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IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM A GENERAL COURT MARTIAL

CRIMINAL APPEAL NO. AAU0035 of 2004S
CRIMINAL APPEAL NO. AAU0043 of 2004S
CRIMINAL APPEAL NO. AAU0046 of 2004S
CRIMINAL APPEAL NO. AAU0048 of 2004S
(General Court Martial No. 1 of 2003S)

BETWEEN:

1. BARBADOS MILLS
2. BENIAME SOKIVETA
3. PAULIASI NAMULU
4. ISIRELI CAKAU
5. FILIMONI RAIVALU
6. JONA NAWAQA
7. METUISELA RAILUMU
8. KENI NAIKA
9. LAGILAGI VOSABECI
10. FEOKO GADEKIBAU
11. DANIELA KOROITAVELENA
12. USAIA ROKOBIGI
13. MACIU TAWAKI
14. EMOSI QICATABUA
15. VILIMONI TIKOTANI
16. MALAKAI CAKAUNITABUA
17. PENI BITU
18. EPARAMA WAQATAIREWA
19. KALISITO VUKI
20. ROPATE NAKAU

Appellants

AND:

THE STATE

Respondent

Coram: Ward, P
Barker, JA
Kapi, JA

Hearing: Monday, 28 February 2005, Suva
Wednesday, 2 March 2005, Suva
Monday, Tuesday 4, 5 July 2005, Suva

Counsel:
Mr S. R. Valenitabua] for the 1st – 14th Appellants
Mr I.V. Tuberi] for the 15th – 19th Appellants

Ms M. Waqavonovono,]
Ms B. Malimali] for the 20th Appellant

Mr K. Tuinaosara]
Mr A. V Rayawa] for the Respondent

Date of Judgment: Tuesday 16th August 2005, Suva

JUDGMENT OF THE COURT

[1] Following the traumatic events of May and June 2000 and the release of the hostages, the first steps were taken to restore the country to some semblance of normality. As one step in that process, the Republic of Fiji Military Forces (RFMF) took back into the Force members of the First Meridian Squadron (1MF), otherwise known as the Counter Revolutionary Warfare Unit (CRW), who had been involved in the unlawful occupation of the Parliament complex and the seizing and holding of the hostages.

[2] On 2 November 2004, members of 1MF mutinied. It had clearly been planned before that date by some members of the unit with the objective of taking over the Queen Elizabeth Barracks and removing the Commander of the RFMF and some officers who had been placed in senior positions in 1MF following the release of the hostages.

[3] The mutiny involved seizing control of the armoury, the main gate and various other strategic points in the barracks. Once the armoury had been secured and the other soldiers working there locked up, the members of 1MF armed themselves with firearms and live ammunition and moved to take over the other targets.

[4] Despite the surprise, some early resistance was offered to the mutineers and, at 6.0 pm, loyal members of the RFMF went into action to retake the barracks. The mutineers fled taking many of the weapons with them. Over the next few days most surrendered and the majority of the weapons were returned.

[5] By the end, the mutiny had resulted in the deaths of eight men with many other injured, some seriously. It was a critical situation which caused considerable alarm throughout the country as a whole and further severely weakened public respect for and trust in the RFMF.

[6] A large number of members of the RFMF were subsequently charged and tried by General Court Martial. The present appellants were part of a group of 25 who were tried

together in one of those trials. Initially they were also charged with a number of other offences but, at the start of the trial, all charges apart from mutiny were withdrawn. Two pleaded guilty and the prosecution offered no evidence against two others. The remaining 21 pleaded not guilty, were convicted and sentenced to terms of imprisonment ranging from three to six years. They had all been held in custody under close arrest from November 2000 to the sentence on 6 August 2004, a period of three years and nine months. The court martial took that period into account when passing sentence.

[7] The court martial was convened by an Order of the Commander of the RFMF dated 22 January 2003. In the Order he named the President of the court martial and members of the panel, the Judge Advocate, the officers who were to conduct the prosecution and defence counsel. It concluded with an instruction that the record of the proceedings were to be forwarded to the Commander.

[8] The case was first called before the Court on 13 February 2003 but the prosecution did not open its case until 23 July 2003, the 16th day of the trial. The case then followed a faltering course with a number of adjournments until its conclusion on 6 August 2004.

[9] At the start of the hearing, the appellants were advised of their right to challenge any members of the panel and one challenge was made. However, after considering the reasons for the challenge the President overruled the objection and the trial proceeded.

[10] The appellants have filed a number of grounds of appeal against conviction which can be summarised as four main challenges:

1. That the Court was not properly constituted and therefore had no jurisdiction:
2. That the manner in which the Court was constituted denied the appellants their right under section 28 of the Constitution to a fair trial:
3. That the delays between the arrest of the appellants and their trial was a breach of their rights under the same section to have their case determined within a reasonable time; and

4. That there were a number of misdirections by the learned Judge Advocate in his summing up to the Court and that he did not accurately or adequately summarise the cases in relation to the individual appellants.

[11] Some appellants have also challenged the provision in section 30 of the Republic of Fiji Military Forces Act, Cap 81 (RFMF Act), which limits the right of appeal to conviction only. They seek to appeal against sentence.

1. JURISDICTION OF COURT MARTIAL

Legislative History

[12] In defining the law on courts martial, the RFMF Act largely incorporates an English statute, the Army Act 1955 (the UK Army Act) by reference. There are only two relevant sections in the RFMF Act, sections 23 and 25. Incorporating amendments to date, they read as follows:

> *"Application of Army Act*
>
> *23.- (1) In relation to the government of and for the enforcement of discipline in the Forces the Army Act shall, subject to the provisions of this Act and any regulations made thereunder and with the modifications referred to in subsection 2, apply as if the Forces formed part of Regular Forces of the United Kingdom -*
>
> *(a) to officers of the Forces and soldiers of the Regular Forces at all times;*
>
> *(b) to soldiers of the Territorial Force and the Reserve when on military service.*
>
> *(2) The modifications to be made are as follows:*
> *(a) the word "President" may be read for the words "Army Council" and "Secretary of State."*
>
> *(b) no sentence exceeding two years' imprisonment imposed by a court martial upon the trial of a soldier when serving within the*

limits of Fiji shall be carried into execution unless confirmed by the President; and

(c) such other modifications consistent with this Act as may be necessary.

Courts-Martial

25.- (1)The President may at any time convene courts martial and delegate powers to convene such courts and to appoint officers to constitute the same for the purpose of trying any officer or soldier of the Forces subject to the Army Act and may also delegate power to approve, confirm, mitigate or remit any sentence of any such court. Such courts shall be composed wholly of officers of the Forces.

(2) The composition of such courts and the modes of procedure and powers thereof shall be, subject to the provisions of this Act, as near as may be in accordance with the regulations which are for the time being in force for the composition, modes of procedure and powers of courts martial for the Regular Forces of the United Kingdom:

[13] It was agreed by counsel, at the hearing of these appeals, that the UK Army Act, in whatever may be its current form, is incorporated by reference into the current law of Fiji for courts martial of officers and soldiers. This was the view of Winter J in the High Court in *Peni Naduaniwai v The Commander and The State* (HBN 32 of 2004, 6 September 2004), an application for constitutional redress. We agree with Winter J's discussion on this point. As he said at p.14 of his unreported judgment,

> *"The intention of the Fijian Legislation was to enact a shorthand reference to the United Kingdom Law so that any improvements by amendment in the UK Law also became part of Fijian Law as long as they were not inconsistent with Fijian Law and our Constitution."*

[14] The only restrictions on the wholesale incorporation of the current UK provisions are (a) the paramountcy of any provisions of the RFMF Act over the UK legislation under section 23(1) of the RFMF Act and (b) any modifications of the UK law permitted by section 23 (2) (c) of the RFMF Act.

[15] The RFMF Act was passed as a colonial ordinance in 1949. The Army Act was enacted by the UK Parliament in 1955. Significant amendments have been made to that Act by way of the UK Armed Forces Act, 1996, Armed Forces Discipline Act 2000 and Armed Forces Act 2001.

[16] Section 2 of the RFMF Ordinance was amended in 1961 to include a reference to the UK Army Act 1955. The Ordinance was further amended by section 31 of the Fiji Independence Order 1970 by inserting the words "of the United Kingdom" immediately after the figures "1955" in the first line of the definition of "Army Act" in section 2.

[17] Section 2 of the RFMF Act as amended provides a definition of the expression "Army Act":

> *"Army Act" means the Army Act, 1955 of the United Kingdom and includes all Acts amending, replacing or read in conjunction with the same and all rules, regulations and Articles of War made thereunder."*

[18] After Fiji's independence, the United Kingdom made amendments to the Army Act 1955 and its subordinate legislation by way of the Armed Forces Act 1971 (UK). The 1971 Act came into force on the 1 July, 1972. In conjunction with that change, a 12th edition of the Manual of Military Law (MML) was published. This book defines comprehensively the systems and procedures for Army discipline. It was published for the guidance of military personnel officers after the 1971 Act came into force in the United Kingdom. It does not, however, contain reference to subsequent legislation.

[19] The RFMF Act has been amended three times since independence in 1973, 1983 and 1998. None of the amendments affecting courts martial was major. In 1985, the Royal Fiji Military Forces Regulations provided, inter alia:

> *"9. The disciplinary powers of officers in the Forces shall be those laid down in the Army Act and the Queen's Regulations for the Army, in so far as such powers are not inconsistent with the provisions of the Act and these Regulations. Officers shall be guided by the Manual of Military Law and shall adhere to the Rules of Procedure therein contained."*

This Regulation added little to what had been provided in the RFMF Act.

[20] In the present case, the processes outlined in the 12th edition of MML seem to have been followed by the Fiji Army, starting with an initial investigation after the appellants were arrested, leading to a Board of Inquiry and the laying of charges against the appellants by their Commanding Officer, based on the Board of Inquiry's Report. In the result, the appellants were remanded for court martial. We do not need to traverse the details of these procedures, although the question of the delay in convening a court martial until 27 months after the alleged wrongdoing will be addressed later in this judgment.

[21] The MML emphasises urgency in resolving charges. It outlines safeguards regarding the holding of accused persons under close arrest. We find it surprising that, despite section 75 of the UK Army Act and rule 6 of the Rules of Procedure (Army) 1972, the appellants were kept under close arrest for successive periods of 72 days without a court martial being convened. Rule 6 provides:

> *"6. An accused shall not be held in arrest for more than seventy two consecutive days without a court-martial being convened for his trial, unless the officer who would be responsible for convening the court martial directs in writing that he shall not be released from arrest. When giving such a direction such officer shall state his reasons for giving it."*

The Court was told from the Bar that the appellants were directed to stay in custody, apparently by the order of the Commander as the officer who was to convene their court martial, on successive occasions without their being heard. Rule 5 requires the Commanding Officer to send a report to the officer responsible for convening the court martial who may direct in writing that the accused be not released from close arrest after having been under close arrest for 72 days. We note also that the appellants were released on bail by the High Court only to be re-arrested by the Army on different charges which are now not proceeding. Because there was said by counsel to be some

further matter to come before this Court, we refrain from further comment on the re-arrest of the appellants which we find disturbing on its face.

[22] The initiating step in a court martial is the convening of it by a person legally authorized to convene one. (i.e. a convening officer). The duties of the convening officer are set out in pages 38 at seq. of the MML. In brief, the convening officer has to satisfy himself that the charge discloses an offence or offences and that the summary of evidence is sufficient to justify a trial. An accused should not be sent for trial unless, in the opinion of the convening officer, there is a reasonable probability that he will be convicted. The convening officer has to decide whether there is to be a District Court Martial or a General Court Martial, the latter being for more serious offences. At the conclusion of the Court Martial, a report on the proceedings is to be made to the convening officer. He may confirm or vary the decision or discharge the accused. The powers of the convening officer at the confirmation phase are wide and are set out in the MML. In Fiji, sentences of more than 2 years' imprisonment have to be confirmed by the President of the Republic.

[23] Once the decision has been made by him in favour of a court martial, the convenor shall issue a Convening Order. Under the 1972 MML, before more recent amendments to the UK Army Act, the procedure appears to have been that the names of the proposed members of the court are nominated in the convening order as well as those of other necessary participants together with the date and place of the trial.

[24] In the present case, Rear-Admiral J.V. Bainimarama, the Commander of the RFMF, (the Commander) signed a Convening Order dated 22 January 2003 for a General Court Martial. It was read out at the opening of the Court Martial on 13 February 2003. It stated the names of the accused, the President of the Court, the members of the Court, 2 alternate members (in the event of challenge), the Judge Advocate, the prosecution and defence counsel, the interpreter and the orderly. It listed a number of charges, the principal one being mutiny, contrary to section 31(1) of the UK Army Act. The Convening Order also required that the record of the proceedings be forwarded to the Commander, presumably for confirmation purposes.

Power to Convene

[25] The Respondents relied upon section 25(1) of the RFMF Act as giving the Commander delegated authority from the President to convene the Court Martial and to appoint the officers to constitute it. Under section 25(1) of the RFMF Act, only officers can be appointed to sit. Counsel relied on a Legal Notice No. 165, issued at some date prior to Independence, entitled 'Interpretation and General Clauses Ordinance' which was said to have been issued under section 21 of the Interpretation and General Clauses Ordinance.

[26] The Legal Notice records, *inter alia,* that a delegation under section 24(1)(sic) of the RFMF Ordinance had been issued by the Governor in favour of the Commander. The date of this delegation is not stated in the Notice. A footnote in the 1985 Edition of the Laws of Fiji gives the date of the publication of Legal Notice 165 as 11 November 1965. The actual date of the delegation by the Governor remains unknown.

[27] Diligent attempts by counsel to obtain the exact wording of the delegation or a copy of the document have been unsuccessful. Accordingly, the Court is unable to state whether the Governor's delegation extended only to convening a court martial (as suggested in the Notice) or to appointing its members also. An indication that it might not have done so is found in the RFMF Standing Orders Volume 1 (1973) to which we were referred by counsel for the Respondent. Besides referring to section 25 of the RFMF Act, Standing Order 21.274 states that: "The Governor-General has delegated his powers to convene and confirm courts martial to the Commander." There is no reference to a delegation of the power to appoint members of a court martial. That statement is technically incorrect since there was no delegation by a Governor-General, an office which came into being at independence and there is no power to confirm the court martial; only the sentence.

[28] For the reasons articulated by this Court in *Air Fiji Limited v Houng Lee* (ABU0016of 9 February 2005), we accepts that any delegation by the Governor under section 25(1) of the RFMF Act to the Commander has not been affected by events since independence in the absence of any amending legislation or of a subsequent delegation post - independence.

[29] Accordingly, the Court accepts the validity of the delegation but cannot assume that it did more than is stated in the Notice, namely, to delegate to the Commander the President's (then Governor's) power to convene a court martial. It would be stretching the *omnia praesumuntur* doctrine too far to assume that the power to appoint members and to confirm sentences had also been delegated. Indeed, it is something of a leap of faith even to assume that the delegation was a continuing one in view of the failure to find the actual document.

[30] Reliance on a delegation, now at least 40 years old, could have been avoided if the President of the Republic had convened the Court Martial and/or appointed its members. Under section 25(1) of the RFMF Act, the primary responsibility for the task is his. Alternatively the President could have delegated the power to appoint members to some other person, although, for reasons to be discussed later, the greatest care would have to be exercised in any selection of a delegate.

[31] Consequently, the Court is of the view that all the Commander had jurisdiction to do, under the colonial delegation, was to convene the court martial. His duties as Convenor would have been as set out in the MML including, particularly, the duty to look at each accused's situation and to judge whether there was a case against each on all or any of the various charges. It follows that, although the Commander did not have jurisdiction to appoint the members of the court martial, he purported to do so. This means that the court martial process was fundamentally flawed.

Appointment of President and Members of Court Martial

[32] The power of the President of the Republic or his delegate to appoint the members of the court martial must be taken under section 25(1) of the RFMF Act as the appropriate means of appointment. The procedures for appointment of members of the court, the Judge Advocate and the prosecutors pertaining in England at the date of this court martial, with such modifications as may be necessary, were not consistent with the clear provisions of section 25(1) of the RFMF Act. Section 25(2) states in effect that the composition of courts martial is to accord with the current England system. In the light of the clear power of appointment given by section 25(1), subsection (2) must mean that only things such as the numbers of appointees, their ranks, etc. are

to be governed by current English procedures; likewise, the appointment of the Judge Advocate and prosecutors.

[33] Major changes were made in the United Kingdom to court martial legislation in 1998 and 2001. The changes were triggered by the application of human rights legislation to courts martial. Included in the changes were the following:

- The Convening Officer ceases to exist and his functions are split among the higher authority, the prosecuting authority and court administration officers.

- The 'higher authority' is a senior officer who must decide whether a accused person should be dealt with summarily or whether the accused should be referred to the prosecuting authority, or the prosecution dropped. After this decision has been made, the higher authority has no further role.

- The prosecuting authority is the Army Prosecuting Authority which decides whether or not to prosecute, what type of court martial is appropriate and what charges will be brought. It conducts the prosecution. In the UK, this role is filled by the Director of Army Legal Services.

- Court administration officers are independent of the higher authority and the prosecuting authority. They are responsible for arranging the venue and timing, ensuring the Judge Advocate and Court officials will be available. They secure the attendance of witnesses and select members of the court. They are appointed by the Defence Council.

- Each court martial must now include a Judge Advocate as a member and his advice on points of law is binding.

- Warrant officers are now to be included as members of the Court where a soldier is to be tried.

- The Judge Advocate deliberates with the court on sentencing and has a vote on the appropriate sentence.

- The Judge Advocate alone has the power to terminate the Court Martial.

- The decision of the court martial does not go through the confirming process but is reviewed by a special Review Authority.

[34] It cannot be sensible to require Fiji, with a defence Force of some 3,000 members and few senior officers, to adopt a structure for courts martial appropriate for a country with a huge population and a large defence force comprising various constituent services. Yet, that must be the consequence of a wholesale incorporation of the current UK legislation, as is required by the RFMF Act, unless the RFMF Act itself permits any deviation.

[35] The only ameliorations that Fiji can make to this elaborate structure have to be measured by any specific provisions of the RFMF Act and Regulations. Notably section 23(2)(c) of that Act which allows. *"such other modifications consistent with this Act as may be necessary."*

[36] Section23(2)(c) must be interpreted to permit some realistic modifications of the current English model to suit Fiji standards, whilst still preserving both the basic thrust of the new English Act, namely, to make court martial procedures and establishment more attuned to human rights law and the statutory instruction in section 25(2) to follow UK practice for appointment and modes of procedure.

[37] It seems to this Court that a possible legitimate adaptation of the UK scheme could include the following propositions which also take account of existing provisions of the RFMF Act. The power to convene, as we have already held, still rests with the President or with the Commander under delegated authority under section 25(1). It cannot be taken to have been abolished by the side-wind of the new English legislation. However, that power will still be scrutinised in the context of the appellants' constitutional right to a fair trial. The "higher authority" under the new UK law is not imported into Fiji because of the specific power to convene in section 25(1).

(a) The members of the court must be appointed by the President under section 25(1) or by a delegate appointed by him. Care would have to be taken in identifying a delegate to avoid attracting any challenge under the fair trial provisions of the Constitution, to be discussed later in this judgment.

(b) In selecting the members of the Court, the President or his delegate must follow English practice as to members, their ranks and other details; section 25(2).

(c) Warrant officers will not be included in the panel, since section 25(1)(a) requires a court martial to be composed wholly of officers.

(d) The investigative role could continue to be carried out as before by the commanding officer, but there would have to be a separation of the investigators from the person who decides whether to convene the court martial.

(e) The prosecution role could be undertaken (by UK analogy) by Fiji Army Legal Services personnel.

(f) The Judge Advocate under the UK Army Act is a member of the court martial. The RFMF Act requires all members of the court to be officers. We were told by counsel that there are lawyers of sufficient standing and experience in Fiji to undertake this role who are on the Reserve or Territorial Forces. Otherwise, if a suitable person for Judge Advocate were found, such as a retired Judge, it may be acceptable to give a temporary commission. The case law emphasises that the Judge Advocate has to be a lawyer of experience and standing.

[38] What would be preferable is for Fiji to adopt its own legislation regarding courts martial, which might well still incorporate much of the UK legislation and the Fiji legislation should not necessarily change with every vicissitude of the UK Act. Such legislation could take account of the realities of Fiji's situation and not impose too elaborate a structure whilst at, the same time, taking into account the human rights of military personnel which are preserved in the Constitution.

[39] What must also follow from the applicability of the current UK Act to this court martial is that the Judge Advocate (were he properly appointed) should have deliberated with and voted with the members of the court when considering sentencing. He did not do so.

State of War

[40] Counsel for the respondent made an alternative submission that even though the court martial may have been constituted contrary to section 25 (1) of the RFMF Act, the Commander had power to appoint the members of the court martial in the exercise of his powers as the only legitimate authority in control following the coup attempted by George Speight on 19th May 2000 and the subsequent mutiny in November 2000. He submitted that there was a state of war during this period. He relied on the doctrine of necessity and cited a number of cases in support of the submission.

[41] We reject this submission for two reasons. First, by the time the court martial was convened in March 2003, constitutional democracy and legal order under the 1997 Constitution of Fiji had already been restored following the ruling of this Court in *Republic of the Fiji Islands v Chandrika Prasad* [2001] FJCA 2. Consequently, the doctrine of necessity is not applicable.

[42] Second, Chapter 14, "Emergency Powers" of the Constitution prescribes the manner in which emergency powers may be exercised. The Parliament may make a law conferring power on the President, acting on the advice of Cabinet, to proclaim a state of emergency; section 187 (1). There was no state of emergency proclaimed at the time this court martial was convened nor has there been any such proclamation since. The power to proclaim a state of emergency is not vested in the Commander of the RFMF. For these reasons, we would dismiss this argument.

Decision on Jurisdiction

[43] The only mechanism for the appointment of members of the Court Martial is that under section 25(2) and we have come to the view, for the reasons stated, that the Commander did not have delegated authority from the President to do so. We must, therefore, consider the effect of such an invalid appointment on the proceedings.

[44] On 4 February and 1 July 2004, the 29th and 71st days of the hearing, Mr Tuberi and Mr Valenitabua made submissions challenging the jurisdiction of the court on the basis of the changes wrought to the Army Act 1955 as a result of cases in the European Court of Human Rights. Mr Tuberi relied, in particular, on the case of *Mehmet Ali Yilmaz v Turkey* (Application 29286/95 ECHR). Both suggested that the failure to constitute the court in the present case in accordance with the new procedures under the amendments to the English Act brought the court martial's independence and impartiality into question. They did not, as we read their submissions, challenge the validity of the power of the Commander to appoint the members of the court.

[45] We will need to consider the effect of their submissions on the human rights aspect later but, at this stage, we must determine the effect of the appointment of the members of the court by the Commander in the mistaken belief that he had been delegated the authority to make them. We have found, the appointments were not lawful but it is clear that the officers appointed believed that their appointments were valid. Equally, the absence of any challenge by the appellants to the Commander's appointments shows that they also accepted they were valid.

[46] What, then, is the position of a member of the court who is not properly appointed under the law but is acting in that capacity in good faith and in ignorance of the defect in his appointment? The answer has been settled law since the reign of Edward IV. Where there is an unknown defect in the appointment or authority of some officer, he may be regarded as holding the office *de facto* and his acts held to be valid even though his appointment is invalid *de jure*.

[47] In the early nineteenth century it was explained that:

> *"An officer* de facto *is one who had the reputation of being the officer he assumes to be and yet is not a good officer in point of law."* *R v Bedford Level Corporation* [1805] 56 East 356 per Lord Ellenborough adopting the definition from an earlier case.

[48] The doctrine of de facto appointment was confirmed in numerous cases arising from the American Civil War. In *The State of Connecticut v Carroll* (1891) 38 Conn 449 it was defined:

"An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised ... [inter alia] *under color of a known election or appointment, void because the officer was not eligible, or because there was want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise such ineligibility, want of power, or defect being unknown to the public."*

[49] This has been followed in other jurisdictions since; see, for example, *Re Aldridge* [1897] 15 NZLR 361, a case involving the invalid appointment of a Supreme Court judge in which there is an extensive review of the history of the doctrine; *Adams v Adams* [1971] P 188; *Andrew Nori's Application* [1988-9] SILR 99.

[50] However, the last words in the passage quoted from the *State of Connecticut case* limit the protection of this doctrine to cases where the defect or irregularity is unknown to the public and, in *Adams v Adams*, it was pointed out, on the authority of the *Bedford Level Corporation case*, that the doctrine "has no place where the circumstances giving rise to the legal defect are notorious".

[51] Had there been, before or during the trial, a challenge to the validity of the power under which the Commander appointed the members of the court martial and the defect ascertained, their actions would not have been protected by the doctrine of *de facto* office. That, however, did not occur and so the members of the court martial, although not members of the court *de jure* were members *de facto* and their actions in that capacity are valid.

[52] This ground of appeal must be dismissed

2. THE RIGHT TO A FAIR TRIAL

[53] The human rights challenges raised in the appeal relate to the constitutional rights of a person charged with an offence to a fair trial (section 29 (1)) and to have the case determined

within a reasonable time (section 29 (3)). It is also suggested that there is a constitutional right to appeal against sentence under section 28 (1) (l).

[54] Section 41 of the Constitution provides a procedure for enforcing rights under Chapter 4 "Bill of Rights". So far as it is relevant to the present case, it provides:

> *"41 – (1) If a person considers that any of the provisions of this Chapter has been ... contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been ... a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.*
>
> *(2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.*
>
> *(3) The High Court has original jurisdiction:*
>
> *(a) to hear and determine applications under subsection (1); and*
>
> *(b) to determine questions that are referred to it under subsection (5);*
>
> *and may make such orders and give such directions as it considers appropriate.*
>
> *(4) The High Court may exercise its discretion not to grant relief in relation to an application or referral made to it under this section if it considers that an adequate alternative remedy is available to the person concerned.*
>
> *(5) If in any proceedings in a subordinate court any question arises as to the contravention of the any of the provisions of this Chapter, the member presiding in the proceedings may, and must if a party to the proceedings so requests, refer the question to the High Court unless, in the member's opinion (which is final and not subject to appeal), the raising of the question is frivolous or vexatious.*

(6) When the High Court gives its decision on a question referred to it under this section, the court in which the question arose must dispose of the case in accordance with:

(a) the decision; or

(b) if the decision is the subject of appeal to the Court of Appeal or to the Supreme Court – the decision of the Court of Appeal or Supreme Court, as the case may be.

...."

Jurisdiction of the Court of Appeal on Human Rights

[55] The question arises whether this Court has any jurisdiction on an appeal from a court martial to enforce human rights under Chapter 4 or to grant redress where any such right is contravened.

[56] The Court of Appeal has general appellate jurisdiction to hear all appeals by virtue of the Constitution (section 121), the Court of Appeal Act (Cap 12) and any other law in force (section 3 (2) (a) and (b) of the Court of Appeal Act). Appeals under the Court of Appeal Act are primarily concerned with appeals from decisions of the High Court. Likewise, section 121 of the Constitution, grants the Court of Appeal general appellate jurisdiction to review decisions of the High Court.

[57] Thus, where the High Court determines any question relating to contravention or enforcement of the Bill of Rights, there can be no question that the Court of Appeal has jurisdiction to hear an appeal from the High Court decision and grant redress or make such orders and give such directions as it considers appropriate.

[58] As the present appeal is not from the High Court, our jurisdiction does not arise by virtue of section 121 of the Constitution or the provisions of the Court of Appeal Act. It lies to this Court by virtue of the provisions of the RFMF Act, section 30, which provides:

"A person convicted by a court martial may, with the leave of the Court of Appeal, appeal to that court against his conviction.

Provided that the leave of the Court of Appeal shall not be required in any case where the person convicted was sentenced by the court martial to imprisonment for ninety days or more or to detention for ninety days or more."

[59] If a court martial has jurisdiction to enforce or to grant redress where there has been a contravention of the Bill of Rights, the Court of Appeal has jurisdiction to review such decisions in so far as they relate to questions of conviction.

[60] The first question is, therefore, whether a court martial has jurisdiction to enforce or grant redress for contravention of a right under the Bill of Rights. To determine this, one has to consider whether the original jurisdiction granted to the High Court under section 41 (3) of the Constitution is a grant of jurisdiction to the exclusion of all other courts. If the answer to this question is in the affirmative, a court martial would have no jurisdiction to enforce or grant redress and, in consequence, such matters could not be considered by this Court on appeal from a court martial.

[61] As far as we are aware, this issue has not been determined by this Court or the Supreme Court. However, the question arose in the High Court in *Peni Naduaniwai's case*, an application to the High Court for redress under section 41 (3) (a) of the Constitution. In exercising his discretion, Winter J had to consider whether an application to a court martial for redress may provide an adequate alternative remedy, in terms of section 41 (4). He held:

"The right to make a redress application to the High Court is without prejudice to any other action with respect to the matter that the person concerned may have (section 41 (2)).

The applicant has the right to seek redress from the High Court if he feels that his right to a fair trial guaranteed by s 29 of the Constitution is likely to be contravened by the structure and proceedings of the general Court Martial convened for his trial.

Since the High Court has original jurisdiction over these matters then the applicant cannot make a redress application to any other court but the High Court. He cannot make an application for Constitutional Redress to the Courts Martial as it has no jurisdiction over redress applications.

Further, while he can make an application for leave to appeal (and appeal) to the Court of Appeal, this court similarly does not have jurisdiction to hear constitutional redress applications."

[62] We consider that the conclusion reached by Winter J in this respect is not definitive. He was under constraint of time and was not able to address the issue fully as he acknowledged in his judgment:

"The application raises several important and fundamental issues of constitutional and military law for the Republic. The General Court Martial is to convene on the 7th of September 2004. To provide the applicant with any purposive remedy I am obliged to give my decision before then. In the short time available to me I cannot address as comprehensively as I would wish much of the complex and conflicting jurisprudence raised by the application."

[63] The first thing to note about section 41 (3) is that it does not give the High Court exclusive jurisdiction (as distinct from original jurisdiction) to hear and determine applications for redress as was suggested by the learned judge at p 4 of the unreported judgment. Section 120 (2) of the Constitution is also expressed in similar terms with regard to any matter arising under the Constitution or involving its interpretation. This may be contrasted, for example, with section 18 (1) of the Constitution of Papua New Guinea which gives not only original jurisdiction but exclusive jurisdiction to the Supreme Court:

"18. Original interpretative jurisdiction of the Supreme Court.
(1) Subject to this Constitution, the Supreme Court has original jurisdiction, to the exclusion of other courts, as to any question relating

to the interpretation or application of any provision of a Constitutional Law." (our emphasis)

[64] The scope of section 41 (3) may be determined by interpreting section 41 as a whole. An application for redress may come before the High Court in two ways. First, a person may apply by way of an originating process (section 41 (3) (a)) or secondly, a subordinate court may make a reference to the High Court under section 41 (5) (section 41 (3) (b)).

[65] Section 41 (5) implies that a subordinate court may consider a question as to the contravention of a chapter 4 right in an originating process. The original jurisdiction of subordinate courts that is implied in this provision must be found in other provisions of the law. Alternatively, a subordinate court may in the exercise of its discretion refer the question to the High Court and it must do so if a party requests the matter to be so referred.

[66] We conclude from the whole of section 41 that the High Court does not enjoy exclusive jurisdiction to grant redress.

[67] A court martial is not a subordinate court (as defined in section 194 (1) of the Constitution) and it cannot, therefore, derive its jurisdiction by implication from s 41 (5). It must derive its jurisdiction from other provisions of the law. That jurisdiction in respect of human rights is derived directly from the Constitution. By section 21(1)(a), the Bill of Rights is binding on a court martial and the provisions of the RFMF Act must be read subject to the Constitution (sections 2 and 21 (3) and (5) of the Constitution). A court martial is bound to apply the requirements of the Bill of Rights including any redress or appropriate orders that may be made for breach.

[68] As we have already concluded, a court martial derives its general jurisdiction from the UK Army Act subject to the provisions of the RFMF Act. We conclude from this that the human rights requirements introduced by amendments to the UK Army Act may be applied by a court martial. We consider that a court martial has a justice system in a category of its own and has jurisdiction to interpret and apply the human rights provisions and the Court of Appeal has

appellate jurisdiction to review a decision of a court martial and may grant redress or make such orders and give such directions as it considers appropriate.

Human Rights Challenge to Court Martial

[69] The main reason for the changes in the UK Court Martial legislation from the situation under the UK Army Act in 1955, appears to have been the impact of several challenges to courts martial before the European Court of Human Rights. Similar challenges had been mounted in Canada which has similar provisions in its Charter of Rights to those in the Fiji Constitution regarding fair and impartial trial.

[70] Section 29 of the Fiji Constitution provides:

> *"29(1) Every person charged with an offence has the right to a fair trial before a court of law."*
>
> *(2) Every party to a civil dispute has the right to have the matter determined by a court of law or, if appropriate, by an independent and impartial tribunal."*

[71] It should be emphasised that the right of the military to have its own system of justice and to try military personnel, both for strictly military offences (such as mutiny) and also for crimes under civilian law is undeniable. Such crimes committed in a military context could have more serious effects than in a civilian context. This Court shares that view. However, as the cases disclose, military justice has to recognize the changes wrought to it in recent years by an emphasis on the human rights of the individual. It is not always easy to reconcile those sentiments with the necessary military emphasis on solidarity and obedience. The new UK law represents the best efforts to date to achieve this reconciliation.

[72] The rationale for a system of military law is summarised in the MML - Introduction p. 3 paragraph 6 - thus:

> *"The object of military law is two fold. First it is to provide for the maintenance of good order and discipline among members of the army and in certain circumstances among others who live or work in a military environment. This it does by supplementing the ordinary criminal law of England and the ordinary judicial system with a special code of discipline and a special system for enforcing it. Such special provision is necessary in order to maintain in time of peace as well as war, and overseas as well as at home, the operational efficiency of an armed force……"*

We agree with that summation.

[73] The case of *Findlay v. The United Kingdom* (Application No. 110/1995/616/706 European Court of Human Rights) highlighted the lack of independence and impartiality of courts martial under the UK Army Act, because of the multiple roles played by the convenor. It evaluated the procedures under the UK Army Act in some detail. The applicant was a British citizen and a member of the British Army. He was tried by a court martial established under the Army Act 1955, pleaded guilty and was sentenced.

[74] Findlay alleged before the European Court of Human Rights that his right to a fair hearing by an independent and impartial tribunal under section 6(1) of the European Convention for the Protection of Fundamental Human Rights and Freedoms had been breached by the Court Martial proceedings. The Court agreed. The main issues of concern to the Court were:

- A significant role of the Convenor before the hearing. That is, he decided which charges were appropriate and was thus linked to the prosecution proceedings yet he then convened the court martial and appointed its members.

- All the members of the court martial were appointed by the Convening Officer and were subordinate in rank to him. Many of them were directly under his command.

- The Convening Officer was also the Confirming Officer so the decision of the court martial was not effective until ratified by him.

[75] Moreover, the Court held (at paragraph 78) the flaws in the court martial proceedings were not remedied by the presence of the Judge Advocate or by the oath taken by the members of the court.

[76] The Supreme Court of Canada held by a majority of 8 to 1 in *R v Généreux* [1992] ISCR 259, that a trial before a General Court Martial (GCM) under the National Defense Act did not meet the standard of fair trial required of an independent and impartial tribunal. As with

Findlay's case, the Judge Advocate, the members of the panel and prosecution had all been appointed by the Judge Advocate General.

[77] The majority in *Généreux's case* identified three elements which led it to conclude that the court martial was not an independent and impartial tribunal, as required by the Canadian Charter of Rights. Two of those elements do not sensibly impact in this case. The first concerned the security of tenure of the Judge Advocate who was a career military judge. In the present case, the Army took commendable steps to obtain the services of a retired Judge of the High Court with no connection with the RFMF to serve as Judge Advocate. The second dealt with the financial security of the Judge Advocate and members of the court and we do not think that this consideration is, realistically, relevant in the Fiji context.

[78] However, the third element of concern, similar to that exposed in *Findlay's case*, is applicable here. At 287, Lamer, CJ posed the test thus:

> *"With respect to the case at bar, therefore, the question is not whether the General Court Martial actually acted in a manner that may be characterized as independent and impartial. The appropriate question is whether the tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence."*

[79] At 309 -10 he outlined his concerns about the role of the convening authority in the setting up of the court martial:

> *"The convening authority, an integral part of the military hierarchy and therefore of the executive, decides when a General Court Martial shall take place. The convening authority appoints the president and other members of the General Court Martial and decides how many members there shall be in a particular case. The convening authority, or an officer designated by the convening authority, also appoints, with the concurrence of the Judge Advocate General, the prosecutor (art 111.23 Q.R. & O.). This fact further undermines the institutional independence of the General Court Martial. It is not acceptable, in my opinion, that the convening authority, i.e. the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as the triers of fact. At a minimum, I consider that where the same representative of the executive, the "convening*

authority," appoints both the prosecutor and the triers of fact, the requirements of s.11(d) will not be met."

[80] His conclusion at 314 was:

> *"In short, the structure of the General Court Martial with which we are here concerned incorporated features which, in the eyes of a reasonable person, could call the independence and impartiality of the tribunal into question, and are not necessary to attain either military discipline or military justice."*

[81] In *R v Boyd* [2002] 3 All ER 1119, the House of Lords stressed the importance of sufficient safeguards to guarantee the independence and impartiality of the members of a court martial and their freedom from outside pressures. Similar views were expressed by the European Court of Human Rights in *Morris v United Kingdom* (Application 38784/97 ECHR).

[82] On the facts of this case where the appellants have a constitutional right to a fair trial, how do the convening and subsequent procedures of the court martial measure against the criteria in the cases cited, all of which concerned the right to trial by an impartial tribunal? In other words, how would the court martial in this case appear to the notional independent observer? This question is not to be answered by enquiring into the state of mind of individual members of the court martial; rather its general appearance has to be scrutinized.

[83] In our view, the court martial in the present case would not appear impartial to the notional observer for the following reasons:

(a) Its Convenor was the Commander who is the person named in the charge as the target of the alleged mutineers and at whose authority the mutiny was aimed.

(b) The Commander as Convenor had the duty of scrutinising the charges against each accused individually before deciding to convene a court martial. There is a requirement to make a judgment as to whether to

convene a court martial and to assess whether there is a likelihood of conviction.

(c) It is the Commander, in effect the 'victim' of the alleged mutiny, who chose the members of the court, the judge advocate and the prosecutors. On both *Findlay* and *Généreux* principles, the dual roles of convening the Court Martial and appointing its members is inappropriate.

(d) All members of the Court Martial were subordinate in rank to the Commander. Those members who were still serving officers and who were not on the Reserve, were under his command.

(e) The Commander as convening officer has the power to dissolve the court martial under section 95 of the UK Army Act. Under sections 107 and 109, the confirming officer has extensive powers to confirm, vary or not accept the findings. The confirming officer is the officer to whom the convening order directs the record of proceedings should be sent and is frequently the convening officer. In the present case, the commander specified that it should be sent to him.

[The RFMF Act reserves the power to confirm sentences of more than two years imprisonment to the President or his delegate, sections 23(2)(b) and 25(1). It appears that the President did so but we note that the warrants of commitment of these appellants state that the President confirmed the findings and sentences. Under the UK Army Act confirmation of the findings rests with the confirming officer and has not been displaced by the provisions of the RFMF Act.]

[84] Section 112 (3) (a) of the Fiji Constitution provides that the Commander is "responsible" for "taking disciplinary action against members of the Forces." We interpret this provision to mean that the Commander has the responsibility of ensuring that proper machinery is in place for the investigation of offences, the convening and conduct of courts martial plus the provision of

facilities for courts martial and making the requisite personnel available and the like. We do not interpret the section as permitting or requiring the Commander personally to convene a court martial and/or appoint its members where to do so, might infringe an accused's constitutional rights.

Decision on the right to a fair trial

[85] On the *Findlay* and *Généreux* tests, we cannot say that the appellants' constitutional rights to an impartial tribunal and therefore to a fair trial were met. The appeal will have to be allowed on that ground and the case remitted for trial by a differently constituted court martial.

[86] This ruling would not necessarily apply in all cases where the Commander exercises his delegated power to convene a court martial. There could be many offences – not ones directed at the Commander personally - from which the Commander would be sufficiently remote. For example, a serious charge against a soldier, such as robbery or rape but, if he does convene the court martial, he should not have any part in the appointment of the members of the court.

[87] It must be emphasised that the state of affairs which has resulted in these appeals having to be allowed on jurisdictional and human rights grounds need not have occurred. The military authorities had some 27 months between the alleged offences and the convening of the court martial within which to investigate the legal situation. Rather than rely on the rather dubious delegation of authority made by the Governor in or before 1965, the President of the Republic could have been asked to issue a fresh delegation to convene and/or to appoint to someone less involved in this particular case than the Commander. Alternatively, the President could have been requested to convene the court martial himself and appoint the members under s 25(1) of the RFMF Act. In that way, someone seen to be removed from the investigation would be making those crucial decisions.

[88] We consider that urgent attention be given to reform of court martial law in Fiji. Obviously, the British precedent is valuable and should not be discarded. It has stood the test of time, it is well understood throughout the Commonwealth and there are helpful text books for guidance. However a wholesale adoption of whatever may be appropriate in the current UK

context can cause problems for a small military force such as Fiji's, given that Fiji can have no input into what the UK Parliament enacts.

[89] We do not overlook the seriousness of the charges against all appellants. That is why we shall be granting new trials rather than releasing them. We also note that, at a very late stage of the court martial the, then, counsel for some of the appellants raised allegations of bias and delay, citing constitutional provisions. The Court noted, quite correctly, that the allegations had been brought very late and came to the view that it would not be wise to make any comments on those issues at that stage.

[90] Later, the Court rejected the claim of delay, pointing out, quite rightly, that much of the delay in the hearing had been caused by the other commitments of defence counsel. It rejected the bias allegations without referring to modern authorities some of which had been brought to the court's attention by defence counsel. It claimed that acceptance of counsel's submission would mean the "banishment of courts martial" which had existed "since time immemorial in countries that have an army and have limited jurisdiction." It claimed that there was no appearance of breach of natural justice because defence counsel were given lunch at the Officers' Mess during the Court Martial and, used the toilets there. The Court then proceeded to convict the appellants on the mutiny charge. Those reasons were quite inadequate and failed to address the situation correctly.

[91] It is regrettable that all the jurisdictional and human rights arguments were raised at such a late stage and not fully canvassed until this appeal hearing. Nothing new had given rise to these issues during the trial. Had counsel prepared the case more thoroughly, they would have come to light before the trial started and could have been addressed then. However, this Court cannot ignore a lack of jurisdiction and it can address constitutional points even at the appeal stage, as was done in *Seru and Stephens v. The State* (Appeals AAU0041&0042 of 1999, 16 May 2003).

3. DELAY

[92] In *Seru and Stephens v The State* this Court considered the application of section 29 (3) of the Constitution. The question of delay was taken on appeal by Seru but not by Stephens and the Court gave Stephens leave to amend the Notice of Appeal to cover the delay ground at a very late stage of the appeal.

[93] The Court concluded:

> *"We consider it is open to an appellant to raise the delay issue post trial, certainly in cases where, as here, the point has been taken pretrial, and an appeal against dismissal was lodged and remained extant. To what extent this Court has jurisdiction to entertain such ground post trial in different circumstances must remain to be decided in cases where that issue arises."*

[94] In the present case, the court martial did not consider the pre-trial delay as it should have done. However, it considered the delay which had occurred during the trial and rejected the objection on the basis that much of the delay was caused by defence counsel.

[95] As to what is reasonable or unreasonable delay, the Court in *Seru and Stephens* approved and applied the principles set out in the judgment of Sopinka J in *R v Morin* [1992] 1 SCR 771.

> *"The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in Smith (R v Smith (1989) 52 CCC (3d) 97] '(i)t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?'... While the Court has at times indicated otherwise, it is*

now accepted that the factors to be considered in analysing how long is too long may be listed as follows:

1. *the length of the delay;*
2. *waiver of time periods;*
3. *the reason for the delay, including*
   - *(a) inherent time requirements of the case;*
   - *(b) actions of the accused;*
   - *(c) actions of the crown;*
   - *(d) limits on institutional resources, and*
   - *(e) other reasons for delay; and*
4. *prejudice to accused....*" (12-13)

Sopinka J then said (at 13)

"The judicial process referred to as 'balancing' requires an examination of the length of the delay and its evaluation in the light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11 (b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinised is the time elapsed from the date of the charge to the end of the trial.... The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11 (b) seeks to protect, the explanation for the delay and the prejudice to the accused."

[96] As we have stated, the appellants were charged with mutiny and detained in December 2000. The charges were not called before the court martial until 13th February 2003 and the trial was conducted over a period of about 17 months. The appellants were sentenced on 6th August 2004.

[97] There was a pre-trial delay of over 2 years in laying the charges before the court martial. Counsel for the respondent submitted that during this period, Fiji experienced a most turbulent time, politically and legally, and we accept that, following the coup and the failed mutiny, there was political instability. Any efforts to restore peace and order were of paramount importance.

[98] We also bear in mind that several courts martial arising out of the mutiny had to be conducted. Limited institutional and personnel resources inevitably hindered the ability to proceed effectively and speedily with the prosecution of offenders and the establishment of courts martial.

[99] After the trial commenced, there were numerous adjournments on application by defence counsel over that period of about 17 months. It is not necessary to enumerate all the applications but we consider that the delay in completing the trial, once started, was largely the fault of the appellants and their lawyers.

[100] Having regard to all the competing interests, we do not consider that there was unreasonable delay in all the circumstances and we dismiss this ground of appeal.

4. THE SUMMING UP

[101] All the appellants have challenged the adequacy of the summing-up. In light of our conclusion about the appellants' right to a fair trial, it is not necessary to deal with the suggested inadequacies in relation to the evidence in individual cases. However, it is appropriate that we deal with three particular aspects of the summing-up which call for comment.

[102] The first is the manner in which the Judge Advocate explained the law in relation to the charge of mutiny and the way he dealt with the defences raised by various appellants that they were subject to, and acting under, superior orders and/or that they acted under a mistake of fact.

[103] In relation to the charge of mutiny, the Judge Advocate read out section 31 of the Army Act followed by a lengthy passage from Halsbury's Laws including an equally lengthy footnote.

Following a brief reference to the dictionary definition of mutiny, he read out a further footnote from Halsbury. The direction concluded with a brief mention of the need for mens rea.

[104] Clearly the panel in a court martial, composed as it is of senior military officers, is likely to have the ability to grasp complex concepts but the court cannot assume any panel, any more than it should assessors, can take in the essential elements of an offence from a single reading of the section and passages from a legal textbook.

[105] A similar approach was taken by the Judge Advocate to the defence of obedience to superior orders which was raised by sixteen of the defendants. It is a defence which depends on the nature of the order, the circumstances in which it was given and the knowledge and opinion of the person charged. They will differ with each defendant and the Judge Advocate should have summarised the evidence upon which each of the appellants relied to raise the defence.

[106] It had been dealt with by Mr Valenitabua in his final written submissions to the court. The Judge Advocate simply read out five paragraphs of those submissions without comment. They included references to reports of cases that had been set out in earlier passages but which did not appear in the part he read and thus had no meaning in the context. He then passed to a passage from paragraph 23 of the MML, gave the dictionary definition of 'manifestly' and pointed out:

> *"...it is clear from paragraph 23 above that a manifestly illegal order from military superior should not be carried out. The officer is '...under a legal duty to refuse to carry out the order and if he does carry it out he will be criminally responsible for what he does in doing so'."*

The last passage is simply a quotation from the paragraph he had just read out. Although he pointed out which appellant was relying on that defence, he gave no further direction on the matter.

[107] Nine of the defendants also raised the defence of mistake of fact and the Judge Advocate took a similar course in directing the members of the court on that defence. He first simply read

two paragraphs from the written submissions of one of Mr Valenitabua, followed by a passage from paragraph 8 of Chapter VI of the MML. He then stated:

> *"Paragraph 8[a] of the MML [above] is quite clear and there is no need for me to do any further explanation.*
>
> *Mr Valenitabua also submitted that the accused persons had a mistaken belief that all orders given by superior officers should be followed without question. This he said raises a scenario where the defence of mistake of fact arises.*
>
> *Mr President and members of the court where an accused pleads mistake as a defence, he is suggesting that the mistake had prevented his having mens rea required for the offence with which he is charged.*
>
> *You may find there is no defence of mistake of fact. It is up to you to decide."*

[108] Both those defences required an explanation beyond the mere reading of counsel's submissions and the MML. The judge, in any summing up, should separately analyse the evidence in relation to each accused who relies on the defence. In a case involving so many defendants, it was vital that he should do so. In *Henry Ali v State*, AAU 9 of 2001S, this Court explained the duty of the Judge Advocate in a court martial:

> *"The judge advocate sensibly commenced his direction by reading section 214 of the Penal Code. Having done so, it was his duty to explain any parts of the section 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, as 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 an unclear terminology clear and, if appropriate, relate it to the evidence the jury is to consider.*
>
> *Unfortunately, having read the terms of section 214, the judge advocate went on to quote extensive passages from the published reports of three leading cases ..."*

[109] The second aspect of the summing up which requires comment is the omission of any reference to the requirement that the burden remained on the prosecution to prove, to the criminal standard in the case of each defendant who raised either defence, that it was not true.

[110] The general direction on the burden of proof at the opening of the summing up correctly stated that the burden:

> *"... lies fairly and squarely upon the prosecution to prove the case against each accused person in the dock. This burden remains throughout the trial upon the prosecution and never shifts. There is no obligation on the accused person to prove their innocence."*

[111] Despite stating that the burden 'never shifts', when the Judge Advocate referred specifically to the defences raised, it was necessary to give a clear direction on the burden of proof in relation to those defences. A failure to do so is a serious omission which could lead the members of the court to consider that the defendants had to prove the defence. The judge advocate must have considered that the evidence raised the special defences since he mentioned them in the summing-up. He should have said, in relation to each of the special defences, that once these have been raised by the defence, it was for the prosecution to prove beyond reasonable doubt that the defences did not apply. He should have emphasised that, in relation to any special defences, it is not for the accused to prove it applies, since he has no duty to prove anything.

[112] As has been stated, the Judge Advocate was summing up a case involving a large number of accused men the allegations against whom varied considerably in terms of their individual involvement and the nature and extent of the prosecution evidence relating to each. Some gave sworn evidence, others made unsworn statements and, again, the details of the defences raised differed with each defendant. The trial itself was punctuated by adjournments of varying lengths resulting in a protracted hearing in which the summing up commenced on the 72nd day. In such a case, it is important that the summing up ensures the members of the court have the case of each individual defendant clearly separated from those of the other defendants.

[113] The Judge Advocate went through the evidence of each prosecution witness and then dealt with the evidence or statements of each defendant. He then returned to the prosecution evidence of the interviews under caution of each of the accused and read some of the questions and answers. Whilst he referred to each defendant separately, we would suggest that it would have been more helpful to have separated the accused and explained how the prosecution and the defence evidence related to that individual. As we have said, the Judge Advocate's duty is to sum up in such a way that the members of the court are left with a clear view of the case relating to each individual defendant. We do not think he did so.

[114] We find it difficult to agree with the Judge Advocate's suggestion in the summing up that the evidence must still be fresh in the minds of the panel. Even if he was correct, the purpose of the summing up is to clarify the issues and not simply to repeat the evidence. As we have said, this was particularly important where there were so many defendants and after such a lengthy and fragmented trial as occurred here.

[115] One of the texts read out by the Judge Advocate was a footnote from Halsburys Laws p392 which might have seemed to indicate that, if the court were not satisfied that, whilst a mutiny had taken place, it did not have any of the objects defined in section 31 of the Army Act, there was a possibility of a finding of guilt on some un-named lesser charges. We are unsure why he read out this extract. Normally, if a finding of guilt on a lesser charge is a possibility, his duty is to discuss the components of the lesser charge and point out circumstances when it might be appropriate. The case was run throughout on the basis that it was mutiny and nothing else and, although counsel for the respondent assured us it was not possible to have alternative or lesser charges than mutiny, he did not expand on the submission. In the circumstances, the reference to lesser charges may have been confusing to the members of the court when it was not followed by a discussion as to how lesser charges might apply.

[116] The overall effect of the matters we have raised in relation to the summing up are such that, had we not reached the conclusion we have over the constitutional right to a fair trial, we would have allowed the appeal on this ground by those appellants who advanced it.

SENTENCE

[117] It is clear from section 30 of the RFMF Act that the right of appeal relates to conviction only and not to sentence.

[118] The appellants suggest a right of appeal against sentence can be read from section 28(1)(l) of the Constitution:

> *"28 – (1) Every person charged with an offence has the right:*
> ....
> *(l) if found guilty, to appeal to a higher court."*

[119] This ground raises an important question of whether the Constitution gives a right, denied under the RFMF Act, of appeal against sentence. We note that there are two decisions by a single Judge of the Court of Appeal on the right of appeal against sentence imposed by a court martial. In *Mosese Vakadrakala v The State* (Civil Appeal No. AAU 0020 of 2004S) Scott JA, while accepting that there was no right of appeal against sentence under the RFMF Act, left open the possibility that appeal against sentence may be conferred by other provisions of the law. In *Pauliasi Vakacereitai & Others v Commander Republic of Fiji Military Forces* (Criminal Appeal No. AAU 004 of 2005) Ward P considered the issue and ruled (adopting a literal interpretation) that the right of appeal under section 28 (1) (l) of the Constitution is confined to appeal against conviction only and not against sentence.

[120] Counsel for the Appellants argue that section 28 (1) (l) should be given a wider or a liberal meaning to include an appeal against sentence. These arguments may have some merit and should be given proper consideration in an appropriate case in the future. However, in view of our ruling to quash the convictions and sentences on the basis of contravention of human rights, this issue does not arise for consideration.

Order:

Appeal allowed.

Convictions and sentences set aside and case remitted for new trial by a differently convened and appointed court martial.

Order:

Appeal allowed.

Convictions and sentences set aside and case remitted for new trial by a differently convened and appointed court martial.

WARD, P

BARKER, JA

KAPI, JA

FIJI COURT OF APPEAL

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