METUISELA RAILUMU and Ors v COMMANDER REPUBLIC OF FIJI MILITARY FORCES and 2 Ors (CBV0008 of 2003S)

SUPREME COURT — APPELLATE JURISDICTION

FATIAKI P, FRENCH and KEITH JJ

10, 17 September 2004

Practice and procedure — appeal — whether or not to grant special leave to appeal against conviction — whether appeal allowed — Constitution of the Republic of Fiji 1970 ss 4, 5, 6, 7, 18(3), 20(2), 28(1)(a), 29(3), 105(3)(f), 122 — Constitution of the Republic of Fiji 1990 ss 86, 168 — Constitution of the Republic of Fiji 1997 ss 112(1), 112(2), 112(3)(b), 112(4), 122, 195(2)(e), 195(3) — Army Act 1995 ss 2, 23, 70, 70(1) — Court of Appeal (Amendment) Rules 1999 O 17 rr 2, 17 — Court of Appeal Act (Cap 12) s 3(3), 12, 20, 21, 35(1)(b), 35(3), 39, O 16 rr 17, 17(3), 18 — Fiji Independence Order 1970 s 5 — Royal Fiji Military Forces Act ss 3(1), 23, 23(2), 127(4)(f), 149(1) — Rules of Procedure (Army) 1972 r 36(1) — Supreme Court Act 1998 s 7(3).

On 24 December 2002, eight soldiers (the Petitioners) who were members of the Republic of Fiji Military Forces (RFMF) were arrested and charged under military law with the murder of another soldier. They were detained pending a court martial. Prior to this, they were already charged with other offences that arose from the events that occurred in May and November 2000 for which courts martial was pending. These events relate to their alleged participation in the uprising and attempt to overthrow the elected government. On the same day, the High Court ordered their release because of delay in their trials on the pending charges but subject to a condition that they surrender to the court martial when it convenes.

The Petitioners challenged the validity of their detention under the murder charges filed on the same day they were released by the High Court claiming they could not be tried under military law on the charges of murder and sought habeas corpus. The High Court refused the habeas corpus on the ground that the military law was applicable to a murder of another soldier.

The Petitioners appealed to the Court of Appeal against the decision of the High Court but the said appeal was later deemed abandoned due to their failure to comply with the procedural requirements under the Rules of the Court of Appeal. They sought an extension of time within which to appeal but were refused by a single judge of the Court of Appeal. They then sought special leave to appeal against that decision.

The issues were: (a) whether the judgment was a final judgment of the Court of Appeal; (b) whether an extension of time was necessary; (c) whether the criteria for the grant of special leave are satisfied; (d) whether the court should exercise its discretion to grant special leave; (e) whether the appeal should be allowed.

Held — (1) What s 122 of the Constitution of the Republic of Fiji contemplated was any judgment of the Court of Appeal which finally disposed of a proceeding in that court. Thus, in this case, the refusal of the Court of Appeal for an extension of time to bring an appeal was a final judgment of the Court of Appeal which may be the subject of a petition for special leave, with a requirement that the criteria for the grant of such leave was satisfied.

(2) The second notice of appeal was filed less than 42 days from the time the first notice of appeal was abandoned. According to the ordinary meaning of r 17 of the Court of Appeal (Amendment) Rules 1999, there was 42 days to run within which a third notice of appeal could be filed. However, the parties and the Court of Appeal believed that the rule did not permit a third notice of appeal without filing an extension of time. Thus, on this assumption, there was a need for an extension of time to file a third notice of appeal.

(3) In the case of *Native Land Trust Board v Narawa*, s 7(3) of the Supreme Court Act 1998 established the necessary conditions for the grant of special leave and if those conditions are met, discretion remains as to whether or not to make a grant except for a refusal to extend time to appeal in which special leave may be granted. It is basically a discretionary judgment which applies settled criteria and does not give rise to far-reaching questions of law, matters of great general or public importance or otherwise of substantial general interest in the administration of civil justice. There was a general and substantial importance to satisfy the necessary criteria for the grant of special leave to appeal which were: (a) whether habeas corpus may be granted for the release of a person from detention on one premise when that person may be detained in another; (b) whether a challenge to the jurisdiction of a military court gives sufficient premise to refuse habeas corpus with respect to detention pending convening by the court martial; and (c) whether the charge of murder can be heard in the court martial.

(4) The possible consequences of the grant of special leave were as follows: (a) if special leave were granted and appeal allowed against the decision of the Court of Appeal refusing an extension of time to file appeal, the appeal against the decision of the High Court refusing habeas corpus application would result to a hearing by the Court of Appeal; (b) the Court of Appeal would determine the important question of law which in relation to s 70 of the Army Act 1955 which it may resolve in favor of the Petitioners but still decline habeas corpus for practical reasons; (c) a granting of a declaration as to the validity of the murder charges would not be prevented; (d) any challenge to the jurisdiction of the murder court martial would be resolved in advance by such procedure; (e) if s 70 issue was resolved against the Petitioners, no challenge to the jurisdiction of the murder court martial could succeed unless the decision of the Court of Appeal were reversed in the Supreme Court.

(5) The Court of Appeal did not take into account the availability to challenge the jurisdiction of the court martial to hear a murder case. Thus, it was not correct for the Court of Appeal to say that an appeal was irrelevant to challenge jurisdiction.

Appeal allowed.

No cases referred to

S. R. Valenitabua for the Petitioners

Tuinaosara for the first Respondent

K.V. Keteca for the second and third Respondents

B. Solanki as Amicus Curiae

Fatiaki P, French and Keith JJ.

Introduction

[1] Eight soldiers, members of the Republic of Fiji Military Forces (RFMF) were arrested on 24 December 2002 and charged under military law with the murder of another soldier. They were taken into detention pending a court martial on those charges. They had already been charged with other offences arising out of events which had occurred in May 2000 and November 2000 and for which courts martial were pending. Because of the delay in their trials on pending charges, they had been released by order of the High Court on the same day, 24 December 2002, on conditions including a requirement that they surrender to the court martial when it was convened.

[2] The soldiers challenged the validity of their detention under the murder charges which were laid on the very day that they were released by the High Court, arguing that they could not be tried under military law on those charges. They sought habeas corpus. However habeas corpus was refused in the High Court on the basis that military law did apply to the murder of another soldier.

The eight men then appealed to the Court of Appeal against the decision of the High Court but failed to comply with procedural requirements under the Rules of the Court of Appeal so that the appeal was deemed to be abandoned. They sought an extension of time within which to appeal. That extension of time was refused by a single judge of the Court of Appeal. They then sought special leave to appeal against that decision.

[3] On 10 September 2004, the court granted special leave, allowed the appeal and extended the time for lodging a fresh notice of appeal. Our reasons for that decision follow.

Factual and procedural history

[4] This case concerns eight members of the Republic of Fiji Military Forces, (RFMF), Corporals Railumu, Cakau and Alava, Lance Corporal Mills and Privates Namulo, Nawaqa, Sokiveta and Raivalu (the Petitioners).

[5] Following their alleged involvement in a mutiny at Queen Elizabeth Barracks in Suva on 2 November 2000, the Petitioners, all members of Battalion Headquarters Company, Third Battalion, Fiji Infantry Regiment, were charged with mutiny, contrary to s 31(2) of the Army Act 1955 (UK) as applied in Fiji in 1961 by the Royal Fiji Military Forces Act (Cap 81) (the RFMF Act). The charge alleged that they took part with other soldiers in a mutiny to resist the lawful authority of Commodore Josaia Voreqe Bainimarama, the Commander of the Republic of Fiji Military Forces (the Commander). They were remanded, by the Commanding Officer of the Third Fiji Infantry Regiment, for trial by General Court martial and were later taken into military custody on various dates in November 2000.

[6] In June 2001, further charges were laid against the Petitioners arising out of events in May and June 2000. These related to their alleged participation, at the Parliament Complex in Suva, in the uprising and attempt to overthrow the elected government of the day. They were charged with offences in the following categories:

(1) Conspiracy to commit treason.
(2) Treason.
(3) Accessory after the fact to treason.
(4) Treason felony.
(5) Mutiny.
(6) Wrongfully confining abducted persons.

[7] Each of these charges was laid by a Captain Saladuadua. Each of the Petitioners was remanded by his commanding officer for trial. It was not in dispute that they were remanded for trial by court martial. The charges laid in June 2001 were evidently by way of an initiating process. They were relaid in a different format in May 2002 and again in June 2004, the charges are now limited to mutiny, wrongfully confining abducted persons and accessory after the fact to treason.

(1) Six of the Petitioners (including Corporal Cakau and Corporal Alava) applied to the High Court for a writ of habeas corpus in Civil Action No HBM12 of 2002S. On 17 May 2002, Scott J refused that application and declined to release the men on bail under the provisions of the Bail Act 2000. His Honour was informed at the time by representatives of the RFMF that the men's court martial would proceed in late July or August 2002. Scott J said:

> In my opinion I must balance the understandable wish of the applicants to be released now on bail to await trial in two to four months against the risk to the safety, stability and well being of our country. Put this way I am entirely satisfied that to release the applicants on bail could be dangerous, at most unwise. Accordingly, the applications are refused.

[8] On 4 September 2002, the Petitioners were still in custody awaiting trial. They filed a motion on that day in the High Court seeking declarations that their detention was unlawful and in breach of their constitutional rights to have the cases heard within a reasonable time. They sought an order that they be released from detention on reasonable terms and conditions pending their trials. The motions were filed:

> pursuant to the provisions of the High Court (Constitutional Redress) Rules 1998 and pursuant to Chapter 2 paragraph 13 of the Manual of Military Law.

[9] In an affidavit in support of the motion Corporal Railumu said that he and the other Petitioners had been held in Suva prison for almost 22 months awaiting their court martial trials. They had not been told when the court martial would be convened. He asserted that they were being held under "close arrest" for the purposes of the *Manual of Military Law* which prescribed a limit of 72 days for both open and close arrests in the event that a court martial was not convened within that time.

[10] Affidavits in reply were filed by various military officers. The delay in bringing the Petitioners to trial within the time indicated in the original habeas corpus proceedings before Scott J was explained in the affidavit of Colonel Naivalurua, the Commander Land Forces of the RFMF. He said that a General Court martial then underway for what he described as "the first group of alleged mutineers" would be completed at the end of October 2002. He said that the RFMF had done its best to complete the General Court martial well before July 2002. That it had been unable to do so was unforeseen and beyond the control of the RFMF and the General Court martial. Other affidavits by military officers referred to the lengthy process of taking statements from the Petitioners themselves and from many other witnesses in the presence of the Petitioners.

[11] It appeared from the affidavit of Colonel Naivalaurua that the President of the Republic had made an order on 15 April 2002 directing that a number of officers and soldiers, including the Petitioners, be held in "close arrest" for a period in excess of 72 days pending the convening of their trials by General Court martial for the charges then preferred against them. It was not clear on what legal basis the men had been held up to that time. In an affidavit in reply, Corporal Railumu challenged the authority of the President to make such an order. The order was said by Colonel Naivalaurua to have been made in accordance with r 6 of the Rules of Procedure (Army) 1972, *Manual of Military Law* and para 6.047 of the Queen's Regulations for the Army 1975. It was further asserted in a later affidavit by Colonel Naivalaurua that the Petitioners posed *"a real threat to the RFMF and the nation"*.

[12] Jitoko J heard the Petitioners' motion on 18 December 2002 and, on 24 December 2002, made an order that they *"be released from detention with conditions"*. His Honour set out stringent residential, curfew, reporting and other conditions restricting movement and communications by the Petitioners. He directed that on the morning of the General Court martial they were to surrender themselves to the Commanding Officer of the Army Training Groups Camp at Nasinu.

[13] His Honour found that the continuing detention of the Petitioners was "close arrest" for 24 months without a trial and was in breach of their constitutional rights. The rights were those referred to in ss 28(1)(a) and 29(3) of the Constitution asserting respectively the right of a person charged with an offence to have the case determined within a reasonable time and the right of persons charged with offences to the presumption of innocence. His Honour said:

> The applicants have been in detention awaiting trial for some 25 months as of today. No country that calls itself civilised, let alone democratic, can possibly allow this situation to continue. It is an intolerable situation. While they may have been charged with serious offences against the State their rights as individuals and citizens of this country cannot be ignored simply because the system is not able to bring them to trial early; Or that there are unsubstantiated reports linking them to further disturbance that has happened recently.

A sealed copy of the order of Jitoko J was served on the Director of Legal Services, RFMF at Queen Elizabeth Barracks on 24 December 2002. On the same day however the men were each charged with the murder of Simione Rawailebu on 2 November 2000 and were taken back into detention.

[14] On 8 January 2003, the Petitioners filed a notice of motion in the same proceedings, HBM 81 of 2002, seeking leave to make an application for an order of committal for contempt against the Commander, the Minister for Home Affairs and the Attorney-General. They contended that the respondents had failed to release them as ordered by the court, that the new charges against them were baseless and were the respondents' means of justifying their continuing detention. The continuing detention, they argued, was in contempt of court.

[15] The ex parte motion came before Jitoko J on 10 January 2003 when counsel for the Petitioners informed the court that he sought to withdraw the contempt motion and file a motion for release on bail and for habeas corpus instead. The court gave leave to the Petitioners to do that and directed that the fees paid on the motion were "to be transferred to the habeas corpus application".

[16] The Petitioners filed an ex parte motion for the issue of a writ of habeas corpus on 20 January 2003 in a new civil proceeding, Habeas Corpus Action No HBM003J of 2003. On 30 January 2003, Jitoko J directed the issue of a writ of habeas corpus to the commander requiring him to have the Petitioners brought before the court on 6 February 2003 *"with the day and cause of their being taken and detained, that the court may examine and determine whether such cause [is] legal"*.

[17] On 14 March 2003, for reasons which he then published, Jitoko J refused the application for habeas corpus and ordered that the parties bear their own costs. In substance his Honour held that the Army Act 1955 (UK) applied mutatis mutandis to Fiji by operation of s 23 of the RFMF Act. Section 70(1) of the Army Act 1955 made it an offence against that section to commit a civil offence. Section 70(4) excluded from the civil offences contravening s 70(1), offences including treason, murder, manslaughter and treason felony. However, that exclusion was said by his Honour to be negated for Fiji, in the case of offences against the person of military personnel, by operation of the United Kingdom Forces (Jurisdiction of Colonial Courts) Order 1965. His Honour characterised the order as a regulation made under the RFMF Act modifying the application of the Army Act 1955 (UK).

[18] For the preceding reasons the court held that the commander was empowered to charge a person who was the subject of military law for the offence of murder provided that the victim was also associated with the military. The commander had therefore discharged the burden of showing that the detention of the Petitioners as and from 24 December 2002 was lawful. In any event, the Petitioners had been brought before a court martial on 13 February 2003 in respect of the earlier offences with which they had been charged. The hearing in that court martial was continuing. The Petitioners evidently conceded, before his Honour, that their detention from 24 December 2002 had ceased to be unlawful on and from 13 February 2003.

[19] Although finding in favour of the Commander Jitoko J was critical of the conduct of the RFMF in laying new charges against the Petitioners on the very day that the court had ordered their release upon conditions. His Honour found that on 24 December 2002 the Petitioners had been re-arrested, charged with the new offence and continued in their detention. Counsel for the commander said the charge of murder against the Petitioners had taken a long time to prepare as there were difficulties in locating and interviewing many witnesses. The charges were ready to be laid during the proceedings in December 2002 but the commander had not wished to appear disrespectful to the court by laying them then. The learned trial judge said:

> The practice of laying fresh charges immediately following an Order of release is not new. Be that as it may, this Court takes a very dim view indeed of such a practice. Especially in situations where the new charge if laid together with the others, may not have had a discernable effect on the Order the Court had made. Our system of justice cannot possibly condone a practice where the freedom of the individual is decided and curtailed by the arbitrariness of decisions of where and when new charges are to be laid following a judicial order for release. If need be, under this practice, prosecution if it so desires may proceed to frustrate Orders of Court by deliberately holding back additional Charges until released. Such action effected an abuse and amounts to circumventing the judicial process. This, in the Court's view, is sailing very close to contempt. It cannot be allowed to continue especially in the light of the elaborate scheme of the protection afforded the individual under Chapter 4 of the Constitution.

[20] The order made by Jitoko J was not perfected until 9 May 2003. For that reason the time limited for filing an appeal from that decision expired on 30 June 2003. In the meantime a court martial to hear mutiny charges arising out of the events of 2 November 2000 was convened on 20 May 2003. It was adjourned to 14 July 2003 because of the proceedings in the High Court and the likelihood of an appeal. It appears from an affidavit filed in these proceedings and filed by Lieutenant Pacolo Luveni on 8 September 2004, that a General Court martial of the Petitioners has commenced. It is not clear from the record what happened to that court martial although the charges relating to the events of May 2000 are said to have been amended on 8 June 2004.

[21] The Petitioners filed their notice of appeal against the decision of Jitoko J within time on 19 June 2003. However, their solicitor failed to file an affidavit of service within 7 days and by operation of O 17 r 2 of the Court of Appeal Rules the appeal was deemed to be abandoned on 26 June 2003. The court martial relating to the events of November 2000 was adjourned from 14 July 2003 to 5 November 2003 because of the pendency of the proposed appeal.

[22] A second notice of appeal was filed by the Petitioners on 25 July 2003 and an affidavit of service on 28 July 2003. On this occasion, however, the solicitor forgot to file a requisite application for security for costs within time and on 1 August 2003 the second appeal was also deemed to be abandoned.

[23] On 7 August 2003, the Petitioners applied for an extension of time within which to file their appeal against the refusal of habeas corpus by Jitoko J. That application came on for hearing before Penlington JA, sitting alone as the Court of Appeal. His Honour took the view that an appeal, if successful, would not result in the grant of habeas corpus. That conclusion was based upon the fact that, at the time of the hearing before Jitoko J, the Petitioners were properly in detention from 13 February 2003 by reason of the commencement of their court martial in respect of the events of 19 May 2000.

[24] On the underlying question as to the jurisdiction of the courts martial to try the Petitioners for murder under s 70 of the Army Act 1955 (UK) as applied in Fiji, his Honour said that it was open to the Petitioners to challenge the jurisdiction of the court martial relating to that offence under r 36(1) of the Rules of Procedure (Army) 1972. The Petitioners now seek leave to appeal against the decision of Penlington J.

The grounds of the petition

[25] The principal grounds upon which the petition is based are as follows:

(a) That the learned justice of the Court of Appeal erred in law and acted contrary to authority in failing to consider the ground that a General Court Martial had no jurisdiction to charge the Petitioners and try them for murder by virtue of s 70(4) of the Army Act 1955 (UK) and to rule in the Petitioners' favour.

(b) That the learned justice of the Court of Appeal erred in law and contrary to authority in failing to consider that the members of the court martial were reluctant to be sworn-in and to address the issue of jurisdiction when the Petitioners asked them to. As a result the issue was put to the Fiji Court of Appeal for its determination.

(c) That the learned justice of the Court of Appeal erred in law and contrary to authority in failing to consider the conflict which will arise between the Director of Public Prosecutions and the Director of Army Legal Services by virtue of Justice Jitoko's ruling aforesaid.

It was asserted in the petition that the matters of law raised by these grounds would affect the prosecution of murder, treason, treason felony, misprision of treason and rape in Fiji and:

(a) questions of general legal importance

(b) substantial questions of principle affecting the administration of criminal justice in Fiji;

Statutory framework — Special leave

[26] Section 122 of the 1997 Constitution provides, inter alia:

122(1) The Supreme Court has exclusive jurisdiction, subject to such requirements as the Parliament prescribes, to hear and determine appeals from all final judgments of the Court of Appeal.

(2) An appeal may not be brought from a final judgment of the Court of Appeal unless:

(a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or

(b) the Supreme Court gives special leave to appeal.

[27] The Supreme Court Act 1998 makes provision for criteria applicable to the grant of special leave. Relevantly, s 7(2) and (3) of the Act provide:

> (2) In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless—
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> (a) a question of general legal importance is involved;
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> (b) a substantial question of principle affecting the administration of criminal justice is involved; or
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> (c) substantial and grave injustice may otherwise occur.
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> (3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises—
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> (a) a far reaching question of law;
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> (b) a matter of great general or public importance;
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> (c) a matter that is otherwise of substantial general interest in the administration of civil justice.

Statutory framework — The Court of Appeal

[28] Section 3(3) of the Court of Appeal Act (Cap 12) as amended in 1998 provides that:

> Appeals lie to the Court as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court.

The powers of a Single Judge of Appeal in civil appeals are set out in s 20 of the Court of Appeal Act and include the power:

> To extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done;

A similar power is conferred by s 35(1)(b) upon a Single Judge of Appeal in criminal matters which include appeals by leave against the grant or refusal of bail or conditions or limitations attaching to the grant of bail.

[29] Section 35(3) provides that where a judge refuses an application by an appellant to exercise a power under subs (1) in the appellant's favour, the appellant may have the application determined by the court as duly constituted for the hearing and determining of appeals under this Act. There is no equivalent provision in relation to the exercise of the power of a judge under s 20.

[30] Section 20 appears in Pt III of the Court of Appeal Act entitled *"Appeals in Civil Cases"*. Civil cases are defined, in effect, by s 12 which refers to *"any cause or matter, not being a criminal proceeding"*. The term *"criminal proceeding"* is not defined in the Act but the jurisdiction of the Court of Appeal in criminal cases is defined in Pt IV and in particular s 21 which provides for appeals against conviction and sentence. Assuming, as seems reasonable, that no lacuna was intended in the classes of final judgment of the High Court from which appeals might be brought to the Court of Appeal, all other appeals from final judgments of the High Court to the Court of Appeal would appear to fall within the category of civil appeals for the purposes of the Court of Appeal Act. It may be concluded therefore that there was no power in the Court of Appeal to review the decision of Penlington JA in the present case as that was a power exercised in respect of something other than an appeal against conviction or sentence and so was a civil appeal.

[31] The Court of Appeal Rules Cap 12 (Rev 1985) in relation to civil appeals provide, in O 16 that the time for filing and serving a notice of appeal is 21 days in the case of an interlocutory order and in any other case 6 weeks.

[32] Rule 17 provides as follows:

> (1) (1) The appellant must—
> (a) within 7 days after service of the notice of appeal—
> (i) file a copy endorsed with a certificate of the date the notice was served; and
> (ii) apply to the Registrar to fix the amount of the security to be given by the appellant for the prosecution of the appeal, and/or the payment of all such costs as may be ordered to be paid;
> (b) within such time as the Registrar directs, being not less than 14 days and not more than 28 days, deposit with the Registrar the sum fixed as security for costs.
> (2) If paragraph (1) is not complied with, the appeal is deemed to be abandoned, but a fresh notice of appeal may be filed before the expiration of—
> (a) in the case of an appeal from an interlocutory order — 21 days; (b) in any other case — 42 days, calculated from the date the appeal is deemed to be abandoned.
> (3) Except with the leave of the Court of Appeal, no appeal may be filed after the expiration of time specified in paragraph (2).

Constitutional and statutory framework for military discipline

[33] The RFMF was originally established by s 3(1) of the RFMF Act enacted in September 1949. It has subsequently been amended and may be subject to modification by the provisions of the Constitution. Section 23 of the Act provides that:

> (1) In relation to the government of and for the enforcement of discipline in the Forces the Army Act shall, subject to the provisions of this Act and any regulations made thereunder and with the modifications referred to in subsection (2), apply as if the Forces formed part of Her Majesty's Regular Forces—
> (a) to officers of the Forces and soldiers of the Regular Forces at all times;
> (b) to soldiers of the Territorial Force and the Reserve when on military service.

The modifications in s 23(2) are not material for present purposes.

[34] The Army Act is defined in s 2 thus:

> "Army Act" means the Army Act, 1955 of the United Kingdom and includes all Acts amending, replacing or read in conjunction with the same and all rules, regulations and Articles of War made thereunder.

[35] On 10 October 1970, Fiji achieved independence effected by the Fiji Independence Act 1970 (UK) and the Fiji Independence Order 1970 which contained the Fiji Constitution 1970 in its Schedule. By s 5 of the Order it was provided that existing laws would have effect on and after 10 October 1970 *"as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Fiji Independence Act 1970"*.

[36] By s 105(1) of the 1970 Constitution disciplinary control over persons holding public office was vested in the Public Service Commission. However the offices of members of *"any naval, military or air force"* were excluded from the application of that section: s 105(3)(f).

[37] Chapter II of the 1970 Constitution was entitled "Protection of Fundamental Rights and Freedoms of the Individual" and prescribed various fundamental human rights and freedoms. Section 18(3) which appeared in Ch II provided, however, that "in relation to any person who is a member of a disciplined force of Fiji, nothing contained in or done under the authority of the

disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than sections 4, 6 and 7". The disciplined forces of Fiji included any naval, military or air force (s 127(1)) and "disciplinary law" was defined as "a law regulating the discipline of any disciplined force". The human rights protected by s 18(3) were the right to life (s 4), protection from slavery and forced labour (s 6) and protection from inhuman treatment (s 7). The rights of personal liberty under s 5 were not protected against infringement by a disciplinary law. This saving provision was carried over into the 1990 Constitution in s 20(2) of that Constitution.

[38] Section 86 of the 1990 Constitution established the Republic of Fiji Military Forces under the command of a commander to be appointed by the President acting in accordance with the advice of the prime minister for a term of 5 years. The Constitution defined the overall responsibility of the RFMF as being "to ensure at all times the security, defence and wellbeing of Fiji and its peoples": s 86(3). The definition of "disciplined force" under the Constitution included the RFMF: s 149(1). The authority of the Public Service Commission established under the Constitution did not extend to the RFMF: s 127(4)(f).

[39] The RFMF was continued in existence by s 112(1) of the 1997 Constitution which provided for the appointment by the President, on the advice of the minister, of a commander "to exercise military executive command of the Forces, subject to the control of the Minister": s 112(2). The commander is responsible under the Constitution for, inter alia, "taking disciplinary action against members of the Forces": s 112(3)(b). The parliament is authorised by s 112(4) to make laws relating to the RFMF.

[40] The general exclusion of the human rights protections from application to members of the military, which appeared in the 1970 and 1990 Constitutions, does not appear in the 1997 Constitution. The protection against "double jeopardy" in s 28(1)(k) is qualified in s 28(3)(a) to allow a member of a disciplined force to be tried for a criminal offence despite his or her trial and conviction or acquittal under a disciplinary law. And in s 29(4), the requirement for open court hearings does not extend to military courts.

[41] Both the 1990 and 1997 Constitutions continued in effect existing laws subject to the requirement that they be construed with such modifications and qualifications as were necessary to conform to the Constitution — (s 168 of the 1990 Constitution), s 195(2)(e) and (3) of the 1997 Constitution.

[42] The RFMF Act was continued in effect by the successive Constitutions subject to such modifications or qualifications as might be necessitated by any disconformity with those Constitutions including any disconformity that might arise by reason of their application of human rights provisions. The application of the Army Act 1955, effected by s 23 of the RFMF Act, would itself be subject to those modifications or qualifications. This raises the potential for some difficult issues of constitutional and statutory construction which it is not necessary to explore for present purposes. The law relating to military discipline is of great importance to the efficient functioning of the military forces and to the security of the nation. At present it is found in a combination of local and British statutes which provides a recipe for confusion. The time is ripe for a single, self-contained, coherent Fijian statute to govern military discipline in this country.

[43] Whatever the scope of the current operation of the RFMF Act and the Army Act 1955, it is not disputed for present purposes that s 70 of the Army Act 1955 applies. That section provides, as far as relevant:

> (1) Any person subject to military law who commits a civil offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against this section.
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> (2) In this Act the expression "civil offence" means any act or omission punishable by the law of England or which, if committed in England, would be punishable by that law; and in this Act the expression "the corresponding civil offence" means the civil offence the commission of which constitutes the offence against this section.
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> …
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> (4) A person shall not be charged with an offence against this section committed in the United Kingdom if the corresponding civil offence is treason, murder, manslaughter, treason-felony or rape …

[44] The learned judge at first instance, Jitoko J, relied upon the provisions of the United Kingdom Forces (Jurisdiction of Colonial Courts) Order 1965. This was an order in council made in 1965. It was expressed to apply to each of the "territories specified in the Schedule". Among the territories specified in the Schedule was Fiji. Section 3(1) of the Order provides, inter alia:

> Subject to the provisions of this section, a person charged with an offence against the law of the Territory shall not be liable to be tried for that offence by a court of the Territory if at the time that the offence is alleged to have been committed he was a member of Her Majesty's forces or a member of a civilian component of any of these forces and—
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> …
>
> the alleged offence is an offence against the person, and the person or, if more than one, each of the persons in relation to whom it is alleged to have been committed had at the time thereof a relevant association with Her Majesty's forces; …

[45] The order was treated by Jitoko J as a regulation made under the Army Act 1955 and therefore applicable, pursuant to s 23 of the RFMF Act, to the RFMF as if they formed part of her Majesty's Regular Forces.

Whether the judgment was a final judgment of the Court of Appeal

[46] The first question to be considered in the present case is whether the judgment of Penlington JA was a final judgment of the Court of Appeal. It was a judgment of a judge of the Court of Appeal in respect of which there was no mechanism for review by a Full Bench: see s 20. It also effectively brought an end to the Petitioners' attempt to appeal against the decision of Jitoko J.

[47] The scope of the term "final judgment of the Court of Appeal" which appears in s 122(1) of the 1997 Constitution was considered but not fully resolved by this court in its judgment in *Native Land Trust Board v Narawa Appeal* [2004] FJSC 7 (*Narawa*) given on 21 May 2004.

[48] The court observed that there is no discretion available under the Constitution to allow the Supreme Court to entertain applications for leave to appeal against decisions of the Court of Appeal which are not final. Having regard to its use as a constitutional term and its function in defining the jurisdiction of the Supreme Court, the words "final judgment" might require a wider interpretation than that which has evolved under Rules of Court in various jurisdictions.

[49] If the words "final judgment" are to be interpreted as referring to any judgment finally disposing of a proceeding in the Court of Appeal, then it might encompass appeals against a range of interlocutory decisions at first instance

which might be of little import. An answer to that concern is provided by the constitutional requirement for special leave which can be supported, as it has been, by statutory criteria for the grant of such leave.

[50] The court said (at 37):

> It is to be kept in mind, … that the Supreme Court is able, through the special leave requirement, to ensure that only those matters which are of sufficient importance to warrant the grant of special leave come to it. Further, as has been demonstrate d in other jurisdictions, there are occasions when matters of great public importance may arise out of interlocutory decisions. Issues of public interest immunity, legal professional privilege and the privilege against self incrimination may arise in the context of discovery. An important question of law may be involved in a decision striking out a pleading and it may be appropriate and convenient to decide that question of law on the pleaded facts. The constitutional jurisdiction of the Court should not be so construed as to prevent these matters, in appropriate cases, from being heard and determined by it.

[51] In our opinion the better view is that a final judgment of the Court of Appeal, for the purposes of s 122 of the Constitution, is any judgment of the Court of Appeal which finally disposes of a proceeding in that court. It was conceded by the first respondent that refusal by a judge of the Court of Appeal of an extension of time to bring an appeal is a final judgment of the Court of Appeal for the purposes of s 122 of the Constitution and may be the subject of a petition for special leave provided that it meets the criteria for the grant of such leave. We are satisfied that the concession was a proper one and that what occurred in this case was in substance a final judgment.

Whether an extension of time was necessary

[52] Rule 17 of the Court of Appeal Rules (the Rules) as amended by the Court of Appeal (Amendment) Rules 1999 provides in paras 2 and 3:

> (2) If *(the requirements of the Rule)* is not complied with, the appeal is deemed to be abandoned, but a fresh notice of appeal may be filed before the expiration of:
>
> (a) In the case of an interlocutory order — 21 days; or
>
> (b) in any other case — 42 days, calculated from the date the appeal is deemed to be abandoned.
>
> (3) Except with the leave of the Court of Appeal no appeal may be filed after the expiration of time specified in paragraph (2).

[53] The second notice of appeal in this case was filed on 25 July, which was less than 42 days from the date the appeal pursuant to the first notice was deemed to be abandoned, that is, 26 June 2003. The appeal instituted pursuant to the second notice was deemed to be abandoned on 1 August 2003. On a reading of the language of r 17, according to its ordinary meaning, there was then 42 days to run within which a third notice of appeal could be filed. That time would have expired on 11 September 2003. The parties and Penlington JA however proceeded on the common assumption that the rule would not permit the lodgment of a third notice of appeal without an extension of time.

[54] It may, no doubt, be regarded as undesirable that there should be an unlimited number of opportunities to file notices of appeal after appeals are deemed abandoned by operation of r 17. Such a usage of r 17 can, however, be prevented by the inherent power of the Court of Appeal to prevent abuse of its processes. It is questionable whether the limitation assumed by his Honour, on the basis of earlier obiter dicta, is correct.

[55] The power of the Court of Appeal to make Rules of Court is vested, by s 39 of the Court of Appeal Act 1978 (Cap 12), in the president of the Court of Appeal. Any unintended consequences of the wording of r 17 can be cured by amendment of the Rule to expressly limit the number of occasions upon which a fresh notice of appeal may be lodged following a deemed abandonment.

[56] Rule 17 has been judicially construed to limit the extent of its application. In *Ports Authority of Fiji v C and T Marketing Ltd* [2001] FJCA 1, Shameem J, sitting as a Single Judge of the Court of Appeal, heard a summons by the Ports Authority to set aside a ruling by the deputy registrar that a third notice of appeal could not be filed under r 17.

[57] Rule 18 provides for the preparation of the appeal record and for the appellant to lodge four copies with the Registrar and give notice to the other parties that it is ready for collection. Non-compliance is visited, by r 18 para 10, with the consequences of deemed abandonment imposed by r 17 paras 2 and 3. In the case before Shameem J, which involved non-compliance with r 18, her Honour found that the third notice of appeal which had been filed was, in any event, outside the 42-day period specified in the rule when the period of the legal vacation over Christmas was included. The notice had therefore been correctly rejected on the basis that it was out of time on any reading of the rule.

[58] Her Honour nevertheless went on to express the view that to allow appellants to file appeal after appeal when there had been deemed abandonment would be to allow delay in the appellate process for months or years and violate the purpose of the Rules. The deputy registrar was said to be correct in having found, at first instance, that the right to file a fresh notice of appeal under r 17 para 2 was limited to one fresh notice. Her Honour said:

> In future, thereafter, an appellant must make an application to file an appeal out of time with the leave of the Court of Appeal under Rule 17(3).

As can be seen, her Honour's observations were not necessary to the disposition of the case before her. They were obiter dicta. They were relied upon by Penlington JA, and, it seems, by the parties, in the present case as supporting the need for an extension of time.

[59] Those who must apply the Rules and those who are bound by them are entitled to expect that generally speaking they will be construed according to the ordinary meaning of the words used in them, read in their context and by reference to their purpose. In this case the imposition by judicial construction of an absolute, once only, limit on the application of r 17 para 2 puts a gloss on its words which is legislative in character and which does not accord with their ordinary meaning. As already observed, the gloss is not necessary to control abuse of the court's process.

[60] No third notice was lodged in this case. That was on the assumption that no third notice could be lodged. An extension of time was sought to allow an appeal to proceed. We proceed therefore on the basis that this common assumption of the parties and their failure to lodge a third notice gave rise to the need for an extension of time which was ultimately refused by Penlington JA.

Whether the criteria for the grant of special leave are satisfied

[61] As the court observed in *Narawa*, the criteria for the grant of special leave under s 7(3) of the Supreme Court Act 1998 establish the necessary conditions for its grant. If those conditions are satisfied there remains a discretion whether to make the grant.

[62] It would be an exceptional case in which a refusal to extend time to appeal could attract the grant of special leave. It is essentially a discretionary judgment which applies well-established criteria and does not give rise to far-reaching questions of law, matters of great general or public importance or otherwise of substantial general interest in the administration of civil justice.

[63] For the most part, the approach taken by Penlington JA to the exercise of his discretion was unexceptional. Indeed, his Honour observed that initially he was inclined to the view that he should grant leave. As he said, a properly brought appeal was on foot until 1 August 2003. It was only deemed abandoned because of a procedural oversight by the Petitioners' solicitor. His Honour's decision to refuse an extension turned substantially, if not entirely, upon the view that he took of the merits of the appeal.

[64] His Honour's adverse view of the merits of the appeal was based upon the proposition that an appeal, if successful, would not result in the grant of habeas corpus. This was because, consistently with the reasons of Jitoko J, the Petitioners were lawfully in custody from 13 February 2003 and could not be released.

[65] The application for habeas corpus before Jitoko J concerned the detention of the Petitioners after 24 December 2002 on charges of murder. Their detention from 13 February 2003 related to charges arising out of the events of 19 and 20 May 2000 and the convening of the court martial to hear those charges. That convening discharged the previous order releasing them from custody until it was commenced.

[66] It may not be correct to say that habeas corpus will not lie for detention on one basis because the applicant for the writ may continue to be detained on another basis. As is pointed out in D Clarke and G McCoy, *Habeas Corpus; Australia, New Zealand, The South Pacific*, Federation Press, Sydney (2000) it is possible on an application for a writ of habeas corpus to grant the order sought but to remand the applicant in custody. The learned authors say (at 232):

> This order requires some explanation because at first sight it seems incoherent. There have been cases involving prisoners and mental patients where the detention in one case was held to be unlawful, hence the order was granted, but where the applicant was subject to another order for detention which remained current; or where the court determined that it was not in the public interest to order release since issues concerning public safety were at stake.

The learned authors cited some old cases involving mental patients, involuntarily committed, whose committal was either unlawful or not justified on the return of the writ but where the court refused to order the release of the patient before full inquiry *Re Gregory* (1899) 25 VLR 539; *Re Stevens* (1900) 25 VLR 688; 6 ALR 128b.

[67] The learned authors refer to New Zealand legislation, proposed in 1997 and now enacted as s 14(3) of the Habeas Corpus Act 2001 (NZ) which specifically requires a judge to determine an application for habeas corpus by refusing the application or by issuing the writ ordering the release from detention of the applicant. They comment on the application of those provisions thus (at 229–30):

> If the detainee is illegally held under one order but in lawful custody on another, independent, order, the court would order release under the illegal order, but detention under the other subsists unaffected.

Re Esperalta [1987] VR 236 involved an application for a writ of habeas corpus by a prisoner held under the Extradition (Foreign States) Act 1966. Goppo J found the detention under that Act to be unlawful. However the prisoner was also held under the Immigration Act and would continue to be held under that Act. Gobbo J said (at 239):

> In the ordinary case I would order that the writ of habeas corpus be made absolute, but, as it was indicated that the applicant was formally (sic) being held under the Immigration Act and will still be so held hereafter, I will simply order that he is no longer to be detained by the Governor of Pentridge Prison under the warrant issued under the Extradition (Foreign States) Act 1966 of 26 April 1984.

Kelleher v Corrective Services Commission (NSW) (1987) 8 NSWLR 423 concerned a prisoner lawfully held in custody pending trial but found to have been unlawfully transferred to another prison. On his application for habeas corpus, Lee J at first instance, instead of ruling the order nisi absolute, declared the transfer to have been without lawful authority and ordered that the prisoner be returned to his former lawful custody. This order was made pursuant to the powers of the Supreme Court of New South Wales, on an application for a writ of habeas corpus to "direct the entry of such judgment or make such order disposing of the proceedings as the nature of the case requires".

[68] There has been no submission made nor anything said at first instance or in the Court of Appeal to indicate that the High Court could not, on an application for habeas corpus, make a declaration as to the unlawfulness of the detention on the basis attacking the application for the writ even though this would not result in the prisoner's release.

[69] The question of utility is not answered by a finding that an applicant for habeas corpus who has been taken unlawfully into custody on one basis is subsequently held lawfully into custody on another basis. The lawful basis for continuing detention may terminate. If the other asserted basis for the detention on murder charges were not a proper basis for that detention, then the applicant would be entitled to immediate release. In so saying we note that it is said that the Petitioners have been convicted on mutiny charges on 6 August 2004 and have been sentenced.

[70] Two other factors which Penlington JA saw as going to the merits of the appeal were:

(1) The availability of a challenge to the jurisdiction of the court martial convened to hear the murder charges being available under r 36(1) of the Rules of Procedure (Army) 1972.

(2) The delay that the grant of leave would cause to the court martial which related to the events of May and June 2000 that court martial already having been adjourned twice because of the Petitioners' expressed intention to appeal.

His Honour did not consider the merits of the conclusion by Jitoko J that the offences mentioned in s 70(4) of the Army Act 1955(UK) are not excluded from court martial jurisdiction in Fiji.

[71] In our opinion there are questions of general importance underlying the decision of Penlington JA in refusing leave to extend time to appeal. These are:

(1) Whether habeas corpus may be granted for the release of a person from detention on one basis when that person may lawfully continue in detention on another?

(2) Whether the availability of a challenge to the jurisdiction of a military court provides a sufficient basis for refusal of habeas corpus in respect of detention pending the convening of that court?; and

(3) Whether the charge of murder can be heard in the court martial?

[72] There is enough of general and substantial importance in this case in our opinion to satisfy the necessary criteria for the grant of special leave to appeal.

Whether the court should exercise its discretion to grant special leave

[73] It is necessary to consider the possible consequences of the grant of special leave in this case. If special leave were granted and the court were to allow the appeal against the decision of Penlington JA then the appeal against the judgment of Jitoko J would have to be heard by the Court of Appeal. It would be open to that court to determine the important question of law which arises in relation to s 70 of the Army Act 1955. The court might resolve that question in favour of the Petitioners but still decline habeas corpus for practical reasons. This would not appear to prevent the granting of a declaration relating to the validity of the murder charges which are pending. Any challenge to the jurisdiction of the murder court martial would in effect be resolved in advance by such a procedure. We express no view on what the Court of Appeal should do in such event but rather what seems to us to be open to it to do.

[74] If the s 70 point is resolved against the Petitioners then no challenge to the jurisdiction of the murder court martial on that basis could succeed, unless the decision of the Court of Appeal were reversed in the Supreme Court.

[75] In our view all the circumstances of this case militate in favour of the grant of special leave.

Whether the appeal should be allowed

[76] We are satisfied that the appeal should be allowed on the basis that the view adopted by Penlington JA that an appeal would necessarily be nugatory is not correct. We also consider that his Honour gave undue weight to the availability of the challenge to the jurisdiction of the murder court martial at that court martial hearing.

[77] We do not want, by these remarks, to be taken as precluding the Court of Appeal from having proper regard to practical discretionary considerations in determining, if the petitioner succeeds on the substantive point, whether any, and if so what, orders should be made. The appeal to this court will be allowed, the decision of Penlington JA set aside and time extended to 24 September 2004 to file a fresh notice of appeal. We do not consider that we should award costs as the basis upon which the special leave was granted was not raised by counsel for the Petitioners.

Orders

(1) Special leave is granted.

(2) The appeal is allowed.

(3) The decision of the Court of Appeal refusing an extension of time within which to appeal is set aside.

(4) The time limited to file a notice of appeal against the decision of Jitoko J is extended to 24 September 2004.

(5) There will be no order as to costs on the petition.

Question 3: How should the sections of the Audit Act Cap 70 relied upon in the decisions of the High Court and the Court of Appeal be construed given the provisions of ss 167(1) and (3) and 195(2)(e) and (3) of the 1997 Constitution?

Answer: The provisions in issue in this case should be construed subject only to the qualification that the fund relates to the relevant public office.

Appeal allowed.