

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBM 89 of 2019

IN THE MATTER OF CONSTITUTIONAL REDRESS OF DESHWAR DUTT

BETWEEN : DESHWAR DUTT

APPLICANT

AND : ATTORNEY GENERAL

RESPONDENT

Counsel : Applicant - In Person
Date of Hearing : 01.10.2019
Date of Judgment : 19.10.2019

JUDGMENT

INTRODUCTION

1. Applicant seeks Constitutional Redress (CR) for delay of determination of his appeal in Court of Appeal. Applicant states that the sentence was handed down by a judge of Criminal Division of this court on 28.4.2017 and being aggrieved, he had filed a notice of appeal. The matter was call over in Court of Appeal in April, 2019 but the appeal had not concluded. He states that there is unreasonable delay. It is axiomatic, that an appeal cannot be heard without a delay and this may be due to logistical and or procedural reasons and other reasons, such as availability of resources complexity of matter and backlog. So *unreasonableness* of delay cannot be determined in isolation. Applicant should be able to state why he consider his appeal was unreasonably delayed. A successful prosecution and also conviction through High Court takes time and it is inevitable that further time will take to determination of appeal. In my judgment this application needs to be struck off as Applicant failed to establish that there is 'unreasonable' delay.

ANALYSIS

2. Applicant had filed CR seeking declaration that Section 14 (2)(g) and Section 15(3) are violated, and also Section 26(1) and 26(2) are violated by state . He is also seeking an order to hear his appeal.
3. Applicant's notice of appeal and grounds of appeal were filed in Court of Appeal and according to affidavit in support it was mentioned on two dates, but was not heard. According to the affidavit in support the delay was due to inaction of state which did not file a response.
4. There is no affidavit in opposition filed though time was granted to file affidavit in opposition. So I cannot verify the correctness of the affidavit in support.
5. Applicant states that further time was granted for the state to file objections.
6. Section 14(2) (g) of the Constitution of the Republic of Fiji (The Constitution) states as follows;
'(2) Every person charged with an offence has the right
(a)...
(b)..... (f)
(g) to have the trial begin and conclude without unreasonable delay.' (Emphasis added)
7. Section 14(2) the Constitution deals with rights of an accused. At the first impression the said right to conclude the trial without unreasonable delay is a right of an accused to have a fair trial. It is one of the ingredients of impartial and fair trial. In Martin v Tauranga District Court 1995 2NZLR 419 at page 423 Cooke P cited with authority following the passage from the judgment delivered by Lord Templeman, in Mungroo VR [1991] 1 WLR 1351 at 1352
"The right to trial 'within a reasonable time' secures, first, that the accused is not prejudiced in his defence by delay and secondly, that the period during which an innocent person is under suspicion and any accused suffers from uncertainty and anxiety is kept to a minimum."
8. According to affidavit in support which is not disputed, Applicant was charged for two counts of aggravated robbery and trial was conducted in 2017 in High Court. High Court judge agreed with the verdict of guilt by assessors. He was sentenced on 28.4.2017 and notice of appeal was filed on 29.5.2017.

9. On 20.6.2018 the appeal was called over presumably in Court of Appeal. Applicant had also informed President of Court of Appeal regarding time taken for appeal.
10. Apart from the said Section 14(2)(2)(g) of the Constitution Section 15(3) of the Constitution reiterate the right of parties before a court not to delay in 'determination' by courts and states as follows;
- 'Every person charged with an offence and every party to civil dispute has the right to have the case determined within a reasonable time'*
11. In terms of Bill of Rights , 'every person charged ... has a right to have the case determined within a reasonable time' should be interpreted to include not only the time period for trial but also any appellate process that a person is entitled under the law as well.
12. In a NZ case Martin v Tauranga District Court 1995 2NZLR 419 at page 420 Cooke P stated in obiter the scope of the Bill of Rights relating to delay in litigation and stated that time period starts with 'the first official accusation' and 'no doubt extends to appeal process'.
13. So time period ends with the determination of highest court in Fiji (The Fiji Supreme Court, if leave granted in accordance with the law). In most of the cases appeal ends with Court of Appeal as leave to Supreme Court are not readily granted unless there is public importance in grounds of the appeal.
14. In the case of Martin v Tauranga District Court 1995 2NZLR 419 at page 424(Cooke P) cited (a decision of Supreme Court of Canada R vs Morin (1992) 1SCR 771, (1992) 71 CCC (3d) 1 at p13 following paragraph of Soinka J's judgment (at p 13).
- 'The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in [R v] Smith [(1989) 52 CCC (3d) 97], '[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable' (p105). While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:*
- The length of the delay;*
- Waiver of time periods;*

*The reasons for the delay, including
Inherent time requirements of the case;
Actions of the accused;
Actions of the Crown;
Limits on institutional resources, and
Other reasons for delay, and
Prejudice to the accused.”*

15. These factors are not exhaustive but useful as a guideline. Lack of affidavit in opposition only supports facts stated in the affidavit in support. Counsel for Respondent argues that High Court lacks jurisdiction to determine CR, since the alleged delay is regarding an appeal to Court of Appeal.
16. In this case length of delay for appeal from conviction is about two years. The matter was transferred from Magistrate's court, and charges were filed in 2014. Time taken for final determination is more than five years, but again the time taken cannot be taken in isolation without further analysis. Plaintiff states that crown had failed to file objections, in Court of Appeal. There is no allegation of delay before he was sentenced. So that period should be excluded, as there was no indication of any factor for delay during that time.
17. High Court is granted first instance jurisdiction regarding violation of Bill of Rights by way of CR. So I do not agree with submission made by Respondent that there is no jurisdiction for the High Court, to determine this CR.
18. The Sections 14 and 15 of the Constitution are relied in this application for Constitutional Redress, are included in the Chapter 2 of the Constitution which deals with the Bill of Rights. The enforcement of the said rights could be made in terms of Section 44 of the Constitution and it states as follows;

‘44. (1) If a person considers that any of the provisions of this Chapter has been or 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 detailed 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 sub-section (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 its discretion not to grant relief in relation to any application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.’ (emphasis added).

19. Both Applicant as well as counsel for the Respondents relied on a decision of High Court Case No HBM 40 of 2016 delivered on 7th April, 2016 (Unreported) (Solomoni Qurivs Vs DPP et al) and stated that this application for CR regarding delay of hearing of the appeal needs to be made in the Court of Appeal.

20. In the said case it was held,

‘ that it would be improper for the High Court to make any directions regarding the conduct of the case and fixing of any dates as this may compromise the independence of the Court before which the matter currently is. The presiding judge in Court of Appeal will be in best position to weigh all the factors I have identified to consider when the matter should be listed for hearing.’

21. I respectfully agree with the said findings by the judge in that case as regard to directions to superior court but disagree with the submission that this CR lacks jurisdiction. As stated in the case of Martin v Tauranga District Court 1995 2NZLR 419 at page 424(Cooke P) simply taking only the time factor into consideration, this court would not be in a position to consider whether there was an unreasonable delay. It is Applicant who should establish that there is unreasonable delay. When a party had failed to comply with directions of court, the court in its discretion can grant further time, and this cannot be considered as unreasonable delay. This is the only reason, stated in Affidavit in Support for alleged ‘unreasonable’ delay.

22. In Martin v Tauranga District Court 1995 2NZLR 419 at page 425 (Cooke P) held

‘Generally speaking, it seems better to prevent breaches of rights than to allow them to occur and then give redress.’

23. In Martin v Tauranga District Court 1995 2NZLR 419 at page 430 Hardie Boys J in his concurring decision held,

'...there is tension between the individual right and the interest of the community in the detection and conviction of offenders. An overenthusiastic assertion of the former to the detriment of the latter can only lead to a destructive diminution of community respect for the law, its institutions and the administration of justice.....'

24. So High Court as court of 'Original Jurisdiction' in forms of Section 44 (3) of the Constitution cannot refuse an application for CR.
25. Applicant's affidavit in support does not indicate unreasonable delay and violation of Section 14(2) (g) or Section 15(3) or Section 26(1) and (2) of the Constitution of Fiji. Affidavit in Support lacks any violation of equality and freedom from discrimination enshrined in section 26 (1) and (2) of the Constitution. Considering the circumstances of the case no cost is awarded.

FINAL ORDER

- a. Application for constitutional redress struck off.
b. No costs.

Dated at Suva this 19th day of November, 2019.



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Justice Deepthi Amaratunga
High Court, Suva