

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 356 of 2017

BETWEEN

THE PROCEEDINGS COMMISSIONER on behalf of **JOSEPH CHRISTOPHER** of
106 Lakeba Street, Samabula.

FIRST APPLICANT

AND

THE PROCEEDINGS COMMISSIONER on behalf of **HUMAN RIGHTS AND**
ANTI-DISCRIMINATION COMMISSION of
Naibati House, Goodenough Street,
Suva, Fiji.

SECOND APPLICANT

AND

THE ATTORNEY GENERAL OF FIJI of Level 7 – Suvavou House,
Victoria Parade, Suva, Fiji.

FIRST RESPONDENT

AND

THE COMMISSIONER OF THE FIJI CORRECTIONS SERVICE of

Fiji Bank Employees Union Buildings, 62 Gordon Street

(corner of Kimberly & Gordon Street), Suva, Fiji

SECOND RESPONDENT

Counsel : Mr. G. Tokelau for the Applicants
Ms. S. Taukei with Ms. G. Naigulevu for the Respondents.

Date of Hearing : 18th May, 2018

Date of Judgment : 15th June, 2018

JUDGMENT

[1] The applicants filed this originating motion pursuant to Rule 3(1) of the High Court Rules (Constitutional Redress) Rules 2015, seeking the following reliefs:

1. That the Honourable Court make a declaration that the detainment of the 1st Applicant by the 2nd Respondent when in remand on the 5th and 6th of October 2017 at the Naboro Corrections Complex was unconstitutional as it

- breached section 13 (1) (e) of the Constitution of the Republic of Fiji when the 2nd Respondent detained the 1st Applicant in the same holding cell with two persons serving a sentence at the Naboro Corrections Complex.
2. That the Honourable High Court make a declaration that the detainment of the 1st Applicant by the 2nd Respondent when in Remand on the 5th of October 2017 at the Naboro Corrections Complex was unconstitutional as it breached section 11 (1) of the Constitution of the Republic of Fiji when the 2nd Respondent allowed the 1st Applicant to be detained in the same holding cell with two persons serving a sentence at the Naboro Corrections Complex who raped the 1st Applicant which was cruel, inhumane and degrading to the 1st Applicant.
 3. That the Honourable Court make a declaration that the detainment of the 1st Applicant by the 2nd Respondent when in remand on the 6th of October 2017 at the Naboro Corrections Complex was unconstitutional as it breached section 13 (1) (j) of the Constitutional of the Republic of Fiji when the 2nd Respondent denied the 1st Applicant from accessing immediate medical attention to treat the injuries that the 1st Applicant had suffered on the 5th of October, 2017.
 4. That as a result of the human rights violations and breaches committed by the 2nd Respondent against the 1st Applicant during the detention of the 1st Applicant at the Naboro Corrections Complex from the 5th – 7th October, 2017 the Honourable High Court award damages and compensation to the 1st Applicant.
 5. That the Honourable High Court award damages to the 1st Applicant for the humiliation, injury to feelings and the inhumane treatment as a result of the 2nd Respondent's actions during the 2nd Applicant's detention at the Naboro Corrections Complex from the 5th – 7th of October, 2017.
 6. That the Honourable High Court make any other orders that the Honourable High Court deems appropriate.

7. That the costs for this matter to be borne by the Respondents.

- [2] The allegation of the 1st applicant who was on remand is that it was unconstitutional for the 2nd respondent to detain him at the Naboro prison with other convicted prisoners in the same cell.
- [3] The 1st applicant has, in his affidavit averred that while being detained at Naboro prison with two other convicted prisoners he was sexually assaulted by the two convicted prisoners by forcefully inserting a tooth brush into his anus.
- [4] In the affidavit in response of the 2nd defendant is more a submission on law than a statement of fact. However, in the said affidavit it is averred that the 1st applicant and his accomplice remand inmate Aiyaz Ali were transferred to the Maximum Correction Centre, for that point of time only, for the following reasons:
- (a) On 29th September, 2017, they had called Corrections Officer Asnil Chand (COC Chand) on his mobile phone to pick and deliver to them at the Suva Remand Centre, a parcel that contained marijuana, Fijian Tobacco (suki), a small plastic of methamphetamine (ice) and two hundred dollars cash which were contrabands.
 - (b) They sent threatening text messages to COC Chand which were forwarded to the Officer in Command at Suva Remand Centre Mr. Jo Savou.
 - (c) On 3rd October 2017, the 1st applicant commenced a hunger strike in protest of his transfer till 5th October 2017 when he was joined by other inmates namely Tevita Qaqanivalu, Bainavalu Tuimatavesi, Gabriel Waqa and Rupeni Kedraika. The hunger strike was considered a threat to the security of the institution and as an act of necessity, the first applicant Tevita Qaqanivalu and Bainavalu Tuimatavesi were segregated from the others and put together in the same accommodation, just for that point of time to prevent any further support from other serving inmates and to proactively avoid the hunger

strike escalating to a more serious situation like a riot or disturbance which would be dangerous.

[5] In response to these averments it is stated in paragraphs 8, 9, 10 and 11 of the affidavit filed on behalf of the Proceedings Commissioner as follows:

8. THAT the contents of paragraph of the Respondent's Affidavit are noted.
9. THAT the contents of paragraphs 8 (a) and (b) of the respondents are totally irrelevant to these proceedings as this matter before the Honourable High Court is in relation to the human rights violations committed by the 2nd respondent against the 1st applicant and not a crime that the 1st applicant is alleged to have committed.
10. THAT the contents of paragraph 8(c) of the respondent's affidavit confirm the breach of the 1st applicant's constitutional right to be detained in a separate room from serving prisoners which should have never happened because as an innocent man, the 1st applicant should have been kept in a separate room from serving prisoners who have been found guilty by a court of law.
11. THAT the applicants contest and dispute the contents of paragraph 9, 10, 11, 12 and 13 of the respondent's affidavit.

[6] Section 11(1) of the Constitution provides that every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.

[7] There is no evidence that the 1st applicant was subjected to torture or cruel, inhuman, degrading treatment by the officers of the prison. As alleged by the 1st applicant he was not sexually assaulted by the officers of the prison nor is there any evidence that the corrections officers had a hand in what the other inmates of the prison did to him.

[8] The next question is whether the right of the first applicant guaranteed under section 13(1)(e) of the Constitution has been violated by the 2nd respondent. Section 13(1)(e)

clearly states that every person who is arrested and detained has the right to be held separately from persons who are serving a sentence. The fact that, for whatever the reason, the 1st applicant was detained in the same cell with two others who were serving a sentence is admitted or at least not denied by the 2nd respondent. In the affidavit in response filed on behalf of the respondents the reasons for the detention of the 1st applicant with the convicted prisoners, which I have referred to in paragraph 4 above, are averred. However, in the Constitution there are no provisos to section 13(1)(e) which say that under certain circumstances these provisions can be ignored or violated. In my view under no circumstance the remand prisoner can be detained along with convicted prisoners. As submitted by the learned counsel for the applicants a person is presumed to be innocent until he is proven guilty. Remanding a person who is suspected of having committed a crime is not a punishment. Such a person is detained to assist the investigations and to facilitate the proper administration of justice.

- [9] In this matter the court finds that the 2nd respondent has violated the applicant's constitutional right guaranteed by section 13(1)(e) of the Constitution. The learned counsel cited the following paragraph from the decision **Suguturaga v Attorney General of Fiji** [2017] FJHC 491; HBM 2 of 2017;

The re-housing at Naboro was a temporary measure to prevent danger and insecurity to the whole body populace within the Natabua prison. If it were in breach of section 13(1)(e) of the Bill of Rights, it was a right limited under section (5)(c) by an action undertaken and with lawful authority by the Supervisor to protect his institution from violent insurrection.

- [10] I do not see how can a hunger strike be considered as a violent insurrection? If it was a violent insurrection the officers of the prison should have kept them separately and not together in the same cell.
- [11] In that judgment Justice Madigan has said the rights guaranteed by section 13(1)(e) of the constitution are rights limited under section (5)(c). In the judgment it does not say

section (5)(c) of which statute. If what the court meant was section (5)(c) of the constitution it should be read as sub-section (5)(c) of section 13 of the Constitution but section 13 of the Constitution has only three subsections and section 5 of the Constitution deals with citizenship rights.

- [12] The reason given in the affidavit in response of the respondents for detaining the 1st applicant with other convicted prisoners is that they started a hunger strike inside the prison. As I stated earlier the best way to solve this problem was to separate them and not to detain them together in one cell.
- [13] For the above reasons I hold that by detaining the 1st applicant who was in remand with the convicted prisoners is a violation of his right guaranteed by section 13(1)(e) of the Constitution.
- [14] Section 13(1)(j) of the Constitution provides that every person who is arrested or detained has right to conditions of detention that are consistent with human dignity, including at least the opportunity to exercise regularly and the provision, at State expense, of adequate accommodation, nutrition, and medical treatment.
- [15] It is alleged by the 1st applicant that when regained consciousness the other two prisoners threatened him not to complain and on 06th October, 2016 when he requested one of the prison officers if he could see the Officer-in-charge to make a complaint the prison officers locked him up in a cell next to the cell where the prisoners who sexually assaulted him were detained. On the same day when he requested for medical treatment the officer has informed him that there was no medical orderly available. As admitted by the 2nd respondent the 1st applicant was taken to the CWM Hospital on 07th October, 2018. In the Medical Examination Form the doctor who examined the 1st applicant has observed dried blood around anus and anal skin tags. All these allegations are denied by the respondents. They have not given any explanation why the applicant was not taken to the hospital if there was no Medical Orderly available on the 06th October, 2017. It is averred in the affidavit in response filed on behalf of the respondents that the

medical report may have corroborated the allegation of rape but it doesn't confirm the day and the time of rape or as to who raped him. This would have been a very fine argument if this incident happened somewhere outside the prison. There is no evidence that the 1st applicant was taken out of the prison on 6th and 7th October, 2017. There is no doubt that this incident occurred while the 1st applicant was under detention in the same cell with other convicted prisoners. From these facts the only reasonable conclusion one could arrive at is that the applicant was sexually assaulted by the other prisoners and the corrections officers without any valid reason delayed producing him before a doctor on the same day. However, he was, on the following day, taken to the hospital. Therefore, it cannot be said that the corrections officers are in violation of section 13(1)(j) of the Constitution. The applicant's claim is that the 2nd respondent denied him from accessing immediate medical attention contrary to section 13(1)(j) of the Constitution. The constitution provides that the detainees must be treated with human dignity including *inter alia* medical treatment. The delay of one day in taking the applicant to the hospital cannot be held to be a violation of Section 13(1)(j) of the constitution.

[16] Section 44(4) of the Constitution provides as follows:

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

[17] The learned counsel for the respondents mainly relied on the above provisions in their submission that the applicant had an alternative remedy and therefore, not entitled to come by way of constitutional redress.

[18] When officers of the prison act in violation of the rights guaranteed by the Constitution, of the detainees there is no other remedy available to them. The applicant can complain to the police and take steps to prosecute the prisoners who sexually assaulted him but would any purpose be served if he complains to the very officers who violated his rights? When the Bill of Rights was enacted the legislature intended to safeguard the

rights of the people. In this instance the officers of the Fiji Correction Service did not have any other alternative way of separating the hunger strikers including the applicant the situation would have been different but in this case there is nothing to say that the Correction Services did not have another place to detain the applicant without detaining him with convicted prisoners.

[19] Section 44(4) of the Constitution is not an absolute bar to instituting proceedings for constitutional redress when there are other adequate remedies available to him. Section 44(4) only confers discretion upon the court not to grant relief if an adequate remedy is available to the applicant.

[20] For the reasons aforementioned the court makes the following orders:

- (1) The court declares that the right of the applicant guaranteed by section 13(1)(e) of the Constitution has been violated by the 2nd respondent.
- (2) The 2nd respondent is ordered to pay the applicant \$500.00.
- (3) The other reliefs prayed for in the Originating Motion are refused.
- (4) The respondents are also ordered to pay the applicant \$500.00 as costs of this application.




Lyone Seneviratne

JUDGE

15th June, 2018