

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0005/96S

(High Court Civil Action No. HBC0017 of 1993)

BETWEEN:

THE ATTORNEY-GENERAL

Appellant

AND:

DHARMENDRA PRASAD f/n BHAGWAT PRASAD

Respondent

Mr D. Singh for the Appellant

Mr V. Maharaj for the Respondent

Date and Place of Hearing : 21 May 1996 at Suva

Date of Delivery of Judgment : 31 May 1996

JUDGMENT OF THE COURT

Mr Dhamendra Prasad (hereinafter referred to as the "Respondent") was convicted in the Magistrates Court on 17 April 1990 of fraudulent conversion and sentenced to six months imprisonment but the sentence was suspended for a period of two years.

On 5 July 1991 during the operational period of the suspended sentence, the respondent was found guilty of 4 charges of dishonesty. The sentence on these offences were deferred to 18 July 1991.

On 18 July 1991 the respondent appeared for sentence. By mistake the Magistrate imposed sentences on a total of nine charges as follows:

Count 1	6 months
Count 2	1 Year
Count 3	6 months
Count 4	6 months
Count 5	6 months
Count 6	6 months
Count 7	6 months
Count 8	6 months
Count 9	6 months

Sentences were ordered to be served concurrently. The warrant of commitment for these sentences are contained in warrant no. 2800.

The mistake made by the Magistrate was that in addition to the sentences imposed in respect of the convictions of four charges on 5 July 1991, he had imposed sentences for five other charges which were earlier withdrawn. Later, on the same day, the Prosecutor pointed out the mistake and the Magistrate directed that the respondent should be brought back to Court on 22 July so he could rectify the mistake.

On 22 July 1991, the Magistrate corrected the mistake and struck out Counts 5 to 9 as these charges had been withdrawn earlier but

confirmed sentences on counts 1 to 4. He further ordered the sentences to be served concurrently. A fresh warrant of commitment was drawn up for this sentence (warrant no. 2843).

In addition to this, the matter of breach of conditions for the suspended sentence of 6 months in relation to the conviction of fraudulent conversion on 17 April 1990 was brought up and the Magistrate ordered the 6 months sentence to be cumulative on the sentence imposed for the four counts of dishonesty of which he was found guilty on 5 July 1991. A fresh warrant of commitment was drawn up in respect of this sentence (warrant no. 2844).

The Magistrate directed that warrant no. 2800 should be recalled and cancelled and replaced by the two new warrants (warrant nos. 2843 and 2844).

In effect a sentence of 12 months originally imposed (warrant no. 2800) was replaced by a sentence of 18 months (combined effect of warrants 2843 and 2844).

Once remission was credited in accordance with section 63 of the *Prisons Act*, the respondent would have been due for release on 17 July 1992. In fact he was not released on this date but released on 18 January 1993 by the Chief Magistrate. This situation had occurred because the original warrant no. 2800 was not recalled and cancelled as directed by the Magistrate. The Prison officials simply treated warrant numbers 2800, 2843 and 2844 as valid warrants and calculated a total of 2 years 6 months.

It was agreed by all parties that as a result of the failure to cancel warrant no. 2800, the respondent served an additional 6 months imprisonment.

Consequently, the respondent brought an action for compensation against the Attorney-General representing the State and the Commissioner for Prisons. This claim was pleaded in paragraphs 6 and 7 of the original 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 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 Defendant's unlawful actions as stated above deprived the Plaintiff of his personal liberty of freedom of movement guaranteed under the Constitution of Fiji."

By way of defence, the State pleaded s 15 (3) (c) of the *Constitution*, section 65 of the *Magistrates Court Act* and section 25 of the *Prisons Act*.

The matter that has been brought before us is an appeal from a decision of Scott J. In order to appreciate the precise nature of the issues before His Lordship, it is necessary to trace the history of litigation in this matter prior to the matter coming before him. During the course of submissions, counsel pointed out that there were prior proceedings in this matter. We called for the record of these earlier proceedings and we were provided with the record in civil appeal in *The Attorney-General and*

Minister of Justice of Fiji, Commissioner of Prisons v Dharmendra Prasad s/o Bhagwat Prasad (Civil Appeal No. ABU0036/94).

We ascertained from this record that the cause of action in this matter initially came up for hearing before Byrne J. and an interlocutory judgment was handed down on 10 August 1994. It appears from the judgment that two preliminary questions of law arose for consideration, namely, (1) whether there was any claim against the Commissioner of Prisons, in view of the fact that the prison officials had acted in accordance with three valid warrants of commitment (warrant nos. 2800, 2843 and 2844); (2) whether the Attorney-General has a valid defence under section 3 (5) of the *State Proceedings Act* (Cap 24).

In respect of the first matter, Byrne J. concluded that the Commissioner of Prisons would not be liable in the circumstances of this case.

In respect of the second issue, Byrne J. concluded that the respondent has a right to compensation under s 19 (1) of the *Constitution* and s 3 (5) of the *State Proceedings Act* (Cap 24) is not a bar to the claim.

The State appealed against the decision of Byrne J. (Civil Appeal No. ABU0036/94) and the Court of Appeal delivered its judgment on 1 June 1994. In respect of the first preliminary point, there was no cross appeal by the respondent and the Court did not interfere with that decision.

In respect of the second preliminary point, the Court of Appeal agreed with Byrne J. who followed the majority decision in *Maharaj v Attorney-General of Trinidad and Tobago (No. 2)* (1979) AC 385 that s

19 (1) of the *Constitution* created a new remedy, namely, a claim against the State for what has been done in the exercise of the judicial power of the State. The Court further concluded that s 3 (5) of the *State Proceedings Act* (Cap 24) cannot provide a shield for the State in proceedings under section 19.

Significantly, the Court then directed the matter to be tried in the High Court in the following terms:

"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."

The matter then came before Scott J. for determination.

Before we deal with the decision of Scott J., we should make some observations with regard to the effect of the decision of the Court of Appeal. First, in view of the fact that the finding by Byrne J. that the Commissioner for Prisons is not liable still stands, this issue has been determined as between the parties. It follows, therefore, that the Commissioner should no longer be a party to the proceedings.

Secondly, the Court of Appeal has determined that the claim for compensation in this case is based on s 19 (1) of the *Constitution* applying the principles enunciated in *Maharaj v The Attorney-General Of Trinidad and Tobago* (supra). In particular this is a public law liability of the State. As such it is not an action in tort nor is it based on some kind of vicarious liability. The Court of Appeal further concluded that s 3 (5) of the *State Proceedings Act* cannot provide any defence to a claim under s 19 (1) of the *Constitution*. In considering section 3 (5), the Court of Appeal said:

" It is clear that it acts as 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*"

It is clear to us that the Court of Appeal concluded that section 3 (5) of *State Proceedings Act* (Cap 24) and section 65 of the *Magistrates Courts Act* may be relevant to actions in tort as distinct from a liability in the public law of the State as enunciated under s 19 (1) of the *Constitution*.

In so far as the Court of Appeal followed the decision of the Privy Council in respect of the nature of the remedy under s 19 (1) of the *Constitution*, that issue is determined as between the parties.

The issue that was referred to the High Court by the Court of Appeal was *"to determine whether there had been a contravention of the respondent's rights under section 6 and the possible liability of the State thereto."*

We now turn to consider the decision of Scott J. in the light of the decision of the Court of Appeal. By the time the matter came before Scott J. for hearing, the respondent had amended his statement of claim to be in accordance with the decision of the Court of Appeal. The amended claim is set out in the following paragraphs:

"6. The Plaintiff contends that he was wrongfully imprisoned and deprived of his liberty for a period of 6 months from 18th July, 1992 until his release and the First Defendant is liable to the Plaintiff in respect of such wrongful imprisonment in public law of the State under the provisions of the Constitution of Fiji and in particular under s 19 (1) of the Constitution.

7. The Plaintiff further alleges that the Defendants unlawful actions as stated above deprived the Plaintiff of his personal liberty and freedom of movement guaranteed under the Constitution of Fiji and the Plaintiff is entitled to compensation from the First Defendant for such deprivation of liberty and freedom of movement."

Before Scott J., counsel sought to reargue s 65 of the *Magistrates Courts Act* (Cap 14) and section 25 of the *Prisons Act* (Cap 86). His Lordship dealt with these issues and concluded:

"In my view the liability or otherwise of the Magistrate, the Court or the Prisons

Department under the relevant Acts is not germane to this action."

With respect these issues had already been decided by the Court of Appeal and parties were prevented from raising these matters again by the common law principles of *estoppel* and *res judicata*. However, nothing turns on this as the practical result of His Lordship's ruling has the same practical result.

Scott J. considered whether the respondent's right to personal liberty under s 6 had been contravened as he was directed to do so by the Court of Appeal. He concluded in the following terms:

"In this case there is a right to personal liberty enshrined in section 6 of the supreme law of the land namely the Constitution. The cumulative effect of the Magistrate's Orders was to imprison the Plaintiff for 18 months. Instead of being released on the due date the Plaintiff was detained. His detention was not authorised by law since the sentence which was treated as subsisting had in fact been set aside. Therefore the Plaintiff was unlawfully detained and acquired a cause of action and right to compensation under section 6 (6) of the Constitution. The machinery for invoking the jurisdiction of the High Court to determine a claim brought under section 6 (6) is section 19 (1) and under the provisions of section 12 (2) of the State Proceedings Act the Attorney-General is the proper Defendant. The Plaintiff has acted with procedural correctness."

We agree that His Lordship correctly determined that in the circumstances of this case there was a contravention of the respondents

right to personal liberty for a period of 6 months. What happened in this case cannot come within any of the exceptions set out under s 6 of the *Constitution*, in particular s 6 (1) (a) which provides as follows:

"6.- (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say -

(a) in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether in Fiji or elsewhere, in respect of a criminal offence of which he has been convicted;"

The sentence of 18 months by the Magistrate comes within the exception set out in s 6 (1) (a) but there was no order authorising the extra period of 6 months.

Similarly, the circumstances in this case cannot come within the exception provided for in respect of freedom of movement under s 15 (3) (c) of the *Constitution* which provides as follows:

"15.- (1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Fiji, the right to reside in any part of Fiji, the right to enter Fiji, the right to leave Fiji and immunity from expulsion.

(2)....

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a)...

(b)...

(c) *for imposing restrictions, by order of a court, on the movement or residence within Fiji of any person....in consequence of his having been found guilty of a criminal offence..."*

Counsel for the State argued that there was adequate means of redress under an ex gratia payment by the State and therefore the Court should decline to exercise its jurisdiction under the proviso in s 19 (2) of the *Constitution* which is in the following terms:

" Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

In our opinion His Lordship correctly applied the proviso under s 19 (2) of the *Constitution*. An ex gratia payment is not a cause of action in law and is not capable of being enforced in a court of law. We are satisfied it is not an adequate means of redress. However, on the other hand, if we were wrong and it were to be a proper cause of action available under the law, we consider that the trial judge correctly ruled on the evidence before him that he could not be satisfied that the respondent was able to get any compensation or any adequate compensation from the State in the form of an ex gratia payment. It is clear from the evidence that the respondent has attempted to get such compensation in the last couple of years but without any success. The trial judge exercised his discretion correctly under the proviso in s 19 (2) of the *Constitution*.

We would dismiss the appeal with costs, confirm judgment for the respondent and the matter should now be remitted back to the High Court for assessment of damages if not settled.

Before we leave this matter, issues of great constitutional importance have been highlighted in this case that need to be clarified:

(1) What is the precise nature of a claim for compensation a person may have for contravention of the right to personal liberty under section 6 of the *Constitution*?

(2) What defence (if any) may any person or authority (such as the State) have where the right to personal liberty under section 6 of the *Constitution* is contravened?

We have determined the result of this appeal strictly on the basis of issues of law decided by the Court of Appeal in the earlier proceedings in this matter. In so doing we are prevented from reconsidering those issues of law that have been decided by the Court of Appeal as between the parties in this case by the common law principles of *estoppel* and *res judicata*.

However, we feel obliged to point out that there is a need to clarify the questions of law we have set out above. We have been prompted to raise this by a statement in the trial judge's judgment. Even though we have ruled that the trial judge correctly dealt with the issue that was referred to him by the Court of Appeal, there is a passage in His Lordship's judgment which may give rise to a different conclusion of law on the question of the true nature of a claim for compensation under the

Constitution and the nature of a defence to such a claim by the State under s 3 (5) of the *State Proceedings Act* and s 65 of the *Magistrates Courts Act*. His Lordship said the following:

*"Therefore the Plaintiff was unlawfully detained and acquired a cause of action and right to compensation under s 6 (6) of the Constitution. The machinery for invoking the jurisdiction of the High Court to determine a claim brought under 6 (6) is section 19 (1) and under the provisions of section 12 (2) of the *State Proceedings Act* the Attorney-General is the proper Defendant."* (emphasis added)

On careful analysis of this passage, it may be argued that it is inconsistent with the ruling of the Court of Appeal in several respects. First, the Court of Appeal founded the cause of action in this matter on s 19 (1) of the *Constitution*. The nature of this remedy is based on the Privy Council decision in *Maharaj's case* (supra), namely, that it is a liability in public law of the State and it is not vicarious liability. The Court of Appeal has also concluded that section 3 (5) of the *State Proceedings Act* and s 65 of the *Magistrates Courts Act* cannot provide the State with any defence in that these provisions may only apply to actions in tort and vicarious liability.

An action based on s 6 (6) of the *Constitution* is in the following terms:

"Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person, or from any other person or authority on whose behalf that other person was acting."

It may be argued that this is an action in the nature of a tort and may involve vicarious liability. Does that attract the argument that defences in s 3 (5) of the *State Proceedings Act* and s 65 of the *Magistrates Courts Act* apply in such an action? The Court of Appeal said that these defences "may be relevant to the claim in tort".

There is another matter, namely, that there is the proviso under s 19 (2) which gives the High Court a discretion on whether or not to grant "redress" under s 19 (1) of the *Constitution*. Whereas, under s 6 (6) there is no such discretion. A person can make such a claim as of right.

Therefore, it is clear to us that the law as it stands at this point requires clarification. The important question that needs to be clarified is whether the true nature of a compensation claim by a person whose right to personal liberty is contravened is determined by s 19 (1) of the *Constitution* as held by Court of Appeal (adopting *Maharaj's case*)? or is it determined by the express terms of s 6 (6) of the *Constitution*?

We observe that in determining the true nature of the remedy of compensation in this jurisdiction it may be argued that there is a marked difference between the *Constitution of Fiji* and the *Constitution of Trinidad and Tobago*. While we appreciate that the wording of s 19 (1) is in substance similar to s 6 of the *Constitution of Trinidad and Tobago*, it is a general provision and it does not indicate the nature of the right that has been contravened nor does it indicate the nature of "redress". The only guidance one gets in relation to the meaning of "redress" is in s 19 (2) which simply says that the High Court may "make such orders, issue such writs and give such directions as it may consider appropriate for the

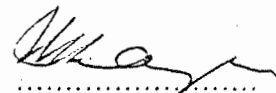
purpose of enforcing or securing the enforcement of any of the provisions of this Chapter" One can understand the reason for the approach taken by the Privy Council in *Maharaj's case* in interpreting the word "redress" in a liberal and an innovative manner. The Privy Council there was faced with uncharted waters.

However, in Fiji one necessarily has to go to the specific provisions in Chapter II of the *Constitution* to determine the nature of the right as well as to determine the nature of a "redress". In this respect it may be argued that the *Constitution of Trinidad and Tobago* is significantly different. Under the *Constitution of Fiji*, Chapter II, a right is prescribed and the same provision provides for the qualification of the right. In respect of some of these rights, a remedy is also provided. In this case the relevant right is set out under s 6 - *Protection of right to personal liberty*. There are exceptions to this right, "save as may be authorised by law" in prescribed cases (see s 6 (1) (a) to (j)). Significantly, s 6 (6) specifically provides for the nature of the remedy if this right is contravened. We have already set out the terms of this provision earlier and we have pointed out the possible argument that this may be a cause of action in the nature of a tort and may involve vicarious liability.

The question then arises whether the Court of Appeal was correct in adopting the principle enunciated in *Maharaj's case* which remedy in nature may be different to a remedy of compensation expressly provided for in s 6 (6) of the *Constitution*. We of course express no view on this question. We note that when the Court of Appeal determined this issue, they made general reference to section 6 on the issue of contravention but no reference was made to section 6 (6) of the *Constitution* on the nature of

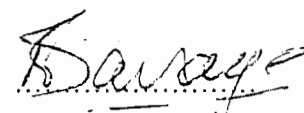
compensation claim. It is possible that counsel failed to draw the attention of the Court of Appeal to the provisions of s 6 (6).

We cannot of course determine these principles of law in this matter because the Court of Appeal has conclusively determined these issues as between the parties now before us in the earlier proceedings mentioned. We have simply raised these issues so that they may be clarified in an appropriate manner in the future.



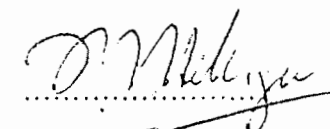
Sir Mari Kapi

Judge of Appeal



Mr Justice Savage

Judge of Appeal



Mr Justice Hillyer

Judge of Appeal