KEPUELI JITOKO v PERMANENT SECRETARY FOR EDUCATION SECRETARY FOR PUBLIC SERVICE COMMISSION

SUPREME COURT — APPELLATE JURISDICTION

VON DOUSSA, KEITH and FRENCH JJ

11 April 2003

[2003] FJSC 9

Criminal law — appeals — Special leave to appeal — whether an acquittal on a charge of rape is also an acquittal that no sexual intercourse took place — whether the charges under the Public Service Commission are substantially the same for the purpose of reg 53 — whether special leave to appeal should be granted — Public Service Commission (Constitution) Regulations 1990 reg 53.

The Petitioner, Kepueli Jitoko was a school teacher and was charged with Rape. He was convicted on three counts in the Magistrate's Court and sentenced to two-and-a-half years' imprisonment. He appealed to the High Court and was successful. Following the successful appeal the Petitioner's solicitor wrote to the Secretary of the Public Service Commission seeking his client's reinstatement. The commission commenced disciplinary proceedings against the Petitioner. The Petitioner was dismissed from the public service. The Petitioner applied to the Supreme Court for special leave to appeal on the ground that whether the acquittal on the charge of rape is also an acquittal that no sexual intercourse took place and whether the charges of sexual intercourse in disciplinary proceedings under the Public Service Commission are the same for the purpose of reg 53.

Held — (1) The Petitioner denied the charges in the Magistrates' Court but presented no specific defence to the charges of rape. The Petitioner did not make an explicit choice between saying that there was intercourse but it was with consent and saying that there was no intercourse at all. He did not put one or other of those possible defences to prosecution witnesses by way of cross examination or in evidence. Lack of consent was not an issue. The charges were substantially different. On their face they were not prevented by reg 53.

(2) The Petitioner did not raise the issue of consent during the criminal trial or the issue of no intercourse at all. He simply remained silent which led to the judgment in the High Court quashing the convictions and discharging the Petitioner. It is not possible to interpret his silence that there was no intercourse at all. Nor can the verdict be interpreted in that way.

(3) The application for judicial review sought on the basis of reg 53 had to fail. The petition did not raise an issue falling within the Supreme Court Act.

Special leave to appeal refused.

Case referred to

Connelly v Director of Public Prosecutions [1964] AC 1254, cited.

V. Tuberi for the Petitioner.

S. Kumar for the Respondents.

Von Doussa, Keith and French JJ. At the end of the Petitioner's oral submissions, the court announced that the application for special leave to appeal was refused. The court would give its reasons later in the day.

The Petitioner, Kepueli Jitoko, was a school teacher from 1979 until 1990. In late 1990 he was charged with raping a student at school. He was convicted on three counts in the Magistrates' Court and sentenced to two and a half

years'imprisonment. He appealed to the High Court. He was successful. On 21 September 1991, Fatiaki J. (as he then was) allowed his appeal, quashed the convictions and discharged the Petitioner. At the end of his comprehensive and careful judgment, the judge said this:

> In the light of the several "irregularities" that occurred in the appellant's trial and having regard to the misdirections of the trial Magistrate in relation to the corroborative evidence the appellant's conviction must be considered unsafe and unsatisfactory.

As that passage indicates, the judge was very concerned both with the process followed by the Magistrate and with the substance of his decision. On process, he records that the Petitioner, who was unrepresented at the trial, unsuccessfully sought an adjournment to enable his counsel to attend; that the Petitioner at the outset of the trial faced a prosecution application, which was granted, to add two further charges that the Petitioner elected to remain silent at the end of the prosecution's case; that the Petitioner was not informed of his right to call witnesses — he claimed that he had witnesses to call; that child witnesses were allowed to give evidence without any recorded inquiry about their age, or their understanding of the nature of an oath or the necessity to speak the truth; the consequential need for corroborating eye witnesses if the children had had to give their evidence not on oath; and that after an overnight adjournment the Magistrate delivered a three paragraph judgment. In respect of each of those steps the judge in the High Court found legal error of one kind or another. On the substance he reviewed what he saw as inadequacies in the evidence of the three girls called as eye witnesses.

Following the successful appeal the Petitioner's solicitor wrote to the Secretary of the Public Service Commission seeking his client's reinstatement.

In June 1992 the commission commenced disciplinary proceedings against the Petitioner. He was charged with engaging in improper conduct in his official capacity which was likely to bring the public service into disrepute and to be prejudicial to the conduct of the public service. The improper conduct was three acts of sexual intercourse, during the course of his duties as a teacher, with a female student (named in the earlier criminal charges) at his school.

The Petitioner was advised by his counsel that the charges were defective, but no steps were taken at that time to challenge them or to reply to the charges. That was so although he had been informed in the letter notifying him of the proceedings that the provisions of the Public Service Commission (Constitution) Regulations 1990 applied and that in accordance with reg 41(2) he was requested to state within 14 days whether he admitted or denied the charges and was advised that he could give such explanations as would enable proper consideration to be given to them. He was also warned that if he failed to state in writing whether he admitted or denied the charges then under reg 41(3) he would be deemed to have admitted them. One or more of the specified penalties might then be imposed by the commission. They ranged from reprimand to dismissal.

The Petitioner was dismissed from the public service. In late 1993 he took the matter up with the Ombudsman and following the receipt of further legal advice he brought the judicial review proceedings, the subject of this petition. The major ground for review, the one remaining before us, was that, because he had been

acquitted in the criminal proceedings of the matter which was the subject of the disciplinary proceedings, those proceedings were prohibited by reg 53 of the 1990 Regulations:

> 53. An officer acquitted of a criminal charge in any court shall not be dismissed or otherwise punished in respect of any charge of which he has been acquitted, but nothing in this regulation shall prevent his being dismissed or otherwise punished in respect of any other charge arising out of his conduct in the matter, unless such other charge is substantially the same as that in respect of which he has been acquitted.

The High Court rejected that argument on the basis that the "discharge" in the High Court was not an "acquittal" in terms of the Regulation. The Court of Appeal disagreed. It held that while technically the High Court decision on the criminal appeal was not a verdict of acquittal in reality it was intended to have that effect and in the interests of justice it should be treated as such for the purposes of the regulation. The appeal nevertheless failed since, in the Court of Appeal's view, the proviso in reg 53 which allowed the appellant to be dismissed or punished in respect of any other charges arising out of his conduct in the matter unless they were substantially the same as the criminal charge applied to allow the disciplinary proceedings:

> The disciplinary charges alleged only improper conduct in his official capacity, in having sexual intercourse with the pupil in the course of his duties. While the acts of intercourse are no doubt the same as those in the rape charges, lack of consent was an essential element in the latter, whereas it was irrelevant to the disciplinary charges. This difference is fundamental in law leading to the conclusion that the charges brought by the respondents are not "substantially the same" as the criminal charges, and that the prohibition in Regulation 53 is inapplicable. Accordingly the grounds of appeal based on that Regulation must be rejected.

The appellant then applied to the Court of Appeal for leave to appeal to the Supreme Court on the following questions:

> 1 *Whether* an acquittal on a charge of rape is also an acquittal that no sexual intercourse took place if the accused denied the charges and that consent was not an issue in the criminal proceedings.
>
> 2 *Whether* the charges of sexual intercourse in disciplinary proceedings under the Public Service Commission (Constitution) — Regulation 1990, which arise out of the same allegations in situations in paragraph (1) aforesaid are substantially the same for the purpose of Regulation 53 of the Regulations aforesaid.

The Court of Appeal refused to grant leave under s 122 (2) of the Constitution which gives that court the power to grant leave on a question "certified by it to be of significant public importance." The court explained that the general verdicts in fact of acquittal, resulting from the discharge ordered by Fatiaki J, established that the Applicant was not guilty of Rape, that is that they established that not all elements of that crime had been proved. But the verdicts did not decide that any specific elements of that crime had not been proved and in particular they did not establish that sexual intercourse with the complainant had not taken place.

The Petitioner then applied to this court for special leave to appeal. In terms of s 7(3) of the Supreme Court Act 1998 leave is to be granted only if on a civil matter only if the case raises:

> (a) a far-reaching question of law;
>
> (b) a matter of great general or public importance;

(c) a matter that is otherwise of substantial general interest to the administration of civil justice.

In the hearing before us, the Petitioner's counsel, Mr Tuberi, elaborated the arguments already made in the courts below. He emphasised that the principle against double jeopardy is of great public importance as reflected in s 28 (1)(k) of the Constitution (Amendment) Act 1997:

> Every person charged with an offence has the right;…
>
> (k) not to be tried again for an offence of which he or she has previously been convicted of acquitted;

His argument is that the constitutional protection does not distinguish between criminal and civil offences and that it applies to this case. Mr Tuberi also referred us to the decision of the House of Lords in *Connelly v Director of Public Prosecutions* [1964] AC 1254.

We do not accept the argument based on s 28 (1)(k). Its terms and context are clearly directed to the trial of criminal offences. By contrast to the punitive purposes of such trials, disciplinary proceedings in the public service have an essentially protective purpose. Some of the provisions of s 29, access to courts or tribunals, may be applicable to such disciplinary proceedings but we need not go into that here.

We return to the argument based on reg 53 on which Mr Tuberi mainly relied. The argument has to be related to and tested against the facts of this case. While the Petitioner denied the charges in the Magistrates' Court he presented no specific defence to the charges of rape: "unlawful carnal knowledge of a woman or girl, without her consent": s 149 of the Penal Code. The Petitioner did not make an explicit choice between saying that there was intercourse but that it was with consent and saying that there was no intercourse at all. He did not put one or other of those possible defences to prosecution witnesses by way of cross-examination or in evidence. He did not indeed give evidence himself or call any witnesses and he cross-examined only one state witness, but without indicating what his defence was. By contrast the disciplinary proceedings alleged sexual intercourse by a teacher with a student at the school. Lack of consent was not an issue. The charges were substantially different. On their face they were not prevented by reg 53.

It is true, as counsel says, that at the criminal trial the Petitioner did not raise the issue of consent — a position which would likely lead to the inference that intercourse had in fact occurred. Nor however did he raise the issue of no intercourse at all. He simply remained silent. That general silence is understandable given the procedural irregularities at the trial which led to the judgment in the High Court quashing the convictions and discharging the Petitioner. But it is not possible to interpret his silence as meaning that there was no intercourse at all. Nor can the verdict be interpreted in that way. So far as it is concerned, we recall the range of reasons, both of process and of substance, given by Fatiaki J. for allowing the appeal against the rape convictions. The Petitioner, even with the benefit of that High Court decision, was required to raise that defence of no intercourse in response to the disciplinary charges. That was particularly so because, as he was advised, of the adverse inference that was to be drawn against him in terms of reg 41(3) if he failed to respond.

We should add, although it is not necessary to do so, that we should not be taken to agree with the Court of Appeal's characterisation of the initial High Court decision as an acquittal for the purpose of reg 53.

We accordingly concluded that the application for judicial review sought on the basis of reg 53 had to fail. The petition did not raise an issue falling within s 7(3) of the Supreme Court Act. Special leave to appeal was accordingly refused.

Special leave to appeal refused.