IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0036U.94S
(High Court Civil Action No. 17 of 1993)

BETWEEN

THE ATTORNEY-GENERAL AND
MINISTER OF JUSTICE OF FIJI
COMMISSIONER OF PRISONS — APPELLANTS

and

DHARMENDRA PRASAD
s/o BHAGWAT PRASAD — RESPONDENT

Mr D. Singh for the Appellants
Mr V. Maharaj for the Respondent

Date and Place of Hearing : 23rd May 1995, Suva
Date of Delivery of Judgment : 1 June 1995

JUDGMENT OF THE COURT

The respondent was convicted in the Magistrates' Court on 17 April 1990 of fraudulent conversion and sentenced to six months imprisonment suspended for two years. On 18 July 1991 he was again convicted of similar offences and sentenced to 12 months imprisonment. These offences were committed in breach of the earlier suspended sentence and so he was brought back to court on 22 July 1991 and the six months sentence was brought into effect consecutive to the sentence passed on 18 July. The result was a total sentence of 18 months imprisonment commencing on 18 July 1991. Once remission was credited in accordance with section 63 of the Prisons Act, he would have been due for release in 12 months but he was, in fact, detained beyond that period and only released on 18 January 1993.

There is apparently no dispute that the magistrate, having signed a committal warrant for 12 months imprisonment on 18 July

1992, signed a further two warrants on 22 July 1992, one for six months imprisonment and the other for 12 months imprisonment. Why or how that happened is not clear but counsel consider the warrant for 12 months imprisonment signed on 22 July was referring to the sentence passed on 18 July. Whatever the reason, the result was that the prison authorities had three warrants issued by the court for a total of 2½ years imprisonment and detained the respondent on that basis.

The respondent brought an action for general and special damages of $250,000 against the Attorney-General representing the State and against the Commissioner of Prisons. Although the prayer refers to a single sum of damages, the claim is clearly made on two bases stated in paragraphs 6 and 7 of the statement of claim.

> *"6. THE Plaintiff contends that he was wrongfully imprisoned and deprived of his liberty for a period of 6 months from 18th day of July, 1992 until his release and the Defendants are liable to the Plaintiff in respect of such wrongful imprisonment.*
>
> *7. THE Plaintiff further alleges that the Defendants' unlawful actions as stated above deprived the Plaintiff of his personal liberty of freedom of movement guaranteed under the Constitution of Fiji."*

Paragraph 6 is a claim in tort for wrongful imprisonment and paragraph 7 is a claim for redress for contravention of his constitutional rights. In relation to the latter, the prayer should, more properly, be for compensation.

The defendants filed a defence stating they relied on section 15(3)(c) of the Constitution, section 65 of the Magistrates Courts Act and section 25 of the Prisons Act. All these sections raise the issue of whether or not there is a right of action against the State and the second defendant.

The trial judge, it would appear, set the case for determination of a preliminary point of law although there is no summons or notice applying for such a determination or stating the precise point of law to be considered.

It should be mentioned that, although it is not included in the papers before us, the judge refers to an amended statement of defence by which it appears the defendants admitted paragraphs 1-3 of the claim which contain the facts set out above but denied the rest save that the respondent was released on 18 January 1993. Clearly those are the only facts the judge was entitled to consider at the interlocutory proceedings.

Judgment was delivered on 10 August 1994 and the State appeals against the conclusions of the judge.

As it is not stated anywhere else in the papers before us, we have taken the preliminary point to be decided from the judgment itself. It is in fact, two points, both stated at page 5 of the judgment.

> *"The point of law as it appears from the defence and submissions I have received is that no claim lies against the second defendant because at all times he acted on the authority of the various warrants."*
>
> *..... All defendants but particularly the first defendant also rely on section 3(5) of the State Proceedings Act ...."*

and the sub-section is then set out.

The inherent danger of proceeding without any formal statement of the point to be decided is only too well demonstrated in this case. The judge directed counsel to file written submissions and that was done. Those submissions, apparently unfettered by a clear statement of the preliminary point of law, ranged widely over the case. Not only was the law argued but matters of fact, that would, presumably, later be the subject of evidence, were discussed. Having set counsel loose in

this way, the judge has followed them rather than confine them to the points of law he has stated required determination.

We can deal very briefly with the first of these points. The judge found that, if the prison authority acts within the terms of a warrant apparently validly issued by a court, it is protected from civil suit by section 65(2) of the Magistrates' Courts Act. That, it appears to us, completed the consideration needed on this point of law. What the judge did was to go further and state:

> *"In my judgment a combination of Section 25 of the Prisons Act and Section 65 of the Magistrate's Court Act and the two cases of Henderson v. Preston and Morris v. Winter must result in the defence of the Second-named Defendant succeeding on this preliminary point and I rule accordingly."*

That decision required a determination of fact. The admitted paragraphs of the statement of claim do not cover this and the judge should have left that decision for the trial. Having found such a defence may be available, he needed to hear the evidence before deciding whether it did, on the facts of this case, avail the second defendant.

However, that decision is not appealed and we do not therefore, intend to interfere.

The second point for determination is whether or not section 3(5) of the State Proceedings Act provides a complete bar to this claim. If the judge should find it does, that would be an end of the matter. If he should find it does not or amounts only to a partial bar, the case needs to be set for trial and decided on its facts.

The decision of the judge was to "hold that the plaintiff has a cause of action against the State for damages to be assessed." That startling order suggests that he has determined not only that section 3(5) does not act as a bar to the

proceedings but also the liability of the State. The question of liability is a question of fact and law and should have awaited the trial.

A careful perusal of the judgment does not make it very clear, with respect to the judge, exactly what has been decided.

Much of the judgment is devoted to a review of the authority for the proposition that the protective provisions of a Constitution must be construed liberally. It would appear he accepts, on the authority of Maharaj v Attorney General of Trinidad and Tobago (No.2) (1979) AC 385, that section 19 of the Constitution creates a new remedy for redress of contravention of constitutional rights and that the respondent, like Maharaj, had been denied natural justice. He gives no reasons for the latter conclusion or for the next finding that the respondent should not be deprived of redress under section 19(1).

It is only then that he deals with section 3(5) of the State Proceedings Act which was, lest one had forgotten, the actual point for determination. He disposes of it in the following passage:

> *"Subject therefore only to the remaining question whether Section 3(5) of the State Proceedings Act bars any action by the Plaintiff against the State, in my judgment the Plaintiff has a right of action for damages.*
>
> *The Plaintiff submits that Section 3(5) is ultra vires the Sections of the Constitution referred to previously. In my judgment in so far as Section 3(5) may refer to any public law liability in the State I would hold that it is unconstitutional although it seems open to the construction that it deals only with vicarious liability and private law rights.*
>
> *For these reasons I hold that the Plaintiff has a cause of action against the State for damages to be assessed."*

The form of the judgment may account for the rather confused

grounds of appeal:

> *"1. THAT the Learned Trial Judge erred in law and in fact in holding the Second Respondent in the High Court interlocutory judgment liable when Section 65 of the Magistrate Courts Act exculpates liability.*
>
> *2. THAT the Learned Trial Judge erred in law and in fact in not holding that Section 3(5) of the State Proceedings Act is not inconsistent with either Section 6(1)(6) or 15(3)(c) of the 1990 Constitution and that it operates without effect on these provisions and the Constitution.*
>
> *3. THAT the Learned Trial Judge erred in law and in fact in holding that the Respondent had been denied natural justice.*
>
> *4. THAT the Learned Trial Judge erred in law and in fact in not holding that Section 3(5) of the State Proceedings Act bars any action by the Plaintiff against the State.*
>
> *5. THAT the Learned Trial erred in law and in fact in holding Section 3(5) of the State Proceedings Act ultra virus and unconstitutional in Public Law Liability of the State.*
>
> *6. THAT the findings of the Learned Trial Judge are unreasonable and cannot be supported having regard to all the evidence and the principles of law as a whole."*

Ground one can be dealt with briefly. The second respondent (presumably appellant) was not found liable and so the ground is irrelevant.

Ground three deals with the finding of a denial of natural justice. No basis for this decision was given and it is a conclusion of fact and law that could only be made after hearing the evidence.

Grounds 2,4 and 5 all relate to section 3(5) of the State Proceedings Act and the finding stated in the penultimate paragraph of the judgment set out above:

215.

Section 3(5) reads as follows:

> *"No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connexion with the execution of judicial process."*

It is clear that it acts as a bar to proceedings against the State in respect of anything done or ordered to be done by a person discharging duties of a judicial nature. As such it may be relevant to the claim in tort but whether, in this particular case, the acts that resulted in the additional term of imprisonment were of a judicial nature or in connection with the execution of judicial process is a matter of fact to be determined at trial as is the question whether they fall within the expression "acting judicially" in section 65 of the Magistrates' Courts Act.

As we have stated, paragraph 7 of the statement of claim raises the question of contravention of constitutional rights. With respect to the judge's research, we would suggest this was the only aspect of the case in which determination of the effect of section 3(5) was or could have been a relevant preliminary point.

In order to determine it, the judge needed to decide, as he did, whether the right to redress under section 19 of the Constitution was a remedy that was subject to section 3(5).

Section 19(1) of the Constitution provides:

> *"If any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action*

> *with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."*

When considering similar words in section 6 of the Constitution of Trinidad and Tobago in Maharaj's case, the Privy Council considered the intention was to create a new remedy. Diplock L J giving the judgment of the majority of the Board stated at 398:

> *"The right to "apply to the High Court for redress" conferred by section 6(1) is expressed to be "without prejudice to any other action with respect to the same matter which is lawfully available." The clear intention is to create a new remedy whether there was already some other existing remedy or not."*

He then cites with approval the following passage from Jaundoo v. Attorney General of Guyana (1971) AC 792:

> *"To `apply to the High Court for redress' was not a term of art at the time the Constitution was made. It was an expression which was first used in the Constitution of 1961 and was not descriptive of any procedure which then existed under Rules of Court for enforcing any legal right. It was a newly created right of access to the High Court to invoke a jurisdiction which was itself newly created."*

He later continues at 399:

> *".... no change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6(1) and (2) of the Constitution."*

The judge in the present case accepted that reasoning and found section 19(1) created a new remedy. We agree.

The Constitution is the supreme law and section 19 created a separate remedy in addition to any existing right of action. The intention is clearly to allow redress for liability in public law of the State. When it was enacted, the Crown (now State) Proceedings Act was already on the statute book as it was at the time of the similar provision in the 1970 Constitution. To allow section 3(5) of that Act to provide a bar to action against the State would defeat much of the purpose of the new procedure. Had that been intended, it would have been stated in the constitutional provision.

We consider section 3(5) cannot provide a shield for the State in proceedings under section 19.

Having reached that conclusion, the judge should have so ruled and set the case for trial to determine whether there had been a contravention of the respondent's rights under section 6 and the possible liability of the State thereto. He was not entitled on the material before him to determine liability as he appears to have done.

We order therefore that the case shall be returned to the High Court for hearing. In view of our finding we direct it should be heard by a different judge.

In the circumstances we order each side shall pay its own costs on the appeal.

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Sir Moti Tikaram
President Fiji Court of Appeal

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Mr Justice Gordon Ward
Judge of Appeal

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Mr Justice Douglas Dillon
Judge of Appeal

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