METUISELA RAILUMU and 5 Ors v COMMANDER, REPUBLIC OF FIJI MILITARY FORCES and 2 Ors

HIGH COURT — CIVIL JURISDICTION

SCOTT J

17 May 2002

[2002] FJHC 51

Practice and procedure — writs — writ of habeas corpus — detention includes "close arrest" by the military — Bail Act 2000 ss 2(1)(f), 13(1), 17, 18, 18(1)(c), 19, 19(2)(c), 20, 20(3) — Constitution ss 3(a), 23 27(1)(e), 41(1), 120(2) — High Court (Constitutional Redress) Rules 1998 — Rules of Procedure (Army) 1972 r 6.

Applicants, who have been held under close arrest following a mutiny in which nine people died and many more wounded, sought an application for a writ of habeas corpus. They alleged that the High Court does not have jurisdiction to supervise the proceedings of a Court Martial and that detention includes "close arrest" by the military.

Held — The detention was lawful since Applicants if released on bail could be dangerous and would be most unwise.

Applications disallowed.

No cases referred to.

S. R. Valenitabua for the Applicants

A. Mohammed for the Respondents

Decision

Scott J. This is an application for a writ of habeas corpus by six members of the Republic of Fiji Military Forces who have been held under close arrest since about 4 November 2000 following the mutiny at the Queen Elizabeth Barracks on 2 November 2000 in which nine persons died and many more were wounded. The 1st Applicant filed an affidavit in support of all Applicants on 27 March 2002. This affidavit was answered by three affidavits filed by Major Sakiasi Ditoka, Major Mason Smith and Lt Col Jone Baledrokadroka on 12 April 2002. The 1st Applicant replied with two further affidavits both filed on 29 April. Both counsels also filed helpful and comprehensive written submissions for which I am grateful. Colonel Mohammed filed on 12 April and Mr Valenitabua on 6 May.

By virtue of ss 2(1)(f) and 13(1) of the Bail Act 2000 this application is to be determined according to the provision of ss 17–20 of that Act.

A number of preliminary matters were raised by Col Mohammed. First he suggested that for the detailed reasons set out in his written submission the High Court does not have jurisdiction to supervise the proceedings of a Court Martial. He also suggested that the jurisdiction accorded to the High Court by ss 41(1) and 120(2) of the Constitution do not enable persons under close arrest to challenge their detention as provided by s 27(1)(e) of the Constitution.

Although it is clear that the Applicants did not make their application in conformity with the High Court (Constitutional Redress) Rules 1998 I indicated that I did not think technical objections should prevent me from hearing an application under s 27. Furthermore, I was satisfied that by applying s 3(a) of the

Constitution the term "detained" should be taken to include "close arrest" and that accordingly I had jurisdiction to entertain the applications.

Mr Valenitabua told me that the Applicants have been in detention for over 16 months. He suggested that they have not been charged and that a Court Martial has not yet been convened. Citing specific provisions of the RFMF Act (Cap 81), the UK Army Act 1955, the Rules of Procedure (Army) 1972 and the UK Manual of Military Law 1972 Mr Valenitabua suggested that breaches of these of provisions rendered the continuing detention of the Applicants unlawful. He also argued that the Applicants had been detained for too long and had suffered too much. Each of the Applicants was prepared to abide by detailed bail conditions which would ensure their attendance at the Court Martial.

Having considered the matters referred to me by Mr Valenitabua and taking into consideration especially the exhibits to Major Ditoka's affidavit I find that the Applicants have indeed been charged but there is little doubt that a Court Martial has not yet been convened and that r 6 of the Rules of Procedure (Army) 1972 has been breached. Mr Mohammed told me that this provision had been overlooked but was now being remedied. In any event I do not find that breach of the provision which I find to be procedural renders the detention unlawful.

Both s 23 of the Constitution and s 3(1) of the Bail Act start from the premise that a person is entitled not to be detained but to be released on bail unless it is shown not to be in the interests of justice to take that course.

In considering an application for bail the specific matters to be taken into account are set out in s 18 of the Bail Act.

The first two matters, the likelihood of the Applicants appearing at the Court Martial and their interests were not addressed in any detail but I have no serious reason to doubt that they would in due course appear at their Court Martial and that it would be in balance in their interests to be released.

The first matter (s 8(1)(c)) the public interest and the protection of the community are the criteria which I am satisfied must be determinative of this application.

As will be seen from the affidavits and submissions the Army's case is that in all the circumstances it would be too dangerous to release these Applicants who it is hoped will be able to appear before their own Court Martial in late July or August this year.

While Mr Valenitabu did not dispute that the Applicants are highly trained former members of the now disbanded CRW Unit and that weapons are still at large he forcefully submitted that the Applicants now represent no danger to the public and have no other desire but to return to their families and a peaceful and law-abiding way of life. They strongly denied knowing anything about any missing weapons.

The charge of armed mutiny is exceptionally serious. Although not capital the likelihood is that if these men are convicted they will face long prison terms.

While it is a cause for concern that the Applicants have been detained for so long I accept that the Army has done all it could reasonably do in very difficult circumstances to bring them to trial at the earliest date. Against counsels of perfection the facts must prevail.

Under the provisions of s 19(2)(c) of the Bail Act I record that I have had regard to each of the considerations set out therein. None of the considerations listed is particularly pertinent to the post–2000 circumstances in which Fiji now finds itself.

In my opinion I must balance the understandable wish of these Applicants to be released now on bail to await their trial in 2–4 months against the risk to the safety, stability and wellbeing of our country. Put this way I am entirely satisfied that to release the Applicants on bail could be dangerous and would be most unwise. Accordingly the applications are refused.

For the purpose of complying with s 20(3) of the Bail Act I advise the Applicants that they have a right to have this refusal of their application reviewed by the Court of Appeal and that they are entitled to apply for Legal Aid for the purposes of that review.

A typed copy of this ruling will be available for collection from my chambers at midday Monday next 20 May 2002.

Applications disallowed.