outside counsel to appear for the Appellants in this case."

Each of the applicants applied to the Commission for legal aid. In each case, as a result of the approach outlined in Mr Prasad's affidavit, the application for aid was not dealt with formally but each applicant was orally advised by the Director of the Commission that, whilst he or she may be eligible to receive legal assistance under the Legal Aid Act and the Guidelines promulgated under s.8 thereof, the Commission did not have sufficient in-house lawyers to represent the applicant in the appeal nor sufficient resources to engage a lawyer to represent the applicant.

That course of action was wrong. Applications for legal aid having been lodged with the Commission, the Commission had a duty to consider and to determine them.

Nothing in the Legal Aid Act or in the Guidelines justified the Commission in excluding appeals to the Court of Appeal from its consideration. The Commission had a duty to consider and to determine each application for aid lodged with it. Applications refused would be the subject of review under Part 4 of the Legal Aid Act. Each applicant was entitled to have his or her application dealt with on its individual merits, taking account of all relevant factors, including that specified in s.8(2)(e) of the Legal Aid Act, "the cost of obtaining the legal services sought from private legal practitioners."

Accordingly, this Court expects that there will be no repetition of the course which has been taken in relation to these five matters.

However, these proceedings do not concern the conduct of the Commission. Five applications have been made to this Court under s.30 of the Court of Appeal Act seeking that the Court assign counsel for the purposes of the outstanding appeals. It is to that matter to which the Court directs its attention.

Section 30 of the Court of Appeal Act is different from s.35(1)(f) a provision directed to the general provision of legal aid in matters coming before the Court of Appeal. At the time of the enactment of s.30, there was already in place the Legal Aid Act (Cap.15) and the Legal Aid Rules made thereunder by the Chief Justice. The Rules empowered the President of the Court of Appeal or any Judge of the Court of Appeal nominated by the President to grant legal aid to poor persons who were parties to appeals from the Supreme Court (as the High Court was then named), in its criminal jurisdiction or its divorce jurisdiction.

Section 30 did not replace that structure. Rather, it empowers the Court to assign counsel to an indigent appellant in a criminal appeal when it appears desirable in the interests of justice that the appellant should have legal representation. The section confers this power so as to ensure that the Court of Appeal will never be precluded by an appellant's lack of funds from ensuring that justice is done in a criminal appeal. The section confers a power upon the Court of Appeal which it may exercise in a particular case if it considers that representation of the appellant by counsel is necessary to ensure the

fair and proper conduct and determination of the appeal. We use the term "necessary" in the sense of "desirable", that is directed to and required to achieve a fair and just trial.

As s.30 confers a special power, the Court of Appeal will ordinarily expect an appellant to have made application for legal aid through the ordinary channel, the Commission, and to have had that application determined, before applying to the Court under s.30.

In the written submissions lodged on behalf of the Attorney-General it was said that the introduction of the Legal Aid Act in 1996 effected an implied repeal of s.30. This submission was also adumbrated by Ms Basawaiya in her address to the Court, although she recognized the force of written submissions to the contrary which were filed by other parties.

The repeal of an earlier statute by a later may be effected either expressly or by necessary implication. The implication may be made where the provisions of the later statute are "wholly inconsistent" with those of the former, per Griffith CJ in ***Goodwin v. Phillips*** (1908) 7 CLR1 at 7; or the provisions are 'so inconsistent or repugment that they cannot stand together" or "are irreconcilable", per Barton J. in ***Goodwin v. Phillips*** at 10, 11. In ***Deputy Commissioner of Taxation v. Moorebank Pty Ltd***. (1988) 165 CLR 56 at 64 Mason CJ, Brennan, Deane, Dawson and Gaudron JJ referred to the situation where a statute has "effectively covered the field and left no room" for the provisions of the other statute. In ***Kartinyeri v. The Commonweath*** (1998) 195 CLR 337, Brennan CJ and McHugh J used the term "inconsistent" at 356. Kirby J. used the terms "irreconcilable, or inconsistent" at 421.

In ***Goodwin v. Phillips*** at 10, Barton J. summarized the matter in this way:

> ***"...if, therefore, there is fairly open on the words of the later Act, a construction by adopting which the earlier Act may be saved from repeal, that conclusion is to be adopted."***

In *Butler v. Attorney-General for the State of Victoria* (1961) 106 CLR 268, Fullagar J. made the same point when he said at 276;

> *"....there is a very strong presumption that the State legislature did not intend to contradict itself, but intended that both Acts should operate."*

In the light of these principles, the submission that there was an implied repeal of s.30 necessarily fails. The Legal Aid Act establishes a general scheme of legal aid. Section 30 confers a special power upon the Court of Appeal to assign counsel to an appellant when it is in the interests of justice to do so. There is no inconsistency between the two enactments. They are complementary and operate together without conflict.

Dr. Shameem, who appeared for the Human Rights Commission, submitted that there is an inconsistency between the operation of s.32 of the Court of Appeal Act and the finance provisions of the Constitution, ss.174-184. However, no such submission was put on behalf of the Attorney-General for the State. Mr Ridgway, for the Director of Public Prosecutions, submitted that s.32 of the Court of Appeal Act and ss.57 and 59 of the Finance Act (Cap.69) constituted a lawful appropriation of the costs involved in assigning counsel. The Court need not further consider this matter. If any issue arises as to the payment of counsel fees, that issue may be considered and dealt with when it arises.

It is not in dispute that each of the applicants has insufficient means to fund legal representation in the appeals and that each has applied to the Commission for legal aid and has been advised that he or she will not receive it. The Court therefore turns its attention to the question whether it is desirable in the interests of justice that counsel be assigned under s.30.

Nanise Wati

This applicant and Daniel Wali were convicted of the murder of Reena Bibi on 3 September 1996. Both were sentenced to life imprisonment. An important witness at the trial was Sophie Radrodro who gave evidence that she saw Danial Wali struggling with Reena Bibi and dragging her into a bedroom. When Ms Radroda went into the bedroom,

she saw Ms Bibi lying on the mattress with blood coming from her neck. She saw Daniel Wali kneeling near Ms Bibi holding a blade covered in blood. She saw Nanise Wati taking clothes and jewellery which belonged to the deceased.

After conviction, Daniel Wali appealed to the Court of Appeal. Sir Maurice Casey, Sir Rodney Gallen and Justice J E Byrne allowed the appeal on the ground that the evidence of an accomplice, which Ms Radrodo was, must be supported by credible corroborative evidence. Their Lordships considered that the three matters which the trial Judge put to the assessors as corroborating factors did not amount to independent testimony tending to show that the person involved in the murder was Daniel Wali. There was only Ms Radrodro's word for that.

On a retrial, Daniel Wali was acquitted.

In those circumstances it seems clear that Ms Wati, who was not alleged to have wielded the murder weapon, has a strong argument that her conviction was unsafe.

However, Ms Wati is a serving prisoner and an out-patient of St. Giles Hospital, suffering from an acute, psychotic disorder. It is not in dispute that she is unable herself to present her case and requires legal representation.

Inevitably, the Court considers that counsel should be assigned to prepare and present her appeal. The interests of justice so require. Mr Ridgway expressed his agreement with this view.

Lautabui and Roko

These applicants and others including Alifereti Nimacere were involved in an armed attempt, on 7 August 2000, to take over the Police check point at Sawani. In the affray, in which many shots were fired, Corporal Raj Kumar and Joela Waleilakeba were shot and killed. Others were injured The prosecution case was that the applicants took part in a joint unlawful enterprise and did so voluntarily, not under compulsion. The applicants

admitted being part of the group which travelled to the Sawani Police Post but said that they were not part of a joint unlawful plan but were forced to follow Mr Nimacere, who was implementing his own plan.

The trial of the applicants and of Mr Tonawai was held before her Ladyship, Justice Shameem, and three assessors. Two assessors would have acquitted the three accused on all charges. One of the assessors would have acquitted Mr Tonawai on all charges but found the applicants guilty of the lesser offences which were charged although not guilty of the major offences.

Justice Shameem rejected the findings of the assessors. Her Ladyship found that the accused were part of a joint unlawful enterprise, that the shooting which occurred was a probable consequence of that enterprise and that the accused participated voluntarily and were not under duress. She convicted the accused and sentenced each of the them to life imprisonment.

The applicants and Mr. Tonawai each appealed to the Court of Appeal from his conviction and sentence. Mr Tonawai has engaged private counsel. Mr Lautabui and Mr Roko are unable to afford representation.

This is not a case where the Court can form any view, however interim, as to the prospects of success. The trial was lengthy and the issues involved were complex. Much of the evidence was conflicting. Each of the accused told his own story and put the blame for the affray and its consequences on others.

Having regard to the findings of not guilty by the assessors and to the lack of detailed reasons setting out her Ladyship's findings of primary fact in relation to each of the applicants, the Court must assume that the applicants have an arguable case.

The position then is that the appeals raise complex issues of fact and law. It is unrealistic to expect the Court of Appeal to be able to conduct an efficient hearing of the appeals and to arrive at an informed judgment thereon unless the Court has the assistance

of counsel to sort out and analyse the facts and issues and to present them in an ordered way.

Mr Ridgway expressed agreement with that point, informing the Court that these appeals were ones in which the assistance of counsel was required.

Moreover, Mr Lautabui and Mr Roko would be placed in a position of great disadvantage by the fact that Mr Tonawai is represented and counsel appearing for him may seek to place some the blame for the affray on them.

In these circumstances, the Court is satisfied that counsel should be assigned to both Mr Lautabui and Mr Roko.

Masidole and Setareki

The position with these applicants is different. Their circumstances do not reflect the special features of those we have already discussed.

These applicants and another accused were charged with the murder of their grandfather. It was alleged that they conspired to burn the home occupied by the grandfather and a grand-uncle. It was alleged that they sought to kill the grandfather as he had used witchcraft to cause his son, the father of one of the applicants and the uncle of the other, to die.

The home was set on fire using benzine. The grandfather died in the fire. Mr Masidole suffered burns which he attributed to the explosion of the benzine. Mr Setareki suffered a cut hand which he later attributed to punching his grand-uncle.

Both applicants made many admissions both before and after being cautioned. The trial Judge, Justice Shameem, on a *voir dire*, rejected a defence of intoxication and, save as to one admission, considered that the admissions made were voluntary and admissible.

The applicants have appealed their convictions raising again the issues of intoxication and voluntariness in relation to the many admissions made.

Mr Ridgway very properly put the point that the applicants are young men in their twenties who may have difficulty in explaining their grounds of appeal to the Court.

However, the grounds of appeal relied upon raise well understood principles. The appeal books, which are already before the Court, are not voluminous. We consider that the members of the Court hearing the appeals will be able to deal adequately with the issues raised without the assistance of counsel. Although a conviction for murder is an extremely serious matter, it is not necessarily a matter with which the Court cannot deal without the assistance of counsel.

We assume that, if the Commission were adequately funded, it would generally provide legal assistance in a matter so serious as an appeal from a conviction for murder. However, that is not the question for this Court. Section 30 of the Court of Appeal Act is not a general legal aid provision. It merely provides a power to the Court of Appeal to ensure that proceedings before the court are conducted fairly and properly. We are not satisfied, on the present material, that the subject applicants cannot obtain justice if legal assistance is not provided.

We should add that none of the applications to the Court contained material which showed why, in the particular circumstances of the case, it was in the interests of justice that the applicant should have legal aid. With the leave of the Court, Ms Waqavonovono subsequently examined the appeals brought by these two applicants and furnished the Court with a statement of the matters which in her submission, justify the provision of legal assistance. We have had regard to the points raised by Ms Waqavonovono but are not convinced that representation by counsel is essential for the proper conduct and consideration of the grounds relied on in the appeal. The substance of the issues raised was considered by Justice Shameem in a *voir dire* and her Ladyship's reasons for her decision on the *voir dire* provide a useful structure in the light of which the appeals can be considered.

The Court is not satisfied that the circumstances of these two applicants justify the assignment of counsel under s.30 of the Court of Appeal Act.

Mr Masidole and Mr Setareki should pursue the applications for legal aid which they have lodged with the Commission. They are entitled to a proper consideration of their applications and to formal decisions thereon. If the Commission were to decide, after considering the merits of the appeals, that legal aid should be granted, it would appear to be the responsibility of the Attorney General to take steps to ensure that the Commission has funds to grant that aid.

Ms Waqavonovono indicated that, in relation to serious criminal cases, the Commission was guided principally by the impecuniosity of the applicant for aid. She indicated that the Commission applied Guideline C (ii). However, that approch is appropriate to a trial at final instance as Guideline C (ii) itself indicates. The grant of aid in relation to an appeal should be considered under Guideline E which provides, inter alia:

> ***"In the event of such an appeal the formerly assisted person must make a fresh application for the grant of assistance in respect of the matter on appeal which the Commission will assess and consider <u>on its own merits</u>, having regard however to the nature of the decision under appeal and the reasons (if any) given on it."(emphasis added).***

As this Guideline indicates, the merits of the appeal must be taken into account amongst other relevant factors when legal aid for an appeal is considered.

<u>Conclusion</u>

It follows that the Court will accede to the applications by Ms Wati and by Mr Lautabui and Mr Roko to assign counsel to them for the purposes of their appeals. The applications by Mr Setareki and Mr Masidole will be refused.

Section 32 of the Court of Appeal Act provides that the cost of assigned counsel shall be defrayed out of the Consolidated Fund. The Court adjourned the hearing of the applications to enable counsel for the parties to consider and agree upon an appropriate

procedure for appointing and remunerating counsel. No agreement was reached. Ms Basawaiya informed the Court that the view of the Attorney-General was that all forms of aid should be channelled through the Commission. However, no clear undertaking was given on behalf of the Attorney-General to fund the Commission should the Court direct that counsel be assigned to any of the applicants.

In this circumstance, the Court will direct the Registrar of the Court of Appeal to arrange the appointment of counsel.

The Court of Appeal Act falls within the responsibility of the Attorney-General. It will be his responsibility to ensure that the provisions of s.32 are carried into effect.

Before leaving this matter we wish to emphasise the point made earlier that this Court's jurisdiction pursuant to s.30 is not a substitute for Legal Aid. The discretion is one to be exercised sparingly and applicants will have to show that the interests of justice require the appointment of counsel. Simply because applicants have been convicted of serious crimes and advised to appeal will not be sufficient. In the normal run of cases lack of means coupled with a reasonable prospect of success, (judged objectively and responsibly), will be prerequisites.

Orders:

1. The Court orders under s.30 of the Court of Appeal Act 1990 that counsel be assigned to Nanise Wati to Leone Lautabui and to Semesa Roko for the purposes of the preparation for and hearing of the appeal which each has lodged against his or her conviction and sentence for murder.

2. The applications by Peceli Masidole and Mosese Setareki are refused.

3. The Court directs the Registrar of the Court of Appeal to take all necessary administrative steps required to be taken on his part to effect the engagement of counsel required by order 1.

4. The Court limits the fees payable to $1,000.00 in respect of counsel for Nanise Wati and to $2000.00 in respect of counsel for each of Leone Lautabui and Semesa Roko.

5. The Court reserves liberty to apply should any further order of the Court be required for the implementation of order 1. Any application pursuant to leave received may be brought before the Court of Appeal differently constituted.

Smellie, JA

FIJI COURT OF APPEAL

Davies, JA

Penlington, JA

Solicitors:

Office of the Legal Aid Commission, Suva for the Applicant/Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent
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