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

MISCELLANEOUS APPEAL NO. 15 OF 2007

BETWEEN:	TIMOCI SILATOLU	*Appellant*
A N D :	THE STATE	*Respondent*

Coram:	Ward, President Ellis, JA McPherson, JA
Hearing:	Wednesday 13th June 2007
Counsel:	Appellant in person M Rakuita & Ms S Serulagilagi for respondent
Date of Judgment:	Monday 25th June 2007

JUDGMENT OF THE COURT

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[1] This is an appeal against the decision of Pathik J delivered on 26 February 2007 striking out a claim by the appellant for constitutional redress under section 41 of the Constitution. The relevant parts of that section provide:

"41(1) If a person considers that any of the provisions of this Chapter [*i.e. the Bill of Rights*] has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.

(2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.

(3) The High Court has original jurisdiction:

(a) to hear and determine applications under subsection (1); and
(b) to determine questions that are referred to it under subsection (5);

and may make such orders and give such directions as it considers appropriate.

(4) The High Court may exercise it discretion not to grant relief in relation to an application or referral made to it under this section if it considers that an adequate alternative remedy is available to the person concerned."

[2] The appellant commenced his proceedings in the High Court by notice of motion claiming:

1. "A Declaration that in not specifying the time to be served in my life sentence, the State is thereby breaching my right under section 25(1) of the Constitution as this constitutes disproportionately harsh treatment or punishment;

2. A further Declaration that I am being adversely treated by the Prison authorities in terms of prison applications and other administrative remedies and this breaches my right to equality before the law under section 38 of the Constitution;

3. A Declaration that my right as a detained person to be treated with humanity and with respect for my inherent humanity pursuant to section 27 (1)(f) of the Constitution has been breached by the Prison Authorities.

4. An Order for appropriate damages in light of the above breaches alleged by the Applicant."

[3] The motion was supported by an affidavit from the appellant relating that he had been convicted of treason on 27 June 2003 by Wilson J and sentenced to life imprisonment. He claimed however that his sentence was "fixed to 9 years" and that the prison officer had failed to enter the earlier release date and the latest day of discharge in the prison records and that his eligibility for further remission was prejudiced. He further claimed that he was wrongfully transferred to the maximum security prison, that he was then told because he had an in indeterminate sentence he could not be given a minimum release date or a latest day of discharge. He said he complained to the Commissioner of Prisons by letter of 29 September 2003 and received a reply dated 23 October 2003 which explained what had been done. This matter remains in contention. He then relates that in October 2003 he applied for a conditional pardon but his request received no response until August 2004 after he had raised the matter with a visiting justice. Next he raised his treatment following good conduct and the failure by the prison to advance him in the "stages". Next he raised some 4 instances of alleged victimisation. He then returned to the question of the minimum term he had to serve and asked for an amendment to the law. He related a personal tragedy involving his wife's health and complains he was treated without compassion when he sought temporary release to help his wife. Next he claimed he was badly treated because he was not taken to the High Court in Lautoka in response to a production order.

[4] An affidavit of a Prison Department officer was filed in reply and the appellant then filed another affidavit repeating the complaints already mentioned and in addition claiming being degradingly handcuffed in public, delay in the issuing of spectacles and failure to notify hospital appointments. He also sought legal assistance. Another affidavit in reply was filed.

[5] The State then applied to strike out the claim on the grounds that no reasonable causes of action was disclosed, that it was scandalous, frivolous or vexatious and that it was an abuse of the process of the Court. Other grounds are stated that the action disclosed no reasonable defence, and that the process may prejudice, embarrass or delay the fair trial of "the action". We are at a loss to understand these two grounds and counsel understandably did not mention them.

[6] Before Pathik J, the appellant had counsel and the Human Rights Commission provided counsel as amicus curiae.

[7] The Judge acceded to the State's application and struck the appellant's claim out. Giving effect to Clause 41 (4) of the Constitution he held that the onus was on the appellant to choose the "adequate alternative forum" and that his application for redress did not fall to be decided under the Bill of Rights provisions of the Constitution. He held they were to be resolved administratively. He held the appellant had adequate alternative remedies, in particular the assistance of the visiting justice. He held the appellants contentions about his earlier release date had no merit, and that his other complaints had already been "satisfactorily considered" and "diligently attended to." He held there had been no breach of s.38 of the Constitution (the equality provision). He concluded there was no reasonable cause of action, that the claim was vexatious, scandalous, frivolous and that it was an abuse of the process of the Court. He said the appellant had not shown he had exhausted alternative remedies available to him.

[7] The Judge said that the proceedings should have been by writ of summons rather than Notice of Motion and affidavit as there were disputed facts which could only be resolved by way of evidence and cross-examination. The High Court (Constitutional Redress) Rules 1998 expressly provide that an application may be made by motion. Further even if proceedings are incorrectly commenced there is ample power under Order 2 of the High Court Rules 1988 to enable the matter to proceed. In short, we cannot agree that the chosen form of application was fatal to the appellant's claims.

[8] The appellant submitted that while most of his complaints had been dealt with administratively, two matters were still in issue; the question of the minimum time he must serve and his date of release, and the effect of the immunity decree which was held invalid by the High Court: *State v Silatolu and Nata* HAM008 and 010 of 2002.

[9] As to the release date, the sentencing Judge pronounced the sentence "life imprisonment – 9 years from this day fixed as the period which must be served (effective from today this 27th day of June 2003)". The prison officer originally entered in the record that his earliest possible release date was 26 June 2012. The appellant was then told that as he had an indeterminate sentence, no earliest possible release date could be stipulated although it was well known that the Prerogative of Mercy Commission considers applications by those serving life sentences after 9 years has been served. The appellant then wrote to the Commissioner of Prison on 29 September 2003 challenging what had happened and the Commissioner replied a month later saying:

> "Remission of Sentence
>
> I write to acknowledge and thank you for your correspondence dated 29th September, 2003 on the above subject and wish to advise as follows:
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> Remission of Sentence is provided for under Section 63 and Regulation 141 of the Prisons Act Cap. 86. Your contention is correct, but your interpretation relating to your case is wrong. The court sentenced you to life imprisonment that is your sentence. Because there is no final date of a life sentence one-third remission cannot therefore be calculated. Hence, the provision of Section 63 and Regulation 141 about calculation and computation of remission cannot be applied.
>
> However, government as a matter of policy adopted that a prisoner sentenced to life imprisonment must service at least nine (9) years before he or she can apply through the Prerogative of Mercy Commission for a Presidential Pardon. The Prerogative of Mercy Commission is established under Section 115 of the 1997 constitution.

However, the prisoner must display consistent, satisfactory industry, good behaviour and conduct to be eligible for sympathetic consideration by the Prerogative of Mercy Commission. There have been cases in the past where prisoners serving life sentences have not been favourably considered for a Presidential Pardon even after serving 15 years of their life sentence due to consistent unsatisfactory industry and frequent misbehaviour.

In your case, as you said you were sentenced to life imprisonment and the Judge fixed a period of nine (9) years with effect from 27th June, 2003 which "must be served". Therefore, your case falls into the same category of other prisoners serving life sentence. We are always guided by the recommendation of the sentencing court of the minimum period that a prisoner sentenced to life imprisonment must serve.

In the absence of such recommendation, the case then conforms to the government policy to at least serve nine (9) years before the Prerogative of Mercy Commission considers for Presidential Pardon. Therefore, in your case your sentence is life imprisonment and the Judge has ordered that you must serve nine (9) years. The nine (9) years therefore is not subject to remission.

I hope the above explanation assists you in understanding your situation."

[10] As we have stated in other decisions this session the statutory authority to fix minimum terms to be served was designed to enable a Court to impose longer terms of actual imprisonment. In this case it appears the sentencing Judge imposed a 9 year term to comply with the policy mentioned above. This was unnecessary and in fact has given rise to the misunderstandings that have beset the appellant. In short we agree that the Commissioner has correctly set out the appellant's position and he must accept it.

[11] As far as the question of immunity is concerned, the High Court has held that the Commander had no power to grant it. It was not possible to revisit that matter now.

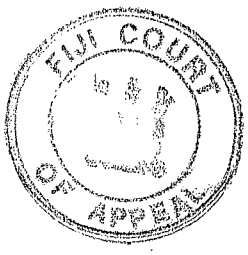
[12] Although all other complaints have been dealt with, the appellant asks that we review them to provide guidelines for the future. This is an appeal against a decision to strike out the appellant's claims. As has already been pointed out his claims may require evidence to be called and issues of contested facts resolved. We have already said that his application can be reconstituted if need be to resolve disputed facts. We are unable to consider his claims until they form part of a decision in the High Court. While the matters the appellant wished to raise have been dealt with administratively whether or not he has had his constitutional rights violated by for example, the apparently excessive handcuffing, is yet to be determined. This can only be done in the High Court. It is true that some of the matters may appear trivial and lack substance but they should receive the Court's consideration.

[13] We agree that the setting of an earlier and latest release date cannot be raised by the appellant and neither can the question of immunity from prosecution. The other matters raised can and the Judge should not have struck them out. We accordingly quash the order dismissing the appellant's claims. The appellant would be well advised to seek further legal assistance.

[14] The order dismissing the appellant's claims is partially quashed as to the most appropriate procedure to determine his claim for redress on the remaining issues. As the appellant represented himself there will be no order as to costs.

Ward, President

Ellis, JA



McPherson, JA

Solicitors:

Appellant in person
Office of the Director of the Public Prosecutions, Suva for the Respondent