IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 312 of 2018

IN THE MATTER of an application by the **ATTORNEY-GENERAL OF FIJI** for leave to apply for an order for committal

AND

IN THE MATTER of ANIRUDH SHARMA employment unknown, Lajonia, Labasa.

Counsel	:	Ms Narayan B., Ms Solimailagi O. & Ms Ali M. for the Applicant. Mr Nawaikula N. for the Respondent.
Date of Hearing	:	28th May, 2019
Date of Judgment	:	15th July, 2019

JUDGMENT

[1] The Attorney General (the applicant) filed ex-parte notice of motion pursuant to Order 52 rule 2 of the High Court Rules 1988 seeking leave to make an application for an order of committal against the respondent and the court by its order dated 18th October, 2018 granted leave to make an application for order of committal against Anirudh Sharma (the respondent).

[2] The applicant then filed notice of motion on 19th October, 2018 seeking the following orders:

1. **AN ORDER** of committal against **ANIRUDH SHARMA** for contempt of court and that the said **ANIRUDH SHARMA** be committed to prison;
2. **THAT** the said **ANIRUDH SINGH** be also ordered to pay a fine;
3. **THAT** the said **ANIRUDH SHARMA** do pay costs of and occasioned by these proceedings on an indemnity basis; and
4. **SUCH** other order(s) as this Honourable Court may deem just.

[3] On 29th August, 2018 one Mr. Imran Khan was charged with unlawful possession of illicit drug contrary to section 5(a) of the Illicit Drugs Control Act 2004 and subsequently released on bail in the sum of $1000.00. This was published in Fiji Sun newspaper on 30th August, 2018 and the respondent posted a snapshot of the news article in the Facebook and made the following comments:

> "Now, this is evident that Khans and Mohammeds are immediately released on bail. They justified that these people were found with small amounts of drugs, so what about this one? It's more than 6kg,
>
> Wake up Fiji, we have double standards of justice, these people are destroying Fiji with drugs yet are left open to roam free".

[4] The respondent does not deny that he posted the above post in his Facebook profile. His position is that when the entire post is read in full it is clear that he was speaking out against illicit drugs coming into Fiji and that he is against illicit drugs. In his affidavit he has further averred that his words have been taken out of context since the since

the paragraph which reads 'They justified that these people were found with small amounts of drugs, so what about this one? It's more than 6kg', explains the basis of his post and when the entire post is read in full and not edited as has been done in both affidavits, the reason behind the post is clear and that is my anger towards people who are charged for illicit drugs offences being given bail

[6] At the hearing the learned counsel for the respondent raised a preliminary objection as to the procedure adopted by the applicant in these proceedings. The learned counsel submitted Order 52 of the High Court Rules 1988 only sets out procedure for committal proceedings and there is nothing in Order 52 to empower the court to decide whether or not a person was in contempt of court.

[7] Order 52 rule 1 provides the procedure to be followed in contempt proceedings. Order 52 rule 1(1) & (2) provides;

> (1) The power of the High Court to punish for contempt of court may be exercised by an order of committal.
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> (2) This Order applies to contempt of court-
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> *(a)* committed in connection with-
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> (i) any proceedings before the Court, or
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> (ii) proceedings in an inferior Court;
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> *(b)* committed otherwise than in connection with any proceedings.

[8] In view of the provisions in Order 52 rule 1, I do not see anything wrong in the procedure followed by the applicant in initiating these proceedings.

[9] The submission of the learned counsel for the respondent is that there are many local decisions including Paramanandan v Attorney General App 13 & 19 / 72 and Re Mahendra Pal Chaudry [1998] 44 FLR 90 where the court has overlooked the fact that Order 52 is really about committal proceedings and not about determining whether or not contempt has been committed for the purposes of Order 52 rule 1(2)(b) and there is on Order 52 of the High Court rules 1988 to give power to a judge to make a determination on whether or not contempt has been committed for the purpose of Order 52 rule 1(2)(b).

[10] The High court Rules 1988 provides for the procedure to be followed in civil litigation. Order 52 rule 1 provides for the procedure to be followed in punishing a person for

contempt of court. Whether a person is in contempt of court or not, is a matter to be decided on the facts of each case and it is a matter for the court after hearing the parties to arrive at a finding whether a particular act or a statement amount to contempt of court.

[11] In this regard the learned counsel for the respondent relied on the decision in **Re Mahendra Pal Chaudry** (*supra*) where it was held:

> No person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him distinctly stated and an opportunity answering it given to him. [In re Pollard (1886) L.R. 2 P.C. 106, 120] What is required is that the person alleged to be in contempt shall know, with sufficient particularity to enable him to defend himself, what exactly he said to have done or omitted to do which constitutes a contempt of court. [Chiltern D.C. v Keane (1985) 2 All ER 118].
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> Any act done or writing published calculated to bring a court or a judge of the court into contempt or to lower its authority, is a contempt of court ... (which) ... belongs to the category which Lord Harvicke L.C. characterised as 'scandalising a Court or a judge'. That description of that class of contempt is to be taken subject to one and an important qualification. Judges are and Courts are like open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could would treat that as contempt of court.

[12] In **Regina v Commissioner of Police of the Metropolis, *Ex parte* Blackburn** (No. 2) No. 37 of 1968 the applicant applied to the Court of Appeal for an order that the writer of the following passage had been guilty of contempt of court. The relevant passage reads as follows:

> "The recent judgment of the Court of appeal is a strange example of the blindness which sometimes descends on the best judges. The legislation of 1960 and thereafter has been rendered virtually unworkable by the unrealistic, contradictory and, in the leading case, erroneous, decisions of the courts, including the Court of appeal. So what do they do? Apologise for the expense and trouble they have put the police to? Not a bit of it. Lambaste the police for

not enforcing the law which they themselves had rendered unworkable and which is now the subject of a Bill, the manifest purpose of which is to alter it. Pronounce and impending dies irae on a series of parties not before them, whose crime it has been to take advantage of the weaknesses in the decisions of their own court. Criticise the lawyers, who have advised their clients. Blame Parliament for passing Acts which they have interpreted so strangely. Everyone, it seems, is out of step, except the courts. ... The House of Lords overruled the Court of Appeal ... it is to be hoped that the courts will remember the golden rule for judges in the matter of obiter dicta. Silence is always an option.

Held, dismissing the application, that the criticism of the court and the judicial decisions, however rumbustious,, whether or not in good taste, and despite its inaccurate statement of fact, was not a contempt of court but was within the limits of the inalienable right of every individual to freedom of speech which the courts had always unfailingly upheld.

[13] In **Fiji Times v Attorney General of Fiji** [2017] FJSC 13; CBV0005.2015 (21 April 2017) the Supreme Court said:

> There is no Statute Law in Fiji dealing with contempt and it is the Common Law principles that have been applied in the cases that have dealt with the subject of contempt.
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> From the above decisions in Fiji, the law as it stood after the decision in Fiji Times (2009) was quite clear regarding contempt as being derived from the Common Law and that the test to be adopted was that of the "real risk" test. What was necessary was to show that there was a real risk that the statements made would undermine the public confidence in the administration of justice and it was sufficient to show that the contemnor had intended to do the acts which are said to constitute the contempt.

[14] In **Finau v Civil Aviation Authority of Fiji** [2018] FJHC 500; HBC117.2017 (12 June 2018) Justice Ajmeer made the following observations:

> Unlike the UK, there is no substantive law governing any contempt of court in Fiji, except for HCR, O 52, which explains the procedure to be adopted in

dealing with an application for an order of committal for contempt of court. In the absence of any substantive law, we need to look at the common law and the principles applied in common law countries such as the UK and Australia in dealing with an application of committal of the contemnor.

[15] In the case of **Gallagher v Durack** (1983) 152 CLR 238 it was held:

> The law endeavours to reconcile two principles: one principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that "it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of impressing imputations upon courts of justice which, if continued, are likely to impair their authority", ...
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> The authority of the law rests of public confidence, and it is important to the stability of society that the confidence of the public should not be taken by baseless attacks on the integrity or impartiality of courts or judges.

[16] The main issue for determination here is whether the words used by the respondent in the Facebook post has the effect of contempt of court, most importantly the phrases "**Khans and Mohammeds are immediately released on bail**" and "**we have double standards of justice**".

[17] The defendant relied on section 17(1) of the Constitution which provides:

> (1) Every person has the right to freedom of speech, expression, thought, opinion and publication, which includes—
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> *(a)* freedom to seek, receive and impart information, knowledge and ideas;
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> *(b)* freedom of the press, including print, electronic and other media;
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> *(c)* freedom of imagination and creativity; and
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> *(d)* academic freedom and freedom of scientific research.

[18] The freedom of speech guaranteed by the Constitution is subject to certain limitations. Section 17(3)(e) provides:

> (3) To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights and freedoms mentioned in subsection (1) in the interests of—
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> *(e)* maintaining the authority and independence of the courts;

[19] What this section says is that the law may limit the freedom of speech for the purpose of maintaining the authority and independence of the courts which means the people must refrain from making allegations against the judiciary which will have the effect of diminishing integrity of the administration of justice system of the country.

[20] The respondent in his affidavit in response avers his post did not at any time questioned the authority or independence of the court or the judiciary and the application against him has taken words out of context and given a new interpretation by stating that he has questioned the integrity, authority and independence of the court.

[21] I do not say that the respondent questioned the integrity and the independence of the judiciary but he has arrived at the conclusion that the judiciary is biased towards the Muslim community and the judiciary has double standards. Any reasonable person who reads this post will certainly lose confidence in the entire judicial system of the country. This cannot be considered as exercising his freedom of speech. This in my view is an absolute abuse of the freedom of speech guaranteed by the constitution.

[22] In the case of **Attorney-General v Wain** (No. 1) [1991] SLR 383,394 the High Court of Singapore said:

> But, because judges in Singapore are judges of facts, the contempt of scandalizing the court by imputing bias to a judge, or attacking his impartiality, his propriety and integrity in the exercise of his judicial functions, must be firmly dealt with. This is for the reason that such imputations and allegations strike at the very core of the functions of a judge. Such accusations are harmful to public interest and are clearly calculated to undermine public confidence in

the administration of justice and must necessarily lower the authority of the courts.

[23] In Attorney-General for **New South Wales v Mundey** [1972] 2 NSWLR 887 the judge who conducted the case found the defendants guilty and fined $500 and were bound over to be of good behavior for three years. The respondent was interviewed outside the court by representatives of three television stations. When Mr. Mundey was asked "What is you impression of this morning's decision?" he replied, inter alia:

> "Well, I think it's a miscarriage of justice .... It showed that the judge himself was a racist judge. It shows you the extent to which racism exists within our society and it shows you what tremendous problem we have, all Australians, to overcome this deeply ingrained racism" and "I think the main purpose, the industrial action by the workers here this morning, the spontaneous action of workers walking off jobs, stopped the racist judge from sending two men to jail; that is the real position".
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> The court found that the defendant's answer to the last question asked of him in the interview constituted scandalizing contempt.
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> The court in finding Munday guilty of contempt of court made the following observations:
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> > "... In the first place, critism will constitute contempt it is merely scurrilous abuse. ... In the second place the critism may constitute contempt if it excites misgiving as to the integrity, propriety and impartiality brought to the exercise of the judicial office". ...it may and generally will constitute contempt to make unjustified allegations that a judge has been affected by some personal bias against a party, or has acted mala fide, or has failed to act with the impartiality required of the judicial office.

[24] In **Attorney-General v Wain** (*supra*) it was held-

> "... I recognize that this court has duty to uphold the right to freedom of speech and expression, and I accept that this right must be balanced against the needs of the administration of justice, one of which is to protect the integrity of the

courts. But, I do not accept the submission for the respondents that the latter should prevail only in cases where the criticism is dishonest or false, and where the circumstances in which it is made create a real and present danger to the administration of justice. In my judgment, as has been said in different words many times, criticism of the courts will constitute scandalizing the court where it is scurrilous abuse or when it 'excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office. .. In this context the defence of fair comment analogous to the defence in the law of defamation which was raised for the respondents is not a defence available to them in contempt of court proceedings.

[25] For the reasons aforementioned I hold that the respondent is in contempt of court and I make the following orders.

ORDERS

1. The respondent Anirudh Sharma, is found guilty of contempt of Court.
2. The respondent is ordered to pay $3000.00 to the applicant as costs of these proceedings.

HIGH COURT OF FIJI SUVA

Lyone Seneviratne

JUDGE

15th July, 2019.