IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HAM No 104 OF 2016

BETWEEN : DESHWAR K. DUTT

Applicant

AND : COMMISSIONER OF PRISONS

SUPERVISOR OF NATABUA CORRECTION CENTRE

OFFICER-IN-CHARGE OF THE FIJI CORRECTIONS SERVICE HEADQUARTERS WESTERN DIVISION

Respondents

FIJI HUMAN RIGHTS AND
ANTI DISCRIMINATION COMMISSION

As Amicus Curiae

Counsel : Applicant in person
Ms M. Faktaufon for Attorney - General's Office
Mr A. Singh for Director of Public Prosecution.

Date of Hearing : 17th of August 2016
Date of Ruling : 14th of November 2016

JUDGMENT

(Constitutional Redress Application; Section 44 (1) of the Constitution of the Republic of Fiji Islands)

Introduction

1. This Constitutional Redress application is made by the Applicant pursuant to Section 44 (1) of the Constitution of the Republic of Fiji Islands (hereinafter

referred as the Constitution) and Order 3 (1) of the High Court (Constitutional Redress) Rules 2015 (hereafter referred as HCCRR).

Background

2. The Applicant has brought this application by way of a Notice of Motion, supported by his affidavit dated 2nd of June 2016, stating the grounds of this application. He stated that he had been detained in the Lautoka Correction Centre since 28th of April 2016. The Applicant deposed in his affidavit, that there has been continuous practice of threatening, assaulting, intimidating, and brutal and emotional torturing of inmates by the prison officers at the Lautoka Correction Centre. The Applicant claims that due to the treatment, the mental and physical wellbeing of him (other inmates) had been substantially deteriorated. He further claims that his rights that have been guaranteed under the Constitution has been violated. Having stated the background of his application, the Applicant seeks following orders, *inter alia;*

   i) That an order that threats, intimidation, oppression, assaults, and all other improper methods and torture practices by the office of the Commissioner of Fiji Prison and Correction Service at Lautoka Correction Centre and other Correction Centres cease and ends it operation,

   ii) That such further relief and orders that the honourable court may deem fit, just, equitable, expedient and necessary in the circumstances of the case,

3. Pursuant to the service of the Notice of Motion, the Director of Public Prosecution and the Attorney-General appeared in court on the 28th of June 2016 and on the 20th of July 2016 respectively. Meanwhile, the court invited the Fiji

Human Rights and Anti- Discrimination Commission to file submissions *amicus curiae*, on this matter and as per the invitation it filed the submissions. The Director of Public Prosecution filed an affidavit of Chief Correctional Officer Mr. Mika Seru Waqa and the Attorney-General Office filed an affidavit of Mr. Suliasi Mataqa in opposition of this application.

4. The Applicant filed an affidavit in reply to the objections filed by the Respondents. In his reply affidavit, the Applicant specifically stated that he has never alleged in his affidavit in support that he was assaulted by the prison officers. He then alleged that they were never provided their food in compliance with the Commissioner's Orders No 008. He then alleged that his right to smoke has been violated and he was never presented to a doctor for medical examination by the management of the Lautoka Correction Centre.

5. Without any directions, the Applicant filed another affidavit, listing out few names of the inmates that he claims as victims of assault by the prison officers. Subsequently, the matter was set down for hearing on the 11th of August 2016. The learned counsel for the Attorney-General and the Applicant made their oral submissions during the course of the hearing. The Applicant has then been released by the prison on 19th August, 2016. Since then, the Applicant did not appear in this court even though notice of adjournment was issued on him. Therefore, I presume that he has no interest in pursuing this application any further. However, I proceed with my judgment as the hearing of the matter has already been concluded on the 11th of August 2016.

6. The Applicant has sought an order to stop the improper treatments carried out by the Prison Officers on inmates, not only in the Lautoka Correction Centre, but

also in other Correction Centres of the Country. He specifically admitted that he never claimed that he was assaulted by the prison officers. However, he claims that his rights as well as of other inmates' have been violated by the assaults, intimidation, and threats carried out by the prison officers.

7. The Respondents contend that the Applicant has not specially stated about the alleged violation of his constitutional rights in detail. Hence, the Applicant could not make an application under Section 44 (1) of the Constitution and the Rule 3 (1) of the HRCRR 2015. Moreover, the Respondents claim that the order sought by the Applicant is obscure and general in nature. Hence no remedy could be granted on such an application.

8. The learned counsel for the Attorney-General intensely submitted that the Applicant cannot bring an application of this nature under Section 44 (1) of the Constitution on behalf of other inmates. Therefore, I now draw my attention to determine whether the Applicant has a *locus Standi* under Section 44(1) of the Constitution to make this application.

Laws and Analysis

9. Section 44 (1) of the Constitution has provided the enforcement procedure in the event of any contravention of the rights stipulated under the Chapter 2 of the Constitution, where it states that;

> *"If a person considers that any of the provisions of this Chapter 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".

10. According to Section 44 (1) of the Constitution, a person could make an application seeking redress if the rights as stipulated under Chapter 2 of the Constitution has or is likely to be contravened in relation to the said person with the exception only in relation to the person who is detained. Under such an exceptional circumstance, a third person is allowed to make an application under Section 44 (1) of the Constitution if the third person considers that there has been or is likely to be a contravention of any of the rights of the detained person as stipulated under Chapter 2 of the Constitution.

11. Section 3(1) and (2) of the Constitution articulates the principles of constitutional interpretation. It states that the approach of interpretation of the provisions of the Constitution must be founded on the grounds to promote the spirit, purpose and objective of the Constitution as a whole in order to enhance the democratic society based on human dignity, equality and freedom.

12. Moreover, Article 7 of the Constitution states that the court is allowed to consider and apply the principles of international laws and common law pertaining to the protection of the rights and freedoms in interpreting the provisions of the Bill of Rights as stipulated under Chapter 2 of the Constitution.

13. Bearing in mind the principles of interpretation of the Constitution, I now turn onto examine the approaches adopted by the other jurisdictions with regard to the *locus standi* in invoking the jurisdiction of the court in respect of a breach of constitutional or fundamental rights.

14. Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedom provides the procedure for the individuals to make an application to the European Court of Human Rights, where it states that;

> *"The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right"*

15. In **Campbell and Cosans v The United Kingdom (7511/76; 7743/76 [1982] ECHR 1 (25 February 1982)**, the European Court of Human Rights interprets the term of "victim" as stipulated under Article 34 of the Convention as someone who is directly affected by the act or the omission of the public authority, that has allegedly breached or is likely to be breached of any convention's right in relation to the said person.

16. Both Mrs. Campbell and Mrs. Cosans lived in Scotland. Each of them had one child of compulsory school age at the time when they applied to the Commission. The applicants' complaints concerned the use of corporal punishment as a disciplinary measure in the State schools in Scotland attended by their children. Mrs. Campbell's application was founded on the refusal by the Strathclyde Regional Council to guarantee that her child would not be subjected to any corporal punishment as a disciplinary measure at the school. Likewise, Mrs. Cosans' application was founded on the refusal by the Beath Senior High School in Cowdenbeath to undertake that her child would not be subjected to any such punishment upon his readmission to the school. In fact ,the son of Mrs.

Campbell had never been subjected to any such punishment and the son of Mrs. Cosans did not attend to the school upon the refusal by the Beath Senior High School in Cowdenbeath.

17. Having considered Article 3 of the Convention, which states that *" no one shall be subjected to torture or to inhuman or degrading treatment or punishment"* The European Court of Human Rights in **Campbell and Cosans (supra)** concluded that;

> *"As to whether the applicants' sons were humiliated or debased in their own eyes, the Court observes first that a threat directed to an exceptionally insensitive person may have no significant effect on him but nevertheless be incontrovertibly degrading; and conversely, an exceptionally sensitive person might be deeply affected by a threat that could be described as degrading only by a distortion of the ordinary and usual meaning of the word. In any event, in the case of these two children, the Court, like the Commission, notes that is has not been shown by means of medical certificates or otherwise that they suffered any adverse psychological or other effects (see paragraph 13 above).*
>
> *Jeffrey Cosans may well have experienced feelings of apprehension or disquiet when he came close to an infliction of the tawse (see paragraph 10 above), but such feelings are not sufficient to amount to degrading treatment, within the meaning of Article 3 (art. 3).*
>
> *The same applies, a fortiori, to Gordon Campbell since he was never directly threatened with corporal punishment (see paragraph 9 above). It*

is true that counsel for his mother alleged at the hearings that group tension and a sense of alienation in the pupil are induced by the very existence of this practice but, even if this be so, these effects fall into a different category from humiliation or debasement.

To sum up, no violation of Article 3 (art. 3) is established. This conclusion renders it unnecessary for the Court to consider whether the applicants are entitled, under Article 25 (art. 25) of the Convention, to claim that their children were victims of such a violation, an issue that was examined by the Commission and was the subject of submissions by the Government"

18. In **Campbell and Cosan (supra),** the European Court of Human Rights has concluded that a feeling of apprehension or disquiet suffered by a person due to the degrading punishment or treatment employed on another person by the Authority is not sufficient for him to claim that his rights under Article 3 of the Convention has been violated.

19. In **British Gurkha Welfare Society and Others v The United Kingdom (Application No 44818/11, 15th of September 2016)** the European Court of Human Rights in determining the "victim" status of the British Gurkha Welfare Society under Article 34 of the Convention, held that;

"It is necessary to address at the outset the matter of the "victim" status of the first applicant. The British Gurkha Welfare Society is a non-governmental organisation, comprised of 399 retired Gurkhas, which had standing before the domestic courts in the litigation concerning the subject-matter of the present case. Nevertheless, the Court has held that

"victim" status must be interpreted autonomously, irrespective of its meaning under domestic law, and according to established case-law it will normally only be granted to an association if the latter has been directly affected by the measure in question (see Association des amis de Saint-Raphaël et de Fréjus et autres v. France (dec.), no. 45053/98, 29 February 2000; Dayras and Others and the association "SOS Sexisme" v. France, (dec.), no. 65390/01, 6 January 2005; and Grande Oriente d'Italia di Palazzo Giustiniani v. Italy (no.2), no. 26740/02, § 20, 31 May 2007).

Although its 399 members were "directly affected" by the GOTT, the British Gurkha Welfare Society does not appear to have been "directly affected" by the measure in its own right. It is therefore doubtful whether it can claim to be a "victim" of the alleged violations within the meaning of Article 34 of the Convention. However, in view of the Court's conclusions on the merits of the applicants' complaints, there is no need to reach any firm conclusion in this regard"

20. In view of Article 34 of the Convention and the conclusions made by the European Court of Human Rights in **Campbell and Cosans (supra)** and **British Gurkha Welfare Society and others (supra)**, I find that a person, group of persons or a non-government organisation is allowed to make an application under Article 34 of the Convention only if his or the organisation's rights is or is likely to be contravened by any of the high contracting parties.

21. Section 7 of the Human Rights Act of United Kingdom of 1998 stipulates the procedure to bring an application to the court in the event of violation of any

rights stipulated under the Human Rights Act by the public authority, where it states that;

i) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

22. Section 7 (3), (4) and (7) of the Human Rights Act has further defined who could bring an application for judicial review or an application to European Court of Human Rights, that;

iii) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

iv) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

vii) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if

proceedings were brought in the European Court of Human Rights in respect of that act.

23. Accordingly, Section 7 of the Human Rights Act 1998 allows to institute an action in an appropriate Court or a Tribunal, only if he is a victim of such alleged act executed by the Public Authority.

24. The High Court of Solomon Islands in **Ulufa'alu v Attorney General [2001] SBHC 178; HCSI-CC 195 of 2000 (9 November 2001)** has discussed the appropriate approach of constructing the term *"in relation to him"* as stipulated under Section 18 (1) of the Constitution of Solomon Islands (which is more equivalent to Section 44 (1) of the Constitution) in an elaborative manner. Therefore, I consider it to be helpful interpreting the meaning of Section 44 (1) of the Constitution. Palmer ACJ in **Ulufa'alu v Attorney General (supra)** held;

> *"Section 18 on the other hand, looks inward. This is plain from the sub-heading of Chapter II "Protection of Fundamental Rights and Freedoms of the Individual". It focuses on the protection of individual rights and freedoms, encapsulated in Sections 3 to 16 of the Constitution, not his interests. The test of sufficient interest is more liberal than the test under Section 18. Satisfying the locus standi requirements under Section 83 does not imply an applicant should be granted locus standi under Section 18. For instance, a close relative of an affected person may show that he/she has sufficient interest in the contraventions of the provisions in Chapter II in relation to an affected person, but he/she cannot and does not have locus standi to bring such action for and on behalf of the affected person. He/she may be able to do it under Section 83 but definitely not under Section 18.*

The allegations of contraventions of any provision of Chapter II must necessarily relate to and are confined in my respectful view, to the individual rights and freedoms of an applicant.

Section 18(1) reads:

"Subject to the provisions of subsection (6) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution 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."

The first qualifying factor in Section 18(1) is that any allegations of contraventions are confined to the individual rights and freedoms specified in Sections 3 to 16. The second qualifying or limiting factor is that those contraventions must relate directly to or personally affect him - "in relation to him". The rights that an applicant can seek redress for under Section 18(1) are not the rights of a friend, supporter or family member. An applicant cannot be permitted to come to court for redress, for contraventions, which relate to others. They can come to court themselves. They have equal rights of access, guaranteed by our Constitution to come to court for redress. It is unnecessary therefore and actually amounts to an abuse of process for another person, whether a friend, supporter or family

member to seek redress on behalf of someone else's rights. An applicant can agitate his own allegations of contraventions under Section 18(1).

25. In view of the above discussed judicial precedents and laws, it is my considered opinion that Section 44 (1) of the Constitution should be constructed with an inward approach rather than an outward approach. Such construction would appropriately serve the purposive approach of interpretation of the Chapter 2 of the Constitution as expounded under Sections 3 and 7 of the Constitution. Hence, the first qualifying ground under Section 44 (1) is whether the alleged contravention or likely contravention of any provision under Chapter 2 is in relation to the Applicant. The only exception is in relation to a detained person, which I will discuss in details below.

26. In this instant case, the Applicant in his affidavit in support claims that there had been continuous assaults, intimidation and threats done by the prison officers. He has not specifically stated whether he had been subjected to those alleged assaults, intimidation and threats. In paragraph twelve of his affidavit in support, the Applicant claims that his physical and mental conditions as well as other inmates' have been substantially deteriorated due to the treatments they had been subjected to.

27. In his affidavit in response dated 20th of July 2016, the Applicant has specifically deposed that he has never said that he was assaulted by the prison officers. Hence, it is clear that the allegation of assault, intimidation and threats by the prison officers are not directly related to the Applicant. He alleged that other inmates have been subjected to such assault, intimidation and threats. The Applicant in his third affidavit has deposed the list of names of inmates whom

he claimed were subjected to the assault carried out by the prison officers. He has further criticised the conduct of the prison authorities in general.

28. It is not specific whether the Applicant alleges that the assaults, intimidation and threats unleashed on other inmates by the prison officers have been detrimental to his physical and mental wellbeing. If so, it is important to provide substantive material or evidence to establish such a claim.

29. As I mentioned in paragraph 17, The European Court of Human Rights in **Campbell and Cosans v The United Kingdom (supra)** has discussed the effect of assault or violent conduct unleashed on other persons by the authority on the Applicants, where the Court held,

> *"As to whether the applicants' sons were humiliated or debased in their own eyes, the Court observes first that a threat directed to an exceptionally insensitive person may have no significant effect on him but nevertheless be incontrovertibly degrading; and conversely, an exceptionally sensitive person might be deeply affected by a threat that could be described as degrading only by a distortion of the ordinary and usual meaning of the word. In any event, in the case of these two children, the Court, like the Commission, notes that is has not been shown by means of medical certificates or otherwise that they suffered any adverse psychological or other effects (see paragraph 13 above).*

30. In the absence of any substantial material or evidence in order to establish that the assaults, intimidation and threats unleashed on other inmates by the prison officers have affected his physical and mental wellbeing, I find the claim of the

Applicant that his rights have been violated due to the such alleged assaults, intimidation and threat on other inmates by the prison officer has no merit and proper foundation.

31. Moreover, as discussed above, the Applicant is not allowed to file an application under Section 44(1) of the Constitution on behalf of the other inmates, unless his claim falls within the scope of the exception clause of Section 44(1) of the Constitution.

32. I now draw my attention to consider whether the Applicant could bring this application on behalf of other inmates under the exception clause of Section 44 (1) of the Constitution, which states that;

> *"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"*

33. Lord Diplock in **Kamrajh Harrikissoon v Attorney-General of Trinidad and Tobago (1979 3 WLR 62)** has discussed the importance of the application for constitutional redress and the protection of the rights of individuals, where his lordship held that;

> *"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some humans right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution*

for redress when any human right or fundamental freedom is or likely to be contravened, is an important safeguard of those rights and freedom; but its value will diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action"

34. I am mindful of the fact that the above observation of Lord Diplock in **Kamrajh (supra)** was made under a different circumstances than of this case, where the Applicant challenged the decision of the Teaching Service Commission to transfer him to another school in an application for constitutional redress without invoking the procedure that has been laid down to challenge such a decision.

35. However, the above observation of Lord Diplock in **Kamrajh (supra)** has confirmed that the regime of constitutional redress is one of the keystones in the enforcement of the rights and freedoms of individuals and it must be invoked with great care and caution.

36. As discussed above, the rights and freedom encapsulated under Chapter 2 of the Constitution are personal rights of persons and citizens. Hence, a person is allowed to make an application for redress under Section 44(1) of the Constitution if only he considers that his rights and freedom as stipulated in Chapter 2 has or is likely to be contravened.

37. Hence, the value and importance of the regime of constitutional redress as provided under Section 44(1) of the Constitution would undoubtedly undermine, if any third person is allowed to make an application on behalf of a detained

person without properly setting out the grounds that made him to make such an application on behalf of the detained person and the nature of such applications.

38. Having carefully considered the approaches adopted in the above discussed judicial precedents, it is my considered opinion that in order to bring an action on behalf of a detained person, the Applicant must first satisfy the court that the detained person is not in a position to invoke the jurisdiction of the court under Section 44 (1) of the Constitution by himself due to any restriction or any condition that has arisen from his detention. Once the Applicant satisfies the above condition, the court could then proceed to entertain such application. Such approach of constructing the scope of the exception clause would not contravene the purpose of main clause of Section 44(1) of the Constitution.

39. In this instant case, the Applicant has neither stated that he brought this application on behalf of other detained inmates nor has provided any material to satisfy the court that other inmates have been prevented to invoke the jurisdiction of the court under Section 44(1) of the Constitution due to their detention.

40. Finally I draw my attention to the issue of meals provided to the inmates by the prison authority. The Applicant in his second affidavit dated 20th of July 2016 has criticised the practice of the prison officers and stated that the food provided to them are not in compliance with the directives of Commissioner of Prison. However, he has not alleged that his right to have adequate nutrition as stipulated under Section 13 (1) (j) of the Constitution has been violated.

41. The Applicant further alleged that he was never presented to a doctor for medical checkup. However, he has not stated that he has or had suffered from any medical condition that required to have medical treatment. Hence, this claim fails *in limine.*

42. The Applicant seeks an order of this court to end and cease any form of assault, intimidation, improper practices, threats by the prison officers not only at the Lautoka Correction Centre, but at all other Correction Centres of the Country. The said relief sought by the Applicant is not for any specific violation of his rights or freedom as stipulated under Chapter 2 of the Constitution. It is more general order against the Fiji Correction Service. Therefore, it is my opinion that this court cannot grant such an order under Section 44 of the Constitution.

43. Having considered the forgoing reasons discussed above, I find the Applicant has no *Locus Standi* to make an application in this form under Section 44(1) of the Constitution. I accordingly refuse and dismiss this Notice of Motion.

R. D. R. Thushara Rajasinghe

Judge

At Lautoka

14th of November 2016

Solicitors: **Office of the Attorney General**

Office of the Director of Public Prosecution