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

CRIMINAL APPEAL NO. AAU0010 OF 1997S
(General Court Martial)

BETWEEN:

VALUONE ROGOYAWA

Appellant

AND:

THE STATE

Respondent

Coram:

The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing:

Tuesday, 17 November 1998, Suva

Counsel:

Mr. Tevita Fa for the Appellant
Mr. J. Naigulevu for the Respondent

Date of Judgment: Friday, 27 November 1998

JUDGMENT OF THE COURT

This appeal is against conviction of the appellant by a General Court Martial of disobeying a lawful command, contrary to section 34 of the Army Act 1955 (U.K.) ("the Army Act"), applied to Fiji by section 23 of the Republic of Fiji Military Forces Act (Cap. 81) ("the RFMF Act"). The applicant is also seeking to appeal against the sentence of discharge from the Republic of Fiji Military Forces ("the RFMF"). However, as Mr. Fa conceded at the hearing, the Act does not give a person convicted by a court martial the right to appeal against sentence; nor does it confer jurisdiction on this Court to alter the sentence except in the special circumstances provided for in section 33 of the RFMF Act. For the reasons set out below we have concluded that those special circumstances do not exist in the present case.

The grounds of appeal are:

- “1. The General Court Martial erred in law and in fact when it construed the instruction of Warrant Officer J. Tawake to the Appellant that the Appellant participated (sic) in the “meke taki ni yaqona” in the “veigaravi vakaturaga” on the occasion of the state visit to Fiji of Her Royal Highness Princess of Thailand as a lawful command falling within section 34 of the Army Act, 1955.

2. That the General Court Martial erred in law and in fact when it failed to see that the Order of Warrant Officer J. Tawake which the Appellant disobeyed was unconstitutional and therefore null, void and of no effect.

3. That the sentence of dismissal imposed by the General Court Martial on the Appellant dismissing herein (sic) from membership of the Fiji Military Force was in the circumstances too severe and unwarranted.”

At all material times section 34 of the Army Act read:

“34. Any person subject to military law who, whether wilfully or through neglect, disobeys any lawful command (by whatever means communicated to him) shall, on conviction by court martial, be liable to imprisonment or any less punishment provided by this Act.”

Discharge or dismissal from the RFMF is, by reasons of the provisions of the present section 71 of the Army Act (at the time when that Act was applied to Fiji section 72(2)

and (3)) a less punishment than imprisonment.

Section 205 of the Army Act includes among the persons subject to military law "any warrant officer, non-commissioned officer and soldier of the regular forces".

The appellant was charged as a soldier of the Regular Force of the RFMF with the rank of Private with an offence against section 34 of the Army Act, namely that on 16 April 1996 he disobeyed an order given by the Regimental Sergeant Major ("the RSM") of his battalion "to participate in a battalion activity, namely Veigaravi Vakavanua rehearsals". At his trial he elected not to be represented by counsel or an officer of the RFMF. He pleaded not guilty.

Evidence was given by a number of members of the RFMF and a senior officer of the Ministry of Foreign Affairs. Their evidence was that the Ministry requested the RFMF to provide guards of honour for the arrival and departure from Fiji of HRH Princess Siridhon of Thailand on the occasion of a state visit by her to Fiji, and also to provide personnel to perform a Veigaravi Vakavanua. There was documentary evidence that that was a traditional Fijian ceremony of welcome and that it was to be performed as a major part of the State's official ceremonies of welcome to the Princess.

The RSM gave evidence that, after rehearsal of the guard of honour, all the members of the battalion were assembled in its lecture room. He said that he selected some of them to take part in the Mata ni Meke for the Veiqaravi Vakavanua, that the appellant was one of those selected and that he instructed the appellant to stand up and take part in a rehearsal for

it. He said that the appellant remained seated, said nothing but shook his head, and that he asked the appellant a second time to stand up but the appellant did not do so. He then ordered that the appellant should be detained for disobeying his order; the appellant was taken away and placed in detention. Cross-examined by the appellant, the RSM agreed that he did not ask the appellant why he was disobeying the order but said that it was not his duty to do so. He said that, if the appellant had stood up and said that he could not take part in the ceremony because of his religious beliefs, he would have accepted that but the appellant had not said anything and had merely shaken his head. He said that he was not aware that the appellant had changed his religious denomination. There was evidence that, when the appellant enlisted in the RFMF, he was a Methodist.

Other witnesses present at the scene gave evidence corroborating that of the RSM. The appellant did not give evidence or call any witness. There was, therefore, uncontradicted evidence of several witnesses that the incident occurred as described by the RSM, that is to say that the appellant disobeyed the RSM's order and gave no reason for doing so. Although the appellant did not give evidence, he answered a number of questions put to him by the Judge Advocate while the RSM was in the witness box. He said that after he had been released from detention the RSM asked him "to explain biblical reference in regards to [his] not partaking in the meke" and that he was asked by Captain Mara why he had refused to do so and that he had told Captain Mara his reason. He also said that it was his "understanding that the law of the land allows individuals privileges concerning his rights and choice of religion as superior to the military law". In answer to a question put to him by a member of the Court Martial he said that he did not know that he was disobeying a lawful command.

At the hearing of the appeal Mr. Fa informed the court that he was abandoning ground 2 and that, in respect of ground 1, he did not wish to contend that the order to stand up and take part in the rehearsal was unlawful. He said that he wished, in effect, to amend ground 1 sufficiently to conform with an argument which he was advancing that the appellant was not guilty of the offence as charged but only of an offence of disobeying a lawful command to stand up. We permitted him to present that argument and agreed to treat ground 1 as though it were appropriately amended. Mr. Fa's argument was that the order given to take part in the rehearsal of the meke did not require immediate compliance. He referred us to a note in the Manual of Military Law which points out that a person who states a refusal to do an act which he is ordered to do does not disobey the order until the time for his doing the act has arrived and he fails to do it.

In the result, the only issue before us is whether the evidence presented at the Court Martial was sufficient to establish that the appellant was ordered to take part in the rehearsal of the meke forthwith. Both counsel referred us to various parts of the oral evidence given by the witnesses.

The RSM gave evidence that his battalion conducted rehearsals for both the guard of honour and the traditional Fijian ceremony of welcome. He said that, following rehearsal of the guard of honour, all the members of the battalion assembled in its lecture room and that he then selected those who were to be part of the meke. They were to come forward to be part of it. It was at that stage that he gave his order to the appellant to stand up and be part of the meke. The RSM did not state expressly that the rehearsal of the meke then took place but when another

witness, Cpl. Lalibuli, gave evidence the appellant asked him:


“Where were you standing when Warrant Officer Tawake gave me the command to take part in the Meketaki yaqona?”

Cpl. Lalibuli replied:

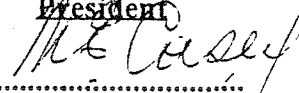
“I was at the main door of the Lecture Room where we were conducting the rehearsal.” That evidence was not contradicted by the appellant; nor was it inconsistent with the evidence of the other witnesses. There was, therefore, cogent evidence sufficient to establish that, when the RSM ordered the appellant to stand up and be part of the Mata ni Meke, he was requiring him to come forward and to take part in a rehearsal of the ceremony forthwith.

Accordingly we cannot accept Mr. Fa’s contention that, after the appellant wilfully refused to stand up, there was still time for him to comply with the order to take part in the rehearsal. The evidence established a requirement of immediate compliance with that order.

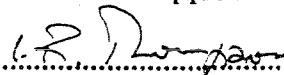
The appeal against conviction must therefore, be dismissed. That being so, the provisions of section 33 of the RFMF Act are not applicable, so that this Court has no power to alter the sentence.



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Sir Moti Tikaram
President



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Sir Maurice Casey
Justice of Appeal



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Justice I.R. Thompson
Justice of Appeal

Solicitors:

Messrs. Tevita Fa and Associates, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent