

IN THE HIGH COURT OF FIJI AT SUVA
MISCELLANEOUS JURISDICTION

MISC Case No. HBM 145/2020

NIZZHAR MUNIT SAMUT

-v-

- 1. STATE**
- 2. ATTORNEY-GENERAL'S OFFICE**

Counsels:

Ms. Tivao S - *for State – Respondent 1*
Mrs. Taukei - *for AG's office – Respondent 2*

Date of Hearing: 13.05.22

Date of Ruling: 01.06.22

JUDGMENT

Introduction

1. This case relates to a Constitutional Redress application filed by the Applicant, as per the provisions of Section 44 of the Constitution of Fiji, in relation to a conviction pronounced by the High Court of Fiji and consequent appeal filed by the Applicant in the Court of Appeal of Fiji.
2. In the substantive matter, the applicant stood charged in the High Court of Lautoka on a charge of Rape, under **Section 207(1) and (2) (b) and (3) of the Crimes Act 2009**.
3. According to the particulars of offence, the Applicant on the 12th January 2013, at Lautoka, had inserted a finger into the vagina of a child of three years, an alleged incident of Digital Rape of a child. At the conclusion of the trial, the Applicant had been found guilty as charged and sentenced to 14 years and 8 months imprisonment with a non-parole period of 13 years imprisonment.
4. Being aggrieved by the said conviction and the sentence the applicant had filed an appeal to the Court of Appeal of Fiji. At the appeal, the sentence pronounced by the High Court had been reduced to 13 years and 8 months imprisonment with a non-parole period of 12 years. He had now appealed further to the Supreme Court of Fiji.

5. In filing the leave to appeal against the Court of Appeal Judgement in the Criminal appeal No, AAU 100 of 2014, the Applicant had been out of time. However, by the Supreme Court of Fiji case No CAV 0016 of 2020, on 13th January 2022, the Supreme Court in the interest of justice has enlarged the time for the Applicant to file and Serve the petition and affidavit.

Position of the Applicant in this Case

6. The Applicant has filed several written submissions in this Constitutional Redress matter, both as original submissions and as responses to the position taken by the State.
7. The gist of the concerns raised by the Applicant can be succinctly briefed, as below:
 - a) The Court record in the Court of Appeal has been unlawfully tampered with, whereby the documents filed by the Applicant for his appeal against the conviction in the High Court were not available for the Court of Appeal Full Bench hearing to peruse and consider. Therefore, the Full Bench hearing proceeded and an adjudication was made without the relevant documents filed by the Applicant.
 - b) As a consequence of the above position, the Applicant contends that the Full Bench of the Court of Appeal failed to consider the additional grounds with fresh evidence submitted by the Applicant, which was suppressed by the state employees.
 - c) The Applicant expect this Court to make an order for the relevant authorities to investigate the Appeal Court Records in the Registry, with the objective of ascertaining how some of the filed documents went missing in a very suspicious manner.
 - d) If the Applicant could be granted a bail hearing that could result in the Applicant been enlarged on Bail, the Applicant could obtain the relevant facts and evidence that were suppressed at the Court of Appeal hearing and provide the Applicant a fair hearing in the Supreme Court.
 - e) The Applicant is also of the view that even some of the documents that the Applicant filed in this Constitutional Redress application are not available in the Court Record.
 - f) The Applicant also mentions of additional medical expenses he had to incur due to this prolonged process and request for redress.
8. When considering the importance of the above raised issues by the Applicant for a fair trial, contingent of the veracity of the substance, this Court perceives that a Court of Law should consider the above issues in the interest of justice. With regard to medical requirement, though this Court was willing to direct the Applicant to a government hospital, the Applicant rejected this offer.

Position of the State

9. In objecting to this Constitutional Redress application, State brings to the attention of this Court **Section 44** of the **Constitution** of Fiji. In this regard, **Section 44 (1)** states , as below:

“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.”

However, **Section 44 (4)** states, as below:

“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.”

9. Therefore, the State submits that the Court has discretionary power to refuse relief under **Section 44(4)** of the Constitution if an adequate alternative remedy was available and since the applicant in this matter has appealed to the Supreme Court the decision of the Court of Appeal, which is the normal process undertaken by an individual when they are not satisfied with the decision of a lower court, this Constitutional Redress application is displaced.

Analysis

10. Consequent to the enlargement of time granted by the Supreme Court of Fiji, the Applicant has filed Petition and Affidavit in the Supreme Court of Fiji on 17th January 2022 against the full bench decision of the Court of Appeal on his conviction. Therefore, it appears that the conviction of the Applicant is due to be considered by the Highest Court of the Republic of Fiji in due course.
11. Further, when the applicant was questioned by this Court during hearing on 13th May 2022, the Applicant informed this Court that his bail matter is coming up for hearing in the Supreme Court of Fiji on the 7th of June 2022.
12. Considering the current applications in relation to the conviction of the Applicant pending in the Supreme Court of Fiji, this Court is confident that all the issues raised in this application seeking Constitutional Redress can be comprehensively considered by the Apex Court of this Country if properly pleaded in due course.
13. As a result, it is perceptible that the Applicant has already ventured to utilize the usual path available to challenge the decisions of the lower Courts. As such, the Applicant has already explored the alternative remedies available in this country to seek redress for his grievance.
14. Therefore, as per **Section 44 (4)** of the **Constitution** of Fiji, this Court does not have jurisdiction to adjudicate and make orders in relation to this Constitutional Redress application.
15. To lend a force to this position, this Court intends to highlight the pronouncement made by **Lord Diplock** in the **House of Lords of England and Wales** in the case of ***Maharaj v Attorney General of Trinidad and Tobago***¹, in relation to similar provisions as in Fiji for Constitutional Redress, as follows:

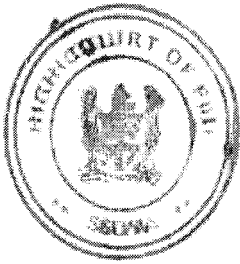
“It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleged that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application in the High Court under section 6(1) with a further right of appeal to the Court of

¹ [1979] AC 385 at 399

Appeal under section 6(4). The High Court, however, has ample powers, both inherent and under section 6(2), to prevent its process being misused in this way."

15. Therefore, this Court dismisses this application.

16. You have thirty (30) days to appeal to the Court of Appeal of Fiji.



A handwritten signature in black ink, appearing to read "Thushara Kumarage".

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Hon. Justice Dr. Thushara Kumarage

At Suva
This 1st day of June 2022