VIJEN ·

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

CIVIL APPEAL NO. ABU0043 OF 2003S
(High Court Habeas Corpus Action No. HBM0003 of 2003S

IN CHAMBERS

BETWEEN:

METUISELA RAILUMU & OTHERS

Appellants

AND:

1. THE COMMANDER, REPUBLIC OF FIJI MILITARY FORCES
2. THE MINISTER FOR HOME AFFAIRS
3. THE ATTORNEY-GENERAL OF FIJI

Respondents

Coram: The Hon P.G.S. Penlington, Justice of Appeal

Hearing: 22 August 2003, Suva

Counsel: Mr. S.R. Valenitabua for the Appellants
Major K.L. Tuinaosara and Lt. L.T. Luveni for the 1st Respondent
Mr. K.T. Keteca for the 2nd and 3rd Respondent

Date of Judgment: 26th August 2003, Suva

JUDGMENT

This is an application for leave to appeal out of time. It came before me on 22 August 2003 sitting as a single Judge.

Mr. Keteca for the 2nd and 3rd respondents made no submissions and was granted leave to withdraw.

The appellants are soldiers in the Republic of Fiji Military Forces (RFMF).

By an order of the High Court on 24 December 2002 the appellants who had been in military custody since November 2000 without a hearing were ordered to be released with conditions. The order followed applications by them under the High Court (Constitutional Redress) Rules 1998 for a declaration that their constitutional rights guaranteed under Chapter 4 of the Constitution and specifically their right to have their cases heard and determined within a reasonable time by a Court of Law had been breached. The High Court held that their constitutional rights had been violated.

As soon as the December hearing had concluded the appellants were taken to Army Headquarters at Nabua. They were then charged with two counts of murder relating to events on 2 November 2000. Such charges were to be tried by Court Martial.

On 20 January 2003 an application was made for a writ of habeas corpus on the ground that the RFMF did not have legal authority to charge and try them for murder before a Court Martial and that they were wrongfully held in custody.

On 28 January 2003 an order ex parte for a writ of habeas corpus was made. It was ordered that the appellants be brought before the Court on 6 February 2003.

On 13 February 2003 the appellants appeared before a Court Martial charged with other offences alleged to have been committed at the time of the coup on 19 May 2000. That hearing commenced and is still proceeding. The appellants by their counsel in the present proceedings accepted in the High Court that the period of detention which was the subject of complaint ended on 13 February 2003.

The trial Judge Jitoko J. after hearing argument delivered a reserved judgment on 14 March 2003. He dismissed the application for habeas corpus. A formal order was perfected on 9 May 2003. The last day for filing a notice of appeal was therefore 30 June 2003.

The Court Martial for the charges arising out of the events of 2 November 2000 assembled on 20 March 2003. Because of the High Court proceedings and the likelihood of an appeal it was adjourned to 14 July 2003.

On 19 June 2003 the appellants filed and served a notice of appeal. Their solicitor, however, overlooked filing an affidavit of service within 7 days. On 26 June 2003 the appeal was therefore deemed to be abandoned.

On 14 July 2003 the Court Martial in relation to the events of 2 November 2000 was again adjourned to 5 November 2003 on account of the appellants appeal (or more correctly at that time their proposed appeal).

On 25 July 2003 a second notice of appeal was filed and served. An affidavit of service was filed on 28 July 2003. Another solicitor's default however occurred. This time the appellants solicitor overlooked filing an application for security for costs within time and accordingly on 1 August 2003 the second appeal was deemed to be abandoned. On the authority of Ports Authority of Fiji v C & T Marketing Limited Civil Appeal ABU004 of 2001 judgment 22 February 2001 an application for leave to extend the time for the filing of an appeal was now necessary.

The present application was filed on 7 August 2003. It was supported by an affidavit of the 1st named appellant Corporal Metuisela Railumu. The first respondent filed an affidavit from Col. Iowane Naivalunua in opposition.

The relevant principles in relation to an application to extend the time to file an appeal are well settled. It is a discretionary power. In Avery v No.2 PSA Board (1973) 2 NZLR 86 (CA) at p.91 Richmond J said:

> ***When once an appeal allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.***

The factors which are normally taken into account in deciding whether to grant an extension of time are:

1. the length of the delay
2. the reasons for the delay
3. the chances of the appeal succeeding if the time for appealing is extended
4. the degree of prejudice to the respondent or respondents if the application is granted.

Mr. Valenitabua for the appellant frankly accepted that there had been two defaults by the appellants legal adviser and that those defaults had occasioned the delay. He submitted that the appellants themselves were blameless. Throughout the period of the delay they were in military custody. At all times since the judgment on 14 March 2003 they have wanted to appeal.

Mr. Valenitabua next addressed the merits of the proposed appeal.

The Army Act 1955 of the United Kingdom applies in Fiji. Under section 70 of that Act there are provisions concerning army personnel who are subject to military law and who commit civil offences. It states that they can be tried for these offences by court martial. According to the appellants argument section 70(4)

provides an exception in respect of murder and the other offences named therein. Section 70(4) provides:

> ***A person shall not be charged with an offence against the section committed in the United Kingdom, if the corresponding civil offence is treason, murder, manslaughter treason – felony or rape or an offence of genocide or an offence under section 1 of the Biological Weapons Act 1974. In this and the following sub section the reference to murder shall apply also to aiding, abetting, counselling or procuring suicide.***

In the High Court the appellant contended that a Court Martial did not have jurisdiction, because of the wording of section 70(4) to try the appellants for murder. The Judge rejected this argument. He founded that rejection on section 3(1) of the United Kingdom Forces (Jurisdiction of Colonial Courts) Order 1965. He concluded that that provision effectively negates the application of section 70 of the Army Act in so far as it purports to apply to Fiji. With the result, so the Judge reasoned, although the offences mentioned in section 70(4) are excluded from Court Martial Jurisdiction in the United Kingdom they are not in Fiji. According to Mr. Valenitabua's argument before me the Judge in effect held that a member of the RFMF was <u>also</u> a member of Her Majesty's Forces and that that finding was wrong. He therefore contended that the proposed appeal was arguable and had a reasonable prospect of success.

As to prejudice Mr. Valenitabua contended that the granting of leave would not occasion any prejudice to the first respondent. Indeed he argued that a decision of the Court of Appeal would be a benefit for both the appellants and the first respondent.

Major Tuinaosara resisted the application. He emphasised that the appellants were now seeking an indulgence and that the defaults which had occurred had not been properly explained.

The principle thrust of Major Tuinaosara's argument related to the merits, the actual situation of the appellants and the issue of prejudice.

The first respondent's counsel contended that the appeal was without merit and that in any event the arguments which were before the High Court and which would be before the Court of Appeal from the appellants if leave was granted could be made before the Court Martial on a challenge to jurisdiction under Rule 36(1) of the Rule of Procedure (Army) 1972.

Major Tuinaosara submitted that the first respondent had been prejudiced by the delay arising from the abandoned appeals of the appellant and that there would be further delay in the disposal of the court martial if leave was granted. Counsel reminded me that the other court martial relating to the events of 19 May 2000 is still proceeding.

Initially I was inclined to the view that I should grant leave. A properly brought appeal within the rules was on foot until 1 August 2003. It was then deemed to be abandoned on account of the 2nd default of the appellants solicitor. Mr. Valenitabua stated in argument without objection from Major Tuinausara that the 2 defaults were due to oversight on his part. Certainly the appellants were personally without fault.

I now turn to the application itself in the High Court and the merits. The application was for a writ of habeas corpus relating to the appellants detention post 24 December 2002. Whether that was lawful or unlawful such detention came to an end on 13 February 2003 when the Court Martial in respect of the 19 May 2000 allegations commenced. The Judge specifically found that at the time of the hearing before him the appellants were properly in the custody of the military law by virtue of the 19 May 2000 charges which had been previously laid against them and for which they were then being tried by Court Martial. The Judge accordingly held that even if the detention which was the subject of complaint was wrongful the application if granted would be nugatory.

In my view an appeal even if successful would not result in the grant of habeas corpus. I regard that conclusion as a relevant factor in the exercise of my

discretion. This factor is adverse to the appellants. There are however 2 other factors of the same kind.

First the appellants can invoke the challenge to jurisdiction procedure under Rule 36(1) of the Rules of Procedure (Army) 1972 before they plead to the charges of murder. The arguments which they would have put to the Court of Appeal if leave is granted can be advanced to the court martial on a challenge to the jurisdiction of that court.

The other adverse factor is that the granting of leave would inevitably further delay the court martial which has already been adjourned twice on account of the appellants expressed intention to appeal.

The justice of the case involves both the interests of the appellants and the first respondent. On a balancing of all relevant factors I therefore conclude that the justice of the case requires that leave be refused.

I must however add one comment. In my view the court martial should proceed without further delay. After all by November it will be three years after the subject events. When the court martial is again convened the appellants can then make their challenge to jurisdiction, if they so wish.

The application is dismissed. In the circumstances I make no order as to costs.

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The Hon P.G.S. Penlington

Justice of Appeal

Solicitors

Valenitabua S.R. Esquire, Suva for the Appellants

Directorate Army Legal Service, Suva for 1st Respondent

Office of the Solicitor-General, Suva for 2nd and 3rd Respondent