0000037

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

MISC.APPEAL N0. 3 OF 2006
[High Court Action N0.HBC.191 of 2003]

BETWEEN:

FIJI MILITARY FORCES AND THE COMMANDER OF THE FIJI MILITARY FORCES

Appellant

A N D:

THE FIJI POLICE FORCE AND THE COMMISSIONER OF POLICE

TIMOCI SILATOLU AND GEORGE SPEIGHT

ATTORNEY-GENERAL OF FIJI

THE REPUBLIC OF FIJI

NAIRESH KUMAR f/n Jai Ram

Respondents

A. Rokomokoti for applicant
S. Banuve for First, third and fourth respondent
S. Inoke for Silatolu
M. Prakash for fifth respondent
G. Speight in person

**Hearing:** 28 March 2006

**Ruling:** 31 March 2006

# RULING

[1] The fifth respondent was the plaintiff in a High Court action brought against the present applicant and the remaining respondents.

[2] This is an application for leave to appeal an interlocutory ruling of the trial judge in respect of an application for discovery of the findings of a Board of Inquiry set up by the applicants and of the record of evidence taken in the Inquiry.

[3] The background is set out in the learned judge's ruling:

> "The third defendant, Timoci Silatolu together with George Speight and others participated in the takeover of Parliament during the May 2000 Coup. They are now co-defendants with the Commander of the Fiji Military Forces, the Commissioner of the Fiji Police Force, the Attorney General of Fiji and the Republic in proceedings brought by those kept hostage or harmed.
>
> It is alleged in the proceedings that Mr Silatolu acted as trainer and leader of a group of soldiers who assisted in the coup and directed the hostage taking. It is pleaded that he did so with the co-operation of the Army.
>
> The Army's defence is a denial that the coup and hostage taking was carried out by soldiers. Rather it is pleaded that men acting outside the terms of their military engagement and lawful duties were responsible.
>
> For the purposes of this ruling the salient issues may be summarised as who trained the soldiers, who ordered the soldiers to take over Parliament and who led them.

The trial proper will commence in May. This is an application by Mr Silatolu one of the third defendants seeking discovery of the findings and records of a certain Board of Inquiry set up by the Fiji Military Forces and conducted between the 21st of August 2000 and the 24th of October 2000.

The Board of Inquiry had as its dominant purpose a robust investigation into the involvement of the Army's first Fiji Meridian Squadron in the coup."

[4] The learned judge proceeded to a consideration of Order 24 and continued:

"The pleadings in this action are not closed. In that sense the application by the third defendant against the first defendants is a little premature. However, this judgment is not going to deal with the substantive application merely a preliminary point of whether or not I should privately inspect the subject documents. I am satisfied that the plaintiff's case against the third defendant is sufficiently certain and defendants responses sufficiently clear to enable me to deal with this matter. It is accordingly convenient and timely that I dispose of this preliminary issue now. ...

I am satisfied that the extent of Order 24 is wide enough to cover this application as between defendants even in circumstances where indemnity as between them has not been sought by way of a cross party or third party notice procedure.

The question which I am called upon to answer is whether or not I should be free to inspect the subject documents in the course of the substantive discovery application. ...

The Army by its Minister have claimed public interest immunity as the documents if produced could effect national security."

[5] Following a detailed and closely reasoned judgment in which he reviewed the authorities and questioned the value of some of the evidence produced in support of the claim for immunity, he concluded:

> "These objections when taken with my earlier comments based on the criticism in Sankey *[Sankey v Whitlam and ors [1978] 53 ALJR 11]* lead me inevitably to the conclusion that the claim for public interest immunity and State privilege cannot be made out without my private review of these documents.
>
> In this case I am satisfied that the documents are relevant. The only issue being whether or not the documents should be produced. I have doubts about the national security claims made in respect of both the class and contents of these documents and I feel it is proper for me to call for their production. I am satisfied that the only way in which the court can properly reach a just decision on the matter is by a private inspection of them."

[6] He then ordered a procedure by which the security of the contents should be ensured whilst a certified copy would be made available to him for the purposes of his perusal - and return if he ruled they were not to be produced.

[7] The applicant relies on the provisions of O24 r15:

> "15. The foregoing provisions of this Order shall be without prejudice to any rule of law which authorises or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest."

[8] A number of affidavits were filed in the High Court to one of which was annexed the Certificate of the Minister of Home Affairs. As it is a certificate, it was not a sworn

document; a point to which the learned judge attached some weight on the authority of *Sankey v Whitlam* [above at p23].

[9] The Minister states that he has read and considered the report of the Board of Inquiry and gives his reasons for claiming immunity. They include:

> "4. The contents of the document would in my view be injurious to the public interest if ordered to be disclosed or to be produced for inspection or to be adduced in evidence. I therefore object to the production of the document.
>
> 5. The document contains very important information relating to matters that affect the very core and fabric of the military institution. The emphasis of the document is on certain organisational structure and framework of the military institution, the strengths and weaknesses of this structure and recommendations to address the weaknesses. ...
>
> 7. Furthermore, the Board has recorded its finding and formulated opinions and recommendations that affect the RFMF. A significant portion of theses findings and opinions attempt to address current and future issues that could seriously affect national security and stability if disclosed. ...
>
> 9. Furthermore if information contained therein falls into the hands of adversaries it could prove detrimental to the armed forces.
>
> 10. The nation of Fiji has just emerged from very trying and difficult times where principles of democracy and freedom were violated and the RFMF was faced with a seriously challenging task of trying to steer the country back to normality.

> 11. The 19 May 2000 incident of the takeover of Parliament is one incident that affected the stability and internal security of the whole of Fiji and the information contained in the document is one that could again seriously initiate threats to stability and internal security of the country if disclosed."

[10] The applicants point out that, although the learned judge referred in his ruling to a number of overseas cases, he did not make reference to the unreported Court of Appeal case of *Public Service Commission v Manunivavalagi Korovulavula*; [1990] Civ App 11 of 1989; 23 March 1990. Counsel suggests that case is the principal authority for the courts in Fiji especially as it postdates most of the authorities cited in the ruling in the lower court. I do not regard that as a serious omission. The Court in *Korovulavula's case* relied heavily on the dicta in both the Court of Appeal and the House of Lords in *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, one of a number of cases the learned judge also took into account in the present case.

[11] In the *Korovulavula case*, this Court concluded that it was for the party seeking production to satisfy the court that the document would either advance his own case or damage that of his adversary. In the present case the challenge is between co-defendants but the same principle applies. The Court ruled that the onus in on the party seeking production to satisfy the court that the production of the document was for the due administration of justice necessary given the whole circumstances of the case. The Court adopted the words of Lord Fraser in the *Air Canada case*:

> "In my opinion inspection ought not to be ordered unless the court is persuaded that inspection is likely to satisfy it that it ought to take the further step of ordering production. (at 434) ... It should inspect documents only where it has definite grounds for expecting

> to find material of real importance to the party seeking disclosure.(at 436)"

[12] Whilst I do not challenge that proposition, I note, with the greatest respect to my learned predecessors, that the approach in that case was narrowly based and the Court appears not to have considered it necessary to take into account a number of other cases. Leave to appeal had been granted in that case partly because of a stated need for an authoritative decision of the Court of Appeal and there is still need for such a decision especially one which considers authority from other jurisdictions more comprehensively – the approach taken by the learned judge in the present case. It is perhaps relevant to mention that the learned judge appears to have accepted that Mr Silatolu had discharged the burden although he does not specify the evidence on which he did so.

[13] I must bear in mind that this is an application for leave to appeal from an interlocutory decision. As counsel for Mr Silatolu points out, this Court has always been reluctant to grant leave to appeal in such cases. Only a few months ago in *Michael Kelly and Another v Michael Harvey*; Civ App ABU 44 of 2005, 22 December 2005, it was again pointed out that leave will only be granted to appeal an interlocutory decision in the most exceptional circumstances:

> "Such circumstances would be where it is clear there had been an incorrect application of the law or where substantial injustice will result from the judgment or order itself. The test is not just whether the order is wrong but whether its operation would effect a substantial injustice."

[14] The learned judge's order in the present case was carefully and sensibly expressed in terms aimed at avoiding any risk of unnecessary or undesirable disclosure. However, if the Minister is correct in the grounds of his objection, even the confidential disclosure to the judge may risk some of the harm to security referred to in his certificate. The reason the judge wishes to see the document is the better

to be able to assess the accuracy of the claim of national security because he has doubts about that claim. He does not specify the reasons for his doubt beyond the lack of specific evidence that the deponents had read the Board's report. However, if the minister's claim is correct, refusal of leave at this stage will result in a risk of the harm he fears.

[15] It is clearly established that the courts have a right albeit a limited one, to override the State's objections in such cases; *Robinson v State of South Australia (No 2)* [1931] AC 704; *Sankey v Whitlam and others* [above]; *Conway v Rimmer* [1968] AC 910. However, even in such circumstances, the court should be careful not to act too precipitately as was pointed out in *Conway v Rimmer* and accepted in *Burma Oil Co v Bank of England* [1980] AC 1090, where Lord Keith, at 1136, having acknowledged the courts' right explained:

> "Apprehension has on occasion been expressed lest the power of inspection might be irresponsibly exercised, perhaps by one of the lower courts. As a safeguard against this, an appeal should always be available as expressed in *Conway v Rimmer*."

Similar views are expressed by Lord Scarman:

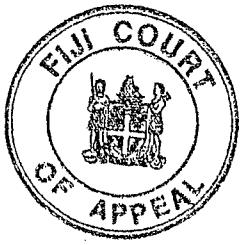
> "Something was made in argument about the risk to the nation or the public service of an error at first instance. Injury to the public interest – perhaps even very serious injury – could be done by production of documents which should be immune from disclosure before an appellate court could correct the error. ... I would respectfully agree with Lord Reid's observations on the point in *Conway v Rimmer*, '...it is important that the minister should have a right to appeal before the document is produced'." (p 1146)

[16] I have only to decide whether there should be leave to appeal at this stage. I am satisfied there are a number of arguable grounds and that it is in the public interest to allow the applicant to appeal before the document is inspected.

[17] I am only too conscious that in the middle of this conflict between co-defendants is the fifth respondent/plaintiff who, no doubt, simply wants to get on with his action. He is not responsible for the delay but this grant of leave will result in the May date for the hearing in the High Court having to be vacated. Even if the Court arranged a special early sitting to hear this appeal, it is unlikely that the May fixture would be saved.

[18] I order that this appeal shall be heard in the July sitting of this Court and the parties must adhere strictly to the timetable set out in Practice Direction No 1/04.

[19] The application for leave to appeal is granted. There will be no order for costs.




**[GORDON WARD]**
**President**
**FIJI COURT OF APPEAL**

**31ST MARCH, 2006**