

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

APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: AAU0004 OF 2006
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BETWEEN :

ALESI NALAVE
KELERA MARAMA

Appellants

AND:

THE STATE

Respondent

RULING ON COSTS

Facts

- [1] The appellants, Alesi Nalave and Kelera Marama (Appellants) were jointly charged with one count of murder.
- [2] On 31st August, 2005, the hearing commenced with a trial within trial to determine the admissibility of the confession. In a ruling delivered on 2nd September, 2005 the trial judge held admissible both the confession statements. Thereafter, the appellants pleaded guilty to the charge, the detail of which is comprehensively contained in the judgment of the Court of Appeal. I do not intend to revisit the same.
- [3] An appeal was filed against both the conviction and sentence to the Court of Appeal. In delivering the judgment, at paragraph 25 of the judgment, the Court of Appeal held :-

"[25] In our judgment the indication of sentence by the learned judge during the hearing of the trial, knowing the appellants had elected to exercise their trial rights, could have operated as an unfair pressure on the appellants to plead guilty. The circumstances in which the appellants pleaded guilty raise serious doubts in our minds about the genuineness of their guilt. For these reasons, we are satisfied that there has been a miscarriage of justice."

[4] Mr A. K. Singh was appointed as counsel for the appellants by the Court of Appeal under S. 30 of the Court of Appeal Act. Where a counsel is appointed under S. 30, the fee and disbursements of the counsel is defrayed from the consolidated funds. Ordinarily under S. 32 (2), the Court fixes a ceiling for the fee based upon its own assessment of the case. However in this case it was not so done.

[5] The basis upon which the appeal was allowed largely emanated from the various affidavits prepared and filed on behalf of the appellants. The respective affidavits filed were :-

- (i) The appellants (2)
- (ii) Mr M. Naivalu
- (iii) Mr H. A. Shah

[6] Of the affidavits, Mr Shah and Mr Naivalu prepared their own affidavits. They are not seeking any costs. Neither are any costs sought on those affidavits filed by Mr. Singh and rightly so.

Bill of Costs

[7] On 12th June, 2007, the Court of Appeal ordered that in "...the interest of Justice" it is "desirable that those appellants be represented by counsel." Therefore, the bill of

costs is only relevant work undertaken with effect from 12th June, 2007 and not prior to that. Mr Singh effectively came on record from 7th August, 2007.

[8] Let me record the documents filed by Mr Singh since taking the brief from 7th August, 2007. These documents are :-

- (a) Notice of Motion to vacate the hearing date in February, 2008 supported by an affidavit of Varsha Mala Karan (10 paragraphs)
- (b) Affidavit of Kelera Marama in support of Notice of Motion sworn on 28th and filed on 30th January, 2008. (7 paragraphs)
- (c) Affidavit of Alesi Nalave sworn on 12th May, 2008. (8 paragraphs)
- (d) Submissions of Appellant filed on 7th July, 2006. (12 pages)

[9] On the issue of costs, a large proportion of the bill contains costs for research on the substantive issues of appeal. However, the "*Primary or substantive submissions*" of the appellants were filed on 23rd May, 2007. Further the backing sheet shows that it was filed by the APPELLANTS (IN PERSON). The submissions are signed by both the appellants and not Mr A. K. Singh. They were executed on 17th May, 2007. It is a comprehensive 34 pages submission. On the right hand side top corner of the page, there is an endorsement and authorisation by the Prison Authorities as follows :-

"Women's Prisons Authorised

Signed

Date 23/05/07.

"

Of significance Mr Singh then was not on record appearing for the Appellants. Later, Mr Singh acknowledges and relies on this submission in paragraph 11 of his own written submissions which was subsequently filed. Thus appropriate discount must be given for the work not undertaken but claimed by Mr Singh.

[10] Secondly, the most part of the Bill of Costs is for the Motion to call fresh evidence. Although Mr Singh stated that there was a separate hearing for the motion, no such record appears from the file. On 30th June, 2006, when the matter was called for hearing before the full court, it was vacated to 11th July, 2008. Mr Singh seeks a fee of \$2000-00 for that.

[11] For the Motion alone, Mr Singh has billed a colossal sum of \$9,100-00 of the total amount billed at \$19,566-78.

[12] Comparatively for the substantive appeal, the amount is \$4,625-00 of which \$3,000-00 is for the day's appearance and argument. An additional sum of \$3,100-00 is claimed for further submissions and appearance in Court for argument on the issue of the swearing of the assessors.

Appeal

[13] There were only 3 grounds of appeal. The appeal was upheld on one ground only.

[14] The issue relating to the swearing of the assessors was dismissed summarily by the Court. In fact it was tantamount to a wasted hearing. In my opinion Mr Singh should ordinarily not to be paid the fees claimed on this issue of the swearing of assessors. Since he was a counsel appointed by the Court in the midst of the appeal, it was incumbent upon him to exercise some restraint on the number of grounds of appeals or issues. Wholly unmeritorious or irrelevant issues should

have been avoided. Since the Court required him to make further submissions on this point, only for that reason perhaps some generous sum may be awarded.

What constitutes reasonable fee?

[15] The issue is whether \$19,566-78 is reasonable, just and fair. That amount is fixed based on the "...courts assessment at the time of the probable work involved ***Timoci Silatolu & Anor. –v- The State Criminal Appeal No. AAU 0024/2002*** we page 2, per Ward P.

[16] Under the Legal Practitioners Act as to the "*reasonableness*" of a practitioner's fee, the court by virtue of S 77(5) is required to consider the following factors:-

- "(a) the complexity of the matter and the difficulty or novelty of the issues involved;*
- (b) the experience and standing of the practitioner;*
- (c) whether the practitioner is to carry the costs of any disbursements;*
- (d) whether the practitioner is entitled to charge professional costs only in the event of success in any proceeding;*
- (e) the duration of the matter to which the agreement relates;*
- (f) the urgency and circumstances in which the business is transacted;*
- (g) the value or amount of any property or money involved;*
- (h) any other matters or circumstances which the Court or judge considers appropriate."*

[17] The Appeal was in two parts. The first was the motion to adduce fresh or additional evidence. The second was the substantive appeal. The Motion was a relatively straightforward one. It did not involve complex legal issues. The law is settled on the subject. In fact no written ruling was delivered by the Court.

[18] Once the fresh evidence was allowed, the substantive issue itself became obvious. Paragraph 25 of the Judgment cited above sums it up.

[19] Mr Singh's total bill is \$19,566-78. He charges at an hourly rate of \$200-00. On that basis, Mr Singh is supposed to have spent 97.83 hours on the case. That is equivalent to 12.2 days of work at 8 hours per day.

[20] That by any measure of standards is excessive. Mr Singh specialises in Criminal law and is thus quite familiar with the law. For that reason alone he should not take long to prepare the case. In any event, the primary submission was filed by the appellants. Apart from that submission, no other lengthy documents were filed that could have possibly consumed much of Mr Singh's time.

Hearing

[21] Mr Singh claims \$7,000-00 for three days of hearing. This is for 30th June, 11th June, and 28th July.

[22] However, on 30th June, the matter was adjourned for parties to file further documents. Likewise on 11th July, there is no record of any hearing. The only record for hearing is 28th July, 2007. That is contained in the Judgment.

[23] Even if there was some preliminary argument on the aforementioned dates as claimed that would not have lasted for the whole day. It would have been for a very short period of time.


[24] At Mr Singh's \$200 per hour rate, for a fee of \$7,000-00, the hearing is supposed to have lasted for a total of 35 hours. That is almost a whole week. Certainly that was not the case. Moreso because Mr Singh is claiming fees for the time spent in research and writing submissions which were subsequently filed by the Court.

- [25] Under the High Court Rules, the daily scale of cost for a day's trial is \$300-00 to \$600-00. \$2,000-00 or \$3,000-00 a day with written submissions is both unprecedented and exorbitant.

Conclusion

- [26] In my view, having reviewed the time taken for receiving instructions, documents filed and issues considered by the Court of Appeal in its judgment it is just and fair to allow a total of 40 hours of work. That includes the hearing of the appeal.
- [27] Mr Singh's hourly rate is \$200-00. That is reasonable for an experienced counsel. On this basis the total fee would amount to \$8,000-00 plus VAT. The disbursements were \$174-36. I will allow that too.
- [28] On a comparative analysis, in ***Timoci Silatolu & Anor -v- State*** (Supra), incidentally Mr Singh again was the counsel appointed by the Court, a bill of \$39,050-00 was rendered. Ward P. considering the Bill of Costs noted that it was a complex case requiring many hours of work. Still he reduced the bill from \$39,050.00 to \$20,000-00. This case is no where near to the magnitude of **Silatolu's** case, which had many volumes of copy record and complex legal issues.

- [29] For the foregoing reasons, I order the costs be fixed at \$8,174.36 plus VAT.


John E. Byrne
JUDGE

3rd March, 2009