In the High Court of Fiji
at Suva
Civil Jurisdiction

Civil Action No. HBM 122 of 2018

In the matter of an application for Constitutional Redress pursuant to section 44(5) of the Constitution of Fiji

Josua Natakuru

Applicant

And

Attorney General of Fiji

First Respondent

And

Officer in Command, Medium Corrections Centre

Second Respondent

Counsel: The applicant in person
Mr R. Vananalagi, as amicus curiae for the Human Rights & Anti Discrimination Commission
Ms S. Taukei with Ms G. Naigulevu for the respondents

Date of hearing: 11th March, 2019

Date of Judgment: 18th April, 2019

Judgment

1. The applicant, a prisoner serving a sentence at the Medium Correction Centre,(MCC) at Naboro, alleges that he was found guilty of two prison offences without "*fair and independent tribunal proceedings*". He was denied his right to give evidence, visitations, proper sanitation and medical attention. He seeks a declaration that his basic constitutional rights under sections 15(2),15(6),13(1)(j),13(1)(k) and 11(1) of the Constitution have been contravened by Temporary Chief Corrections Officer, Orisi Kuboutawa,(TCCO K) and an injunction prohibiting him from further contravening his basic rights.

The determination

2. The applicant, in his affidavit in support filed on 16th July,2018 states that on 11th May,2018 he was ordered to be locked up in the Condemned Punishment Block,(CPB) in solitary confinement by TCCO K, the Officer in Command of the MCC, in respect of an alleged prison offence. He was not charged nor given a hearing within a reasonable time from 11th to 30th May,2018. On 30th May, the hearing was vacated on his request to have the matter heard by another tribunal. He was locked up again in the CPB on 7th June, 2018, for another prison offence and was not charged nor given a hearing within a reasonable time until 20 June,2018.

3. Jovesa Vosanibola, Deputy Superintendent and Supervisor of Fiji Corrections Service, in his affidavit in response states that:

   i. the applicant was charged on 11 May, 2018 for committing an offence contrary to section 13(2) (s) of the Corrections Service Regulations,2011. He was referred to the tribunal on the same day. The tribunal was adjourned on 30 May,2018 and reconvened on 20 June,2018. He was found guilty of the offence of using abusive, threatening, insolent, indecent or other improper language contrary to section 13(2)(s) of the Corrections Service Regulations, 2011. He was kept in solitary confinement during this period, due to the severity of the offence committed by him.

   ii. he was charged with a separate offence on 7 June, 2018 contrary to regulation 13(2) (x) of the Corrections Service Regulations 2011. The matter was heard before the tribunal on the same day and he was found guilty of the offence.

4. The applicant, in his affidavit in reply states that the second respondent has not presented any evidence to establish his contention that the second matter was heard before the tribunal on the same day and not on 20 June,2018.

5. Be that as it may, I do not find the time periods from 11th to 30th May,2018 and 7th to 20 June, 2018 to lay charges and convene a tribunal, to be unreasonable. In my judgment, the applicant's contention is untenable.

6. The applicant's second grievance is that both allegations of prison offences were presided by TCCO K. On 30 May,2018 TCCO K did not allow his application for another tribunal to hear the matter, as the charge alleged that he was trying to remove him. He had a vested interest in the outcome of the proceedings.

7. Ms Naigulevu, counsel for the respondents submitted that section 15(2) of the Constitution relates to a " *civil dispute*" and does not cover a prison offence.

8. Section 15(1) enshrines that "*Every person charged with an offence has the right to a fair trial before a court of law*".

9. Section 15(2) provides that "*Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal*"

10. In my view, the two sub-sections must be read together to give effect to the spirit of the chapter on the Bill of Rights in the Constitution.

11. Moreover, section 39(2)(d) of the Prisons and Corrections Act,2006, provides that the principles of natural justice shall be applied in proceedings against prisoners.

12. It is not disputed that TCCO K had the power to hear and determine prison offences. The applicant alleges that he was not "*independent as the charge alleges that he* (the applicant) *was trying to remove him*".

13. In ***Muir v Commissioner of Inland Revenue,***[2007] NZCA 334 as cited by Goundar J in ***Chaudhary v The State,*** the New Zealand Court of Appeal said that :

> *First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased .* ***This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is then to ask whether those circumstances as established might lead a fair minded lay-observer to reasonably apprehend that the judge might not bring an impartial minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case.***(emphasis added)

14. The first charge reads that the applicant "*was found to be criticizing the new management that you*(he) *will remove them from office and threatening the officers and Management*". In my view, that was a general criticism of the management. It was not directed to TCCO K personally, who was admittedly, a temporary officer. The second charge was for "*shouting at the top of his voice in a disrespectful and disorderly manner wanting to see the Visiting Justice*"

15. In my judgment, the applicant's argument that TCCO K was not independent and impartial cannot be maintained.

16. The applicant also contends that he was denied his right to give evidence under section 15(6) of the Constitution. He states that he was not asked by the tribunal, if he wished to cross examine the witnesses for the prosecution and call witnesses for his defence.

17. The respondent states that the applicant was given an opportunity to be heard on 7th and 20th June, 2018. On 20th June, 2018, he exercised his right to remain silent.

18. I do not accept the argument of the applicant, as the disciplinary proceedings of 7th and 20th June, 2018 provide that the "*defendant was given an opportunity to be heard*".

19. Next, the applicant complains that his constitutional right under section 13 (1)(k) to be visited and communicate with visitors by telephone was denied by TCCO K from 11th to 30th May, 2018 and from 7th to 16th July,2018. His requests for regular exercise, while being solitary confined at the CPB was also denied. He was made to relieve himself in an old biscuit bucket and to eat beside his bucket of human waste, in contravention of his constitutional rights in section 11 (1).

20. The respondent refutes these allegations. Jovesa Vosanibola states that the applicant's visitation rights were restricted when he was placed in solitary confinement from 11th to 30th May, 2018. The visitations were thereafter restored. He was allowed to exercise. The facility for solitary confinement is fit for human habitation and contains amenities for sanitation.

21. In my view, the applicant's complaints are statutorily required to be addressed to the visiting Magistrate.

22. Section 18 of the Prisons and Corrections Act mandates a Magistrate to inspect every prison monthly. Section 8 of the Corrections Service Regulations, 2011, gives the Visiting Justice wide powers to hear a complaint from a prisoner, look at the conditions of the prison and take necessary action.

23. Singh J stated in ***In the matter of an application for constitutional redress by Josefa Nata,*** (Civil Action no. HBM 35 OF 2005):

> *It is the visiting magistrate who goes to a prison. He can talk to the prisoners and look at conditions of the prison,.. Given these provisions, there is no need for the High Court to conduct an enquiry at the Court House ... The visiting magistrate can see first hand for himself the conditions in prison.*

24. Section 44(4) of the Constitution provides that the Court may in its discretion decline to grant relief, if it considers that "*an adequate alternative remedy is available*".

25. In ***In the matter of an application for constitutional redress by Josefa Nata,*** (*supra*) Singh J declared:

> *..the Constitution provides that a Court may refuse to grant relief if "adequate alternative remedy is available to the person concerned". The Redress Rules do not provide for a parallel procedure to be invoked where alternative remedy is available. To use the Constitutional Redress process as a substitute for normal procedure is to devalue the utility of this Constitutional remedy. Mere allegation of constitutional breach was insufficient to invoke this remedy — Harrikissoon v. Attorney General — 1979 3 WLR 62.*

26. It is settled law that a constitutional redress application is inappropriate where there are disputed facts.

27. The judgment of the Court of Appeal in ***Abhay Kumar Singh v Director of Public Prosecutions and Anor,***[2004] FLR297 at pg 306 ;AAU0037 of 2003S cited Lord Diplock in ***Harrikissoon v. Attorney General,***[1980] AC 265 at pg 268 as follows:

> *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 is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court ... the mere allegation that a human right or fundamental freedom of the applicant has been or likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom .*

28. The Privy Council in ***Thakur Prasad Jaroo v Attorney-General*** [2002] 5 LRC 258 as also cited in ***Abhay Kumar Singh,***(*supra*) said :

> *Their Lordships wish to emphasise that the originating motion procedure under s 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law.*

29. The applicant states that the Learned Magistrate of Nasinu issued a directive for him to be taken to MOIT Private hospital for specialist bone treatment on 2nd July, 2018. He never refused to pay his medical costs, as contended by the respondent. This is also a disputed issue. The respondent states that there was no request made by the applicant to receive treatment at that hospital nor did he insist on being taken there.

30. Finally, the applicant, in his affidavit in reply states that TCCO K exceeded his jurisdiction when he placed him in solitary confinement.

31. In my judgment, prison authorities are entitled to take disciplinary action against prisoners. It follows that the applicant's application for an injunction is misconceived and is declined.

32. The applicant has filed a "*SUPPLEMENTARY AFFIDAVIT*" on 17th October,2018, in respect of a third prison offence allegedly committed on 14th June, 2018 and determined on 17th August, 2018.

33. I agree with the respondents that the supplementary affidavit contains new allegations which cannot be entertained after the time limit of sixty days.

34. In the result and for the reasons I have given the applicant's application for a declaration that his constitutional rights in sections 15(2),15(6),13(1)(j),13(1)(k) and 11(1) of the Constitution have been contravened and an injunction fails and is declined.

35. ***Orders***

i. The applicant's application for a declaration that his constitutional rights in sections 15(2),15(6),13(1)(j),13(1)(k) and 11(1) of the Constitution have been contravened is declined.

ii. The application for an injunction is declined.

iii. I make no order as to costs.

A.L.B. Brito-Mutunayagam
JUDGE
18th April, 2019