

**IN THE COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Judicial Review No. HBJ 5 of 2018**

**IN THE MATTER OF AN**  
**APPLICATION FOR JUDICIAL**  
**REVIEW**

**BETWEEN** : ILAISA SOUSOU CAVA

**APPLICANT**

**AND** : THE COMMISSIONER OF POLICE

**1<sup>ST</sup> RESPONDENT**

**AND** : THE ATTORNEY GENERAL

**2<sup>ND</sup> RESPONDENT**

BEFORE : Justice M. Javed Mansoor

COUNSEL : Applicant appeared in person

: Ms O. Solimailagi and Ms M. Ali for the First and Second  
Defendants

Date of Hearing : 20 May 2019

Date of Judgment : 19 June 2019

## RULING

JUDICIAL REVIEW: complaint to Commissioner of Police – allegation of perjury by Police Constable – failure to hold inquiry – whether prosecution can be compelled by Judicial Review – administrative discretion – delay – natural justice – fresh evidence after conviction

### References:

A Legislation

- (a) High Court Rules, Order 53
- (b) Court of Appeal Act 1949, Section 28

B Cases

- (a) Inland Revenue Commission v National Federation of Self Employed and Small Businesses Ltd [1982] ac 617
  - (b) Caswell v Dairy Produce Quota Tribunal for England and Wales [1990] 2 AC 738
  - (c) Cagika v Public Service Commission [1998] FJCA 59
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1. The Applicant, Ilaisa Sousou Cava, was convicted for murder in November 2008, and sentenced to 16 years imprisonment. Thereupon, Mr. Cava appealed to the Court of Appeal and the Supreme Court. Neither effort was successful; the Supreme Court refused leave to appeal the Court of Appeal judgment. By Application for Leave to Apply for Judicial Review dated 12 February 2019, the Applicant applied to this Court for Judicial Review, not in respect of his conviction and sentencing by Court, but against the Commissioner of Police for failing to take steps against a constable named, Nacanieli Lomani of the Fijian Police Force.
2. The complaint against Constable Lomani is that he gave false evidence when testifying in Court to the effect that he identified the Applicant travelling in the vehicle of the murdered taxi driver; that as a result of such false evidence the Applicant was convicted and sentenced to imprisonment; that Constable Lomani visited the residence of his parents and “confessed” to his mother - in the presence of his grandmother - that he had actually not been able to identify the Applicant contrary to what was stated in his testimony; that Lomani had asked his mother, Ms. Mareca Vakatalai, to forgive him, and given an assurance that he would make a fresh statement. Lomani’s visit to his mother’s house was on 6 November 2011.

3. Constable Lomani's visit to the Applicant's mother's house is not in dispute. That Lomani apologised to the Applicant's mother is also not in dispute. These matters are admitted in the statement given by Lomani. What is in dispute is whether or not Lomani gave false testimony; which Lomani has denied and has stuck to his original statement. It is on this question, and on the alleged inaction of the Police Commissioner in response to the complaints made by Mr. Cava and his mother, that this application for Judicial Review has been preferred.
4. The Applicant made his complaint to the Commissioner of Police in February 2012. He was not able to produce a copy of this letter. Nor did he have in his possession the acknowledgment of the receipt of his complaint sent by the Commissioner of Police. The Respondent was unable to confirm or deny whether such a letter was sent by the Applicant. It is clear that the Commissioner of Police has not responded to the Applicant's letter of February 2012. The failure to do so, no doubt, is a matter of concern. The explanation given on behalf of the Respondents is that the letter sent by the Applicant may have been misplaced during an internal re-organisation. The Applicant's position is that criminal proceedings should have been initiated against Constable Lomani in terms of Section 180 (c) of the Crimes Act. He averred that neither he nor his mother was summoned, and a Police Tribunal was not established, as provided by law, consequent to his complaint to the Commissioner of Police. He complained that his legal and constitutional rights (Section 26 (1) of the Constitution) were violated.
5. The Applicant has, therefore, sought an investigation to be carried out against Police Constable Lomani for giving false evidence at his trial; an order that Constable Lomani be formally charged for perjury and for a declaration that the internal proceedings and/ or decision of the Fiji Ethical Standards Unit in response to his complaint dated 18 February 2012 was an abuse of the process.
6. In addition to the Applicant's complaint, Ms. Mareca Vakatalai, his mother wrote a letter dated 3 October 2016, which was referred

to the Ethical Standards Unit (later called the Internal Affairs Unit).

7. By letter dated 3 October 2016, Ms. Vakatalai wrote to the Commissioner of Police requesting that Police Constable Lomani be investigated for perjury, and stating that there had been no response to the allegation made against Lomani in 2012. Notwithstanding that the Applicant's application relates also to the complaint made by Ms. Vakatalai, the Respondents conceded that the Applicant had sufficient interest in the matter as is required by law<sup>1</sup>.
8. The Applicant submitted that although Ms. Vakatalai sent a letter to the Police, and she was interviewed subsequently, the Police had failed to interview his grandmother, who had been present during Constable Lomani's visit, and that a Police Tribunal was not set up.
9. However, Ms. Vakatalai, by a statement to the Police Headquarters dated 24 November 2016, stated that she complained about Constable Lomani as he had agreed to change his statement if the Applicant appealed. Ms. Vakatalai added that she was satisfied and that she did not wish to lodge any complaint against Police Constable, Nacanieli Lomani. Days prior to that, on 16 November 2016, Constable Lomani gave a statement to the Rotuma Police Station. In it, he said that he saw the Applicant with another person in a taxi belonging to the deceased, and that he told Mareca Vakatalai, his aunty, and asked her to forgive him. This provides some context to Lomani visiting Ms. Vakatalai. Lomani's statement also does not help the Applicant, as he has not changed his original testimony identifying Mr. Cava in the taxi, which testimony resulted in the Applicant's conviction.
10. Ms. Mareca Vakatalai addressed an undated letter to the Commissioner of Police in which, Ms Vakatalai refers to certain new information in her possession that she claimed would establish the innocence of her son while proving the guilt of the actual murderer - whose identity she claims to have discovered in quite fortuitous circumstances; the names of the alleged

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<sup>1</sup> Order 53, Rule 3 (5), Rules of the High Court

murderer and that of her informant are mentioned in the letter. The Applicant, however, makes no direct reference in his affidavits to these revelations by his mother.

11. This Court has perused the Ruling of the Supreme Court dated 23 April 2015 (CAV 0028/ 2014) refusing Leave to Appeal the Judgment of the Court of Appeal which dismissed the Applicant's appeal on 6 December 2013. The matters raised by the Applicant, as well as the information provided by letters written by Ms. Vakatalai in 2016, are matters that have the potential to be admitted as evidence if the intervention of Court is appropriately sought<sup>2</sup>. A Court exercising the discretionary power of Judicial Review is not in a position to sift through evidence and judge whether or not an act of perjury has been committed in the trial Court, or whether fresh evidence could change the judgment of a Court after trial. Where there is a claim of a miscarriage of justice the affected party must invoke the jurisdiction of a competent Court seeking a remedy. The judgment of the Supreme Court suggests that the evidence given by Constable Lomani has been urged before and considered by their Lordships in the form of an amended ground of appeal (ii) (b). This Court, therefore, is not in a position to make a finding that perjury was committed by Police Constable Nacanieli Lomani.
  
12. According to the Applicant, the Police Ethical Standards Unit had responded to his complaint somewhere in 2012/ 2013 stating that it had made no findings against Constable Lomani. Unfortunately, there is no information as to the depth of the investigation carried out by the Ethical Standards Unit. The Respondents have not been helpful in assisting Court in this matter. They are unable to say anything concerning the Applicant's initial complaint of 2012 or the investigation carried out in response to such complaint. Lomani's visit to the Applicant's parents' residence - given that he was a material witness in the murder trial against the accused - should have evoked a more concerned response from the authorities, evidenced by a proper inquiry and the findings duly communicated to the Applicant. This has not happened.

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<sup>2</sup> In terms of Section 28 (b) of the Court of Appeal Act 1949, a witness who would have been compellable in a trial can be ordered to give evidence before the Court of Appeal.

13. But the tests for granting Leave for Judicial Review do not rest merely on the conduct of the Respondent. At the threshold stage, the Applicant must satisfy Court that he has an arguable case in order to be granted Leave<sup>3</sup>. In view of the matters to which consideration has been given, Court is of the view that the Applicant has not established an arguable case for the granting of Leave.
14. Judicial Review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abused its powers. Notwithstanding the failure of the Commissioner of Police to promptly deal with the Applicant's complaint and revert to him within a reasonable period of time, this is not a fit case for Judicial Review.
15. It is not for this Court to direct the prosecution of Constable Lomani for perjury. The decision to take disciplinary action against Constable Lomani is a matter for the Commissioner of Police to decide. These are matters in which the relevant authorities must exercise their respective discretionary powers and take a decision, and the Applicant cannot be said to have a sufficient interest in the taking of those decisions for the purpose of applying for Judicial Review. Such matters are entirely within the realm of the administrative machinery with which this Court will not interfere. The taking of such decisions or the failure to do so would not infringe on the legal rights of the Applicant.
16. The Applicant's delay in applying for Judicial Review also does not help his cause. Where an Application is made after the relevant period of three (3) months has expired, the Court may refuse to grant Leave if in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration<sup>4</sup>. The Application for Leave to Apply for Judicial Review is dated 12 February 2019 whereas the Applicant first made his complaint in February 2012; that amounts to a delay of seven (7) years. Ms. Vakatalai sent two other letters

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<sup>3</sup> Inland Revenue Commission v National Federation of Self Employed and Small Businesses Ltd [1982] ac 617

<sup>4</sup> Order 53 Rule 4 (1) of the High Court Rules.

on behalf of the Applicant to the Commissioner of Police in 2016; as the Counsel for the Respondent submitted, even if the 2016 dates are considered in assessing the question of delay, there is considerable delay in invoking the Court's jurisdiction. Although it has been held that questions of delay are best dealt with in-depth at the substantive hearing<sup>5</sup>, the delay in filing this Application is substantial and has not been backed by a reasonable explanation in the Applicant's affidavits<sup>6</sup>.

17. In his Supplementary Affidavit dated 12 February 2019, the Applicant has sought the inclusion of his mother and grandmother in these proceedings. Considering the facts of this case there is no basis upon which to consider the Applicant's mother and grandmother as necessary parties to this Application.
18. In the aforesaid, the Applicant has failed to satisfy Court that he has an arguable case with a reasonable prospect of succeeding at a full hearing of the Application for Judicial Review. For these reasons, together with the undue delay in initiating these proceedings, his Application must fail.
19. **Orders:**
  - a. Leave to Apply for Judicial Review is refused. Application is dismissed.
  - b. There is no order for costs.

Delivered at Suva this 19<sup>th</sup> day of June, 2019



*M. Javed Mansoor*  
Justice M. Javed Mansoor  
Judge of the High Court

<sup>5</sup> Caswell v Dairy Produce Quota Tribunal for England and Wales [1990] 2 AC 738

<sup>6</sup> See the judgment of the Court of Appeal in Cagika v Public Service Commission [1998] FJCA 59

