IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

MISC ACTION NO. HBM 33 OF 2019

IN THE MATTER of an application for constitutional redress
AND

IN THE MATTER of section 44 (1) of the Constitution of Fiji

BETWEEN : PAULIASI NAUASARA

APPLICANT

A N D : THE DIRECTOR OF PUBLIC PROSECUTIONS

FIRST RESPONDENT

A N D : THE ATTORNEY GENERAL OF FIJI

SECOND RESPONDENT

Appearances : Applicant appears in person
No appearance for the first respondent
Mr V. Chauhan for the second respondents

Date of Hearing : 28 November 2019
Date of Ruling : 24 February 2020

RULING

[on constitutional redress]

Introduction

[01] This is an application for constitutional redress. By his application filed in person on 1 August 2019, which is supported by an affidavit sworn by the applicant on 31 July 2019, the applicant seeks constitutional redress against a trial Judge's decision concerning a unanimous verdict of the assessors.

[02] The second respondent (*"AG"*) filed an affidavit in response and opposes the application on the grounds that the application is time bared and alternatively, the applicant had alternative remedy.

[03] The applicant has filed an affidavit in reply to the affidavit in response filed by the second respondent.

[04] At the hearing, both parties sought time to file their respective submission. There was no oral argument. Only the second respondent had filed their written submission. The applicant did not file his submission.

Background

[05] The background facts relevant to the application are briefly as follows:

1. The applicant, Pauliasi Nauasara was indicted in the High Court of Fiji held at Lautoka for the offence of murder.
2. The trial before the High Court was with assessors.
3. Upon conclusion of the trial, the trial judge made the summing up and the required each of the assessors to state their opinion orally.
4. The assessors returned with a unanimous opinion that the applicant was not guilty of murder but guilty of manslaughter.
5. Thereafter, the trial judge delivered his judgment and overturned the unanimous opinion of the assessors that the applicant was guilty of manslaughter and convicted him of murder.

[06] The applicant applies to this Court by way of constitutional redress alleging that he was denied a fair trial when the trial judge over turned the unanimous opinion of the assessors.

Legal Framework

[07] Section 44(1) of the Constitution of the Republic of Fiji ("*the Constitution*") provides:

> *"Enforcement*
>
> *44.—(1) If a person considers that any of the provisions of this Chapter has been or is 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 detained person), then that person (or the other person) may apply to the High Court for redress.*

[08] Section 44(4) of the Constitution states:

> *" (4) 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 is available to the person concerned."*

[09] The High Court (Constitutional Redress) Rules 2015 ("*HCCRR 2015*"), Rule 3(2) says:

> *"Rule 3 (2) An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a Judge finds there are exceptional circumstances and that it is just to hear the application outside of that period."*

[10] The Criminal Procedure Act 2009 ("*CPA*"), Section 237 (1) and (2) sets out:

> *"Delivery of opinions by assessors*
>
> **237(1)** *When the case for the prosecution and the defence is closed, the Judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
>
> **(2)** *The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors."*

[11] The Constitution, section 15(1) provides:

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

Discussion

[12] The applicant has made this application seeking constitutional redress. He complains that his right to a fair trial has been violated when the trial judge overturned a unanimous verdict of the assessors that he was not guilty of murder but guilty of manslaughter.

[13] The right to a fair trial is protected under section 15(1) of the Constitution, which may be enforced by way of application to the High Court for redress.

[14] The applicant considers that his right to a fair trial guaranteed under the Constitution has been violated in relation to him when the trial judge overturned the unanimous opinion of the assessors.

[15] The applicant is entitled to make an application to the High Court if he considers that his right to a fair trial is contravened in relation to him (see: the Constitution, s.44 (1)).

Preliminary issue

[16] The second respondent has raised a preliminary issue that the application is time barred as it has been filed outside 60-day period allowed by the HCCRR 2015, Rule 3(2).

[17] The HCCRR, Rule 3(2), states that an application to the High Court for redress must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a Judge finds there are exceptional circumstances and that it is just to hear the application outside of that period.

[18] The applicant had filed his application for redress to the High Court on 1 August 2019 and the matter at issue arose on 5 October 2018, when the trial Judge

reversed the assessors' unanimous opinion. The application is late by some 10 months.

[19] He explains his application why he is late in applying that "... *I am lay person and did not understand how to file a constitutional redress application, until I was informed that this form of application was now available. Secondly, I had to exhaust the remedy of filing an appeal*".

[20] He says the exceptional circumstances as to why the Judge nonetheless should hear his late claim in this way:

> *"The current practice of judges overturning the unanimous opinion of the assessors in finding me not guilty is inconsistence and repugnant with section 237 of the CPA and thus a procedural irregularity. This questions the legality of current practice of judges overturning the unanimous not guilty opinions of the assessors and the right to a fair trial."*

[21] On the other hand, the second respondent contends that the applicant has not given any satisfactory reason why he has lodged his application 60 days after the event. The applicant must plead the exceptional circumstances in his application which would then enable the Court to exercise its discretion to enlarge time to hear and they submit to dismiss the application as it is non-compliant with Rule 3(2) of the HCCRR 2015.

[22] This application has been filed by the applicant in person. He in his application states the exceptional circumstances why his late claim should be heard by the Court.

[23] The exceptional circumstances provided by the applicant is that the Judges overturning the unanimous opinion of the assessors is inconsistent with s. 237 of the CPA and it is a procedural irregularity which affect his right to a fair trial.

[24] The delay in lodging the application is too long – 10 months which is not sufficiently explained. Further, the reasons provided by the applicant to be considered as exceptional circumstances are not satisfactory and they only raises some appeal point. In the circumstances of the case, I would dismiss the application as it is lodged some 10 months after the event.

Adequate alternative remedy

[25] For the sake of completeness, I would also consider the second respondent's objection that the applicant has an adequate alternative remedy. They rely in support of the objection, on s.44 (4) of the Constitution and the case authority of *Harrikissoon v Attorney General of Trinidad and Tobago* [1979]3 WLR 62.

[26] In terms of s.44(4) of the Constitution, 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 is available to the person concerned.

[27] Essentially, if I find that an adequate alternative remedy is available to the applicant, I can exercise my discretion under the Constitution (s.44 (4)) not to grant relief in relation to this application.

[28] The applicant's primary complaint is that the trial Judge has overturned the unanimous verdict of the assessors.

[29] The Judge shall not be bound to conform to the opinions of the assessors (see: s. 237(2), CPA). Subsection 2 clearly state that the Judge shall not be bound to conform to the opinions of the assessors. It does not differentiate between the unanimous opinion and the majority of opinions. In the absence any such differentiation, the opinions of the assessors, in my opinion, may include the unanimous opinion as well as the majority opinion of the assessors.

[30] In any event, the applicant has two-tier appeal against the Judge's decision to overturn a unanimous decision of the assessors. Firstly, he can appeal the Judge's decision to the Fiji Court of Appeal and secondly, to the Supreme Court of Fiji if he is not satisfied with the decision of the Court of Appeal in respect of his appeal. Thus, adequate alternative remedy was readily available to the applicant. Notably, the applicant has lodged an appeal in the Fiji Court of Appeal, which is now pending, having opted to recourse by way of appeal.

[31] The Court in *Harrikissoon* (supra) stated [at page 64]

> *"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 under section 6(1), 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."*

[32] The matter at issue may be challenged by way of appeal. The applicant has a right of appeal against the decision of the High Court as it is susceptible to appeal. The second respondent submits that the applicant has lodged an appeal against the decision of the High Court in the Fiji Court of Appeal (Criminal Appeal No. AAU 108 of 2018) and, that his appeal awaits determination.

[33] The applicant has right of appeal to test the matter at issue and in fact has filed an appeal against the Judge's decision delivered reversing the unanimous opinions of the assessors. This leads me to find that an adequate alternative remedy, which is a judicial remedy by way of appeal, is/was readily available to the applicant. I exercise my discretion under s.44 (4) of the Constitution not to grant relief in relation to his application.

Conclusion

[34] For all the reasons I have set out above, I conclude that the application for redress made to the High Court by the applicant is time barred, and that there is an adequate remedy by way of appeal is available to the applicant. In the circumstances, I proceed to dismiss the application, but without costs.

The result

1. Application dismissed.
2. No order as to costs.

....

M.H. Mohamed Ajmeer
JUDGE

At Lautoka
24 February 2020

Solicitors:
Office of the Attorney General for the second respondent