

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

CRIMINAL APPEAL NO. AAU0061 OF1999S
(High Court Criminal Action No. HAA 018 of 1998S)

BETWEEN:

GRAHAME BRUCE SOUTHWICK
Applicant

AND:

THE STATE
Respondent

Coram: Reddy, P
Kapi, JA
Sheppard, JA

Hearing: Tuesday 18th February, 2003, Suva

Counsel: Mr. Paul Greaney and Ms. Shayne Sorby for the Applicant
Mr. G.H. Allan for the Respondent

Date of Judgment:

SUPPLEMENTARY JUDGMENT OF THE COURT

Judgment in the matter was delivered by the Court on 28th February last. The effect of the Court's order was to grant to Mr Southwick leave to appeal to the Supreme Court to enable him to have dealt with the question whether s.158(2) of the criminal code was in part inconsistent with the Constitution of Fiji.

After our judgment was delivered, Counsel for the Director of Public Prosecutions raised the question whether we had dealt with an application for leave to appeal to the Supreme Court made by the Director. That application was heard by us at the same time as Mr Southwick's application. The application was for leave to appeal to the Supreme Court on the questions whether any appeal lay from the primary judge's decision to refuse Mr Southwick his costs of the proceedings. The circumstances under which Mr Southwick's trial came to an end are set out in the judgment of the Court of Appeal and, to a degree, in our own judgment.

The Director's submission was that no appeal lay to the Court of Appeal because s. of the Court of Appeal Act (Cap.?) provided only for appeals against convictions or acquittals. Here there was no conviction or acquittal so that the legislation did not deal with the matter.

The reasons why we considered that we should not grant the Director's application were discussed with Counsel during the oral argument before us. The only order made by the Court of Appeal was to dismiss the appeal to it so that the trial Judge's order refusing costs remained in place. [This statement needs to be checked.]

Appeals lie against orders; not reasons. The Director was content with the Court of Appeals order, so there was no order against which he could appeal. When the matter comes to the

Supreme Court, it will be a matter for it to decide whether the

Director should be given leave to file a notice to the effect that he wishes to uphold the order appealed from not only for the reasons given by the Court of Appeal, but also because the Court of Appeal lacked jurisdictions to deal with the appeal at all. That is not a matter that we have jurisdictions or power to deal with.

On reflection, there are two other matters we should mention. These have some relevance to Mr Southwick's submissions. The first of these was whether the Court of Appeal was correct in concluding that the onus of establishing at least one of the matters specified in the proviso to s.158(2) of the Criminal Code lay on Mr Southwick or whether it was for the Director to show that neither lay of the provision applied. One of the difficulties Mr Southwick may share in pursuing this matter is that a transcript were shown suggests that Counsel for Mr Southwick yielded the power in the course of his submissions to the Court of Appeal.

The second question was whether if the proviso to s.158 (2) was inconsistent with the Constitution, the Court should sever the proviso from the rest of the subsection or whether the outcome would be the invalidity of the whole subsection. If that proved to be the case, there would be no application statutory provision dealing with costs in criminal matters. That would mean a return to the common law, a result which may not put Mr Southwick in any better position than he is now. On the other hand, the removal of the proviso only from the subsection would have the effect of changing the whole sense of the provision.

We, of course, express no view on any of these matters. They are matters for the Supreme Court. Whether they will be permitted to be raised will be a matter for that Court. It is not a matter for us.

For the above reasons we did not deal with any of the matters which were before us other than Mr Southwick's application for leave to appeal.

We make no further order in the proceedings.

Reddy, P
Kapi, JA
Sheppard, JA

Solicitors:

Howards, Suva for the Applicant

Office of the Director of Public Prosecutions, Suva for the Respondents