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

APPELLATE JURISDICTION

CIVIL APPEAL NO.: ABU0038 OF 2007

BETWEEN:

THE REPUBLIC OF FIJI MILITARY FORCES

Appellant

AND:

EMOSI QICATABUA & OTHERS

Respondents

Counsel: Mr. K. Tuinaosara for the Appellant
Mr. F. Vosarogo & Ms. B. Malimali for the Respondents

Date of Hearing: 15th & 18th February, 2008
Date of Judgment: 12th September, 2008

JUDGMENT OF GOUNDAR, JA

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[1] I have had the advantage of reading in draft the judgments of my sister Scutt JA and my brother Byrne JA. I agree with the conclusion reached by my brother Byrne JA. I give brief reasons for my decision.

[2] Republic of Fiji Military Forces (the appellant), is a disciplinary force established by the Republic of Fiji Military Forces Act (RFMF Act), Cap. 81 and is recognized in the Constitution by Section 114.

[3] The respondents are former military officers who were convicted of criminal offences under the RFMF Act and were sentenced to respective terms of imprisonment. By previous decisions of this Court, the respondents were restricted to appeal against their sentences. The respondents filed a constitutional redress application in the High Court seeking relief under Section 41 of the Constitution. Section 41 provides:

> "(1) If a person considers that any of the provisions of this chapter has been or is likely to be 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, or is likely to be, a contravention in relation to the detained person), then the 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 direction 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."

[4] On 22 May 2007, the High Court allowed the constitutional redress and read the words "and sentence" after the word conviction in Section 30 of the RFMF Act, thus, creating a right of appeal and jurisdiction for the respondents to appeal against their sentences to the Court of Appeal.

[5] The RFMF appeals against the High Court judgment.

[6] It is not contended by the appellant that the respondents should not have a right of appeal against sentence to a higher court. Nor does the appellant contend that the courts cannot read in words into a statute. What the appellant contends is the creation of a right of appeal to the Court of Appeal by reading words into a statute.

[7] Section 30 of the RFMF Act 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."

[8] The High Court found Section 30 to be inconsistent with two particular provisions of the Constitution, namely, Sections 28 (1) (l) and 38.

[9] Section 28 (1) (l) provides:

> Every person charged with an offence has the right:
> if found guilty, to appeal to a higher court."

[10] Section 38 provides:

> Every person has the right to equality before the law.

[11] The High Court's justification for the reading of words in the RFMF Act is constitutional breach of the respondents' rights. Firstly, the High Court held that the respondents had a constitutional right of appeal against sentence pursuant to Section 28 (1) (l) of the Constitution. The High Court found Section 30 of RFMF Act restricted the respondents' right to appeal against sentence. The High Court found that the restriction violated the equality before the law provision of the Constitution because civilians convicted of an offence have a right of appeal

against sentence to a higher court, but not soldiers, primarily because of their profession.

[12] I accept that the Constitution is the supreme law and any legislation that is inconsistent with it is void to the extent of the inconsistency.

[13] However, I am of the view that Section 30 of the RFMF Act is not unconstitutional. In fact, Section 30 is constitutionally valid. Section 30 expressly provides a right of appeal against conviction and conforms with Section 28 (1) (l) of the Constitution.

[14] The High Court held Section 30 was unconstitutional because there was no reference to the word "sentence" in the provision.

[15] The High Court has failed to recognize that there exists a presumption of constitutionality in regard to legislation passed by the Parliament. The presumption of constitutionality is a strong one, and a court must make every effort to find an interpretation of legislation that is consistent with the Constitution.

[16] Section 30 of the RFMF Act does not expressly prevent an appeal against sentence. Just because the word "sentence" is not mentioned in Section 30, does not mean that the section contravenes the Constitution. Section 30 creates a right of appeal against conviction to the Court of Appeal. A soldier who is convicted under the RFMF Act has a right of appeal against conviction to the Court of Appeal like any civilian convicted of an offence in the High Court. To that extent there is a right of appeal and equality before the law for soldiers who are convicted under the RFMF Act.

[17] The issue of whether a soldier convicted of an offence under the RFMF Act has a right of appeal against sentence to the Court of Appeal first arose in the case of

Rogoyawa v State, Criminal Appeal No. AAU0010 of 1997S (General Court Martial). ***Rogoyawa*** was convicted of disobeying a lawful command in a court martial, which is an offence under the RFMF Act. He was discharged from the RFMF. On appeal, this Court upheld the conviction and observed the Court lacked jurisdiction to alter the sentence because there was no right of appeal against sentence.

[18] On the issue of an appeal against sentence from a court martial to the Court of Appeal, in two subsequent unrelated matters, single justices of this Court took a similar view. In ***Mosese Vakadrala v The State***, Criminal Appeal No. AAU70 of 2004, Scott J said "it seems that there is a most unfortunate lacuna in the law"

[19] In ***Private Pauliasi Vakacereitini & Others v Commander RFMF***, Criminal Appeal No. AAU004 of 2005, Ward P (as he was then), in rejecting the constitutional arguments advanced by the appellant said:

> The Court of Appeal is created by statute and its powers cannot be extended beyond the terms of the statutes which grant them. Section 121(1) of the Constitution provides:
>
> "(1) The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of the High Court and has such other jurisdiction as is conferred by law."
>
> That jurisdiction is prescribed by Parliament principally in the Court of Appeal Act but it may also be provided under other acts such as, in this case, the RFMF Act.
>
> It is undeniable that the Court has, beyond those statutory limits, inherent jurisdiction to control its own proceedings and prevent abuse of process: ***Aviagents Ltd v Balstravest Investments Ltd*** [1966] 1 WLR 150. Such inherent jurisdiction is necessary to ensure the Court can do justice to the parties appearing before it. It does not extend to a power to increase its statutory jurisdiction.

[20] I respectfully endorse the views of Ward P to be the correct position in law.

[21] The issue is not just a right of appeal but jurisdictional as well. Appellate jurisdiction is solely created by statute and there is no inherent jurisdiction.

[22] In ***R v Jefferies*** [1969] 1 QB 120, 52 Cr.App.R.654, the English Court of Appeal held that whatever may be the powers of courts exercising a jurisdiction which does not derive from statute, its powers in criminal appeals derived from and were confined to those given by the Court of Appeal Act 1907, and there is no inherent jurisdiction, the appeal itself being the creature of statute.

[23] ***Jefferies*** was applied in ***R v Collins*** [1970] 1 QB 710, 54 Cr.App.R.19. It was held that the Court of Appeal (Criminal Division) having the same powers as its predecessor, the Court of Criminal Appeal, which was created by the CAA 1907, had no statutory jurisdiction to hear an interlocutory appeal and that, since the court was created by statute, it had no powers beyond those conferred on it by Parliament.

[24] ***Jefferies*** was also applied in ***Kini v the State,*** Criminal Appeal No. AAU0041 of 2002S. In ***Kini,*** this Court in considering whether it had jurisdiction to hear an appeal from a judgment of the High Court sitting in its appellate jurisdiction when none of the grounds of appeal raised a question of law as required by section 22 of the Court of Appeal Act said:

> Parliament has prescribed that Section 22(1) of the Court of Appeal Act governs appeals from the High Court in its appellate jurisdiction and that such appeals are to be based on grounds of appeal involving a question of low only.

[25] Similarly in ***Cavubati v The State***, Criminal Appeal No.AAU0022 of 2003S, the Court said:

> "It is fundamental that a right of appeal is a creature of statute and that that right only exists to the extent created by statute. See *Police v S.* [1977] 1 NZLR 1 (CA) *Nuplex Industries Ltd v Auckland Regional Council* [1999] 1 NZLR 181,185. It is not a mere matter of practice or procedure, and neither a superior nor an inferior court, nor both combined can create or take away such a right." (underlining mine)

[26] The Court of Appeal is established by the Court of Appeal Act, Cap. 12, and the Constitution recognizes the Court's jurisdiction. The Constitution allows the Parliament to prescribe the jurisdiction of the Court of Appeal. Section 121(1) of the Constitution states:

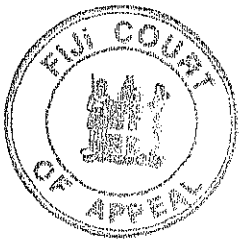
> The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by law.

[27] While I agree that the term "law" generally includes the Constitution, I am unable to agree that "conferred by law" under Section 121(1) of the Constitution included the same Constitution. I think, the framers of the Constitution meant "conferred by law by Parliament". The specific jurisdiction of the Court of Appeal has to be conferred by law by Parliament. I hold that conferring appellate jurisdiction to a court is a legislative function and not judicial. Appellate jurisdiction cannot be created by courts. Only the legislature can create appellate jurisdiction. By reading the words "and sentence" to Section 30 of the RFMF Act, the High Court created jurisdiction for the Court of Appeal and thereby usurped the function of the Parliament. The Constitution does not permit this.

[28] I am satisfied that the High Court erred in allowing the respondents' application for constitutional redress.

[29] I, therefore, make the following orders:

1. Appeal is allowed.
2. Judgment of the High Court is set aside.
3. No order for costs.



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Daniel Goundar
JUDGE OF APPEAL

At Suva
Friday 12th September, 2008

Solicitors:
Directorate Army Legal Services
Legal Aid Commission, Suva for the Respondents