

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBM 137 of 2023

IN THE MATTER of Constitutional Redress pursuant to section 44(1) (a) of the Constitution of the Republic of Fiji and the High Court (Constitutional Redress) Rules 2015.

IN THE MATTER of a contravention of Salote Vuibureta Radrodro's Constitutional Rights provided/protected by Sections 14 and 15 in the Criminal Case No. HACD 007 of 2022.

BETWEEN: **SALOTE VUIBURETA RADRODRO** a serving prisoner at
Women's Corrections Center, Suva

APPLICANT

AND: **THE CHIEF REGISTRAR**

1st RESPONDENT

AND: **THE ATTORNEY GENERAL OF FIJI**

2nd RESPONDENT

AND: **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

INTERESTED PARTY

AND: **THE COMMISSIONER OF PRISONS**

INTERESTED PARTY

Before: Mr. Justice Deepthi Amaratunga

Counsel: Mr. Jagath Karunarathna for the Applicant
Mr. V. Chauhan and J. Qeica for first and second Respondents and
for second Interested Party.
Ms. Pene J for First Interested Party

Date of Hearing: 19.3.2024

Date of Judgment: 12.4.2024

JUDGMENT

INTRODUCTION

- [1] This is an action seeking Constitutional Redress (CR). Plaintiff (Applicant) was charged for providing false information and claiming allowance of money as a parliamentarian in the Magistrates' Court; this action was transferred to High Court by learned Resident Magistrate (RM) after hearing objections from Plaintiff for such transfer. A written ruling was also delivered by RM.
- [2] This decision to transfer was appealed to High Court and the decision of RM was affirmed and the trial proceeded before another judge of Anti-Corruption Division of High Court (Criminal).
- [3] Plaintiff was convicted as charged, and also sentenced after mitigation submissions were heard. This was appealed to Court of Appeal and awaits hearing by Full Court.
- [4] Plaintiff is alleging breach of Section 15 (1) of the Constitution of the Republic of Fiji (the Constitution), which deals with the Right to Fair Hearing by way of CR in parallel proceedings to the Appeal.
- [5] Respondents (Defendants) objected CR and sought strike out of the CR on the basis of availability of alternate remedy through an Appeal, which is pending in Court of Appeal.
- [6] Plaintiff admitted that identical issues as to Right to Fair Hearing, were raised in Court of Appeal for seeking leave to appeal and leave is granted for Plaintiff to proceed with Full Court of Court of Appeal including the allegation of denial of Right to Fair Trial. Said appeal of Plaintiff is pending before Court of Appeal.

- [7] Court of Appeal in *Abhay Kumar V DPP* Criminal Appeal AAU0037 of 2003s (decided on 16.7.2004) held, that when a party is having an 'adequate alternative remedy', a discretion is vested with the judge to dismiss an application for CR 'summarily'. It was also held 'applying principles so firmly established by the Privy Council in the line of authority set out above to the circumstances of this case the appellant's application for constitutional redress was an abuse of process and was properly dismissed.' These are cases where constitutional remedies were sought while the trial is pending. I cannot see any reason to deviate from such a ratio to be applied to a CR application , when there is pending appeal before Court of Appeal where the same issue is raised as a ground of appeal.
- [8] Plaintiff not only has an adequate alternative remedy by way of an appeal against conviction including alleged violation of Right to Fair Trial, but had already exercised it and it is pending determination before Court of Appeal, having obtained leave to appeal. It is before Full Court of Court of Appeal. This is yet to be determined by Court of Appeal, hence the discretion is exercised to refuse this application for CR and striking out. [see Privy Council decision of ***Brandt v Commissioner of Police (Montserrat)*** [2021] UKPC 12 (10 May 2021)¹. This is again an action where constitutional remedy sought while trial was pending and held that it was an abuse of process as such determination will lead to interference with criminal trial.
- [9] Section 44(4) of the Constitution states '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.'
- [10] When there is 'adequate alternate remedy' is available by way of an appeal and identical issue of alleged denial of Right to Fair Hearing is before Court of Appeal, the discretion granted to this court in terms of Section 44(4) of the Constitution must be interpreted to avoid duplicity of actions. Section 44(2) of the Constitution allows CR irrespective of availability of any 'action', but cannot be expanded to include pending appeals of criminal action, such as the matter before this court.
- [11] Criminal Appeals are comprehensive to deal with issue of denial of Right to Fair Hearing and CR is not a substitute for such time tested rules and procedures laid and also development of comprehensive case law .So it is unwise to consider Section 15 (1) of the Constitution in isolation to grant declaration sought by Plaintiff, when the issue can be adequately addressed in pending appeal before Full Court of Appeal, to say the least.

¹ [2021] 4 All ER 637, [2021] 1 WLR 3125, [2021] UKPC 12, [2021] WLR(D) 267, [2021] 2 Cr App R 11

FACTS

[12] Plaintiff was charged for the following counts in the Magistrates' Court

"FIRST COUNT

Statement of Offence (a)

FALSE INFORMATION TO PUBLIC SERVANT: Contrary to section 201 (a) of the Crimes Act No. 44 of 2009.

Particulars of the Offence (b)

SALOTE VUIBURETA RADRODRO on 13th June 2022 at Suva in the Central Division, gave Viniana Namosimalua the Acting Secretary General to the Parliament of Fiji, a person employed in the civil service, false information that her permanent place of residence is in Namulomulo Village, Nabouwalu, Bua, which she knows to be false, knowing it to be likely that she will thereby cause the said Viniana Namosimalua to approve allowance claims submitted by her, which the said Viniana Namosimalua ought not to do if the true state of facts with respect to the permanent place of residence of SALOTE VUIBURETA RADRODRO was known to her.

SECOND COUNT

Statement of Offence (a)

OBTAINING FINANCIAL ADVANTAGE: Contrary to section 326 (1) of the Crimes Act No. 44 of 2009.

Particulars of the Offence (b)

SALOTE VUIBURETA RADRODRO between 01" August, 2019 and 30'h April, 2020 at Suva in the Central Division, engaged in conduct, namely, submitted allowance claims to the Office of the Acting Secretary General to the Parliament of Fiji and as a result of that conduct, obtained a financial advantage amounting to \$37,921.13 from the Parliament of Fiji, knowing or believing that she permanently resides at Lot 41 Tacirua East, Suva which is a place less than 30 kilometres away from the place of Parliament or Committee as per the Parliamentary Remunerations Act 2014, and therefore she was not eligible to receive the said financial advantage.

[13] Plaintiff had pleaded not guilty to the above counts and the matter was transferred to High Court despite objections by Plaintiff for such transfer. A written ruling was handed down by RM and this was appealed to Anti-Corruption Division of the High Court and the said appeal was dismissed on 4.2.2022.

- [14] Trial proceeded before another judge of Anti-Corruption Division of High Court and after hearing Plaintiff was found guilty and convicted on the 6.9. 2022.
- [15] After conviction submissions were heard regarding mitigation and Plaintiff, was sentenced to thirty-six (36) months imprisonment on the 22.9. 2022, of which 6 months were suspended for 5 years.
- [16] This CR Application was filed in the Registry on 24.8. 2023. Plaintiff amended the Applications thereafter, and amended Applications was filed 21.12.2023.
- [17] First and second Defendants filed a Strike out Application on 15.2. 2024 first and second interested parties joined with the application for strike out.
- [18] Application for strike out is made in terms of Order 18 Rule 18 (1) (a), (b) and (d) of the High Court Rules 1988 (HCR) read with section 44(4) of the Constitution

ANALYSIS

- [19] This is an application for CR and in terms of High Court (Constitutional Redress) Rules 2015, Rule 7 'the practice and procedure , including any rules of Court for the time being in force in relation to civil proceedings in High Court, with any variations the circumstances require' applies.
- [20] Accordingly HCR apply to CR with *mutatis mutandis*. The procedure to be followed in CR is civil procedure.
- [21] First and Second Defendants filed summons for strike out of Plaintiff's CR in terms of Order 18 rule 18 (1) (a), (b) and (d) of HCR. Applications for CR are made to court without obtaining leave of the court as of right. In order to prevent frivolous applications being made or where there is an abuse of process, an application can be made to , strike out such Applications for CR. For this Section 44(4) of the Constitution is read along with Section 44(2) of the Constitution and also HCR.
- [22] Order 18 rule 18(1) of HCR states,
Striking out pleadings and endorsements (O.18, r.18)

18.–(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that–

- (a) it discloses no reasonable cause of action or defence, as the case may be;
- (b) it is scandalous, frivolous or vexatious;
- (c) it may prejudice, embarrass or delay the fair trial of the action;

or

- (d) **it is otherwise an abuse of the process** of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be...(emphasis added)

[23] Plaintiff in the Amended Originating Summons filed sought

“1. A DECLARATION that the Applicant's right to fair trial guaranteed under section 15 of the Constitution of Fiji was contravened in her Criminal Case No. HACD 007 of 2022, on the following ground....

2. AN ORDER that FICAC’s whole case against the Applicant was unconstitutional and invalid to the extent of the above inconsistencies with the Applicant's constitutional rights, freedoms, and is of no legal effect due to the contraventions and means that it wasn't a fair trial against the accused which contravenes the Applicant's right to a fair trial before a court of law under section 15(1) of the Constitution.”

[24] It is clear that the orders sought in this CR clearly interferes with the pending appeal before Court of Appeal filed by Plaintiff . On that basis alone this application is an abuse of process and struck off *in limine*.

[25] Even if I am wrong on the above Order 18 rule 18 of HCR is to be read along with Section 44(4) of the Constitution. It is an abuse of process to file parallel proceedings by way of CR, for denial of fair trial when the when the same issue is pending in Court of Appeal.

[26] Section 44(4) of the Constitution states,

"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] In Privy Council decision of *Brandt v Commissioner of Police (Montserrat)* [2021] 4 All ER 637 at 646-647 decided that boundaries of abuse of process of the court cannot be defined precisely. It was a case seeking constitutional declaration as to manner in obtaining electronic evidence from personal electronic device in a pending trial. It was held, (pp 646-647)

"The boundaries of what may constitute an abuse of the process of the court are not fixed. As Stuart-Smith LJ said in *Ashmore v British Coal Corp* [1990] 2 All ER 981 at 984, [\[1990\] 2 QB 338 at 348](#), the categories are not closed and **considerations of public policy and the interests of justice may be very material**. Lord Diplock's speech in *Hunter v Chief Constable of West Midlands* [\[1981\] 3 All ER 727 at 729](#), [\[1982\] AC 529 at 536](#) underlines this point. He stated:

'My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'

Abuse of process must involve something which amounts to a misuse of the process of litigation. However, whilst the categories of abuse of process of the court are not **fixed there are clear examples which are relevant** to this appeal.

[35] First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court's process in the absence of some feature 'which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate'. The correct

approach to determining whether a claim for constitutional relief is an abuse of process because the applicant has an alternative means of legal redress was explained by Lord Nicholls, delivering the judgment of the Board in *A-G v Ramanoop* [2005] UKPC 15, (2005) 66 WIR 334, [2006] 1 AC 328(at para [25]), as follows:

'... where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. **To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process.** A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of State power.'

There are examples of the application of that approach in cases such as *Harrikissoon v A-G of Trinidad and Tobago* (1979) 31 WIR 348 at 349, [1980] AC 265 at 268, *Thakur Persad Jaroo v A-G* [2002] UKPC 5, (2002) 59 WIR 519, [2002] 1 AC 871(at para [39]) and most recently, in *Warren v State* [2018] UKPC 20, [2019] 3 LRC 1 (at para [11]). This approach prevents unacceptable interruptions in the normal court process, avoids encouraging technical points which have the tendency to divert attention from the real or central issues, and prevents the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little or no practical relevance in a case when properly viewed at the end of the process. This approach also promotes the rule of law and the finality of litigation by preventing a claim for constitutional relief from being used to mount a collateral attack on, for example, a judge's exercise of discretion or a criminal conviction, in order to bypass restrictions in the appellate process (see eg *Chokolingo v A-G of Trinidad and Tobago* [1981] 1 All ER 244 at 248–249, [1981] 1 WLR 106 at 111–112). “(emphasis added)”

- [28] From the above Privy Council (UK) decisions it can be deduced that for determination of abuse of process public policy and interest of justice are material. Section 44(2) of the Constitution must be read along with Section 44(4) of the Constitution. Section 44(2) allows a party to seek CR ‘without prejudice to any other action with respect to same matter..’. At the same time discretion is granted to the court to restrict CR in terms of Section 44(4) when there is ‘adequate alternate remedy is available’. There should be a balance between the said provisions but these provisions were not meant to allow parallel litigations to create confusion on settled law. Public policy and interest

of justice guides the use of discretion of the court in the exercise of powers under Section 44(4) of the Constitution.

- [29] So Plaintiff must show that the alternate remedy by way of an appeal against the conviction is not adequate. This is an uphill task as the appeal process against conviction is comprehensive as to procedure and the law including and not limited to the allegation of denial of Fair Trial enshrined in Section 15(1) of the Constitution.
- [30] For this Plaintiff at hearing submitted two reasons, and they are
1. Appeal before Full Court of Appeal may delay while CR takes shorter time.
 2. Plaintiff seeks to adduce new evidence and this will further delay as that needs to be determined by Full Court of Appeal.
- [31] To me both issues relate to delay in seeking within 'reasonable time'. The delay is a valid concern for any litigant. Section 15(2) of the Constitution also deals with this issue. By having multiplicity of actions when there is adequate alternate remedy, will not solve the issue of delay on public policy perspective, as this may lead to opening of flood gates and lead to further delay through parallel CR and Appeals.
- [32] There are many litigants awaiting hearing of their actions or appeals by the court due to overloading of cases and limited resources available for disposal of such matters. This overload will get further aggravated if parallel CR is allowed.
- [33] As held in Brandt v Commissioner of Police (Montserrat) (supra) considerations of public policy are valid grounds for determination issue of abuse of process. CR is not a short cut to Appeal process before Court of Appeal.
- [34] Adducing new evidence in an Appeal is an exception to the rule and such needs to be looked carefully hence such matters cannot be hastily decided. These procedures are time tested methods and cannot be circumvented by CR. When there are adequate remedies to CR are available and such remedies are also pending in court, it is an abuse of process to seek CR only solely on the basis of delay.
- [36] Court of Appeal in Abhay Kumar V DPP Criminal Appeal AAU0037 of 2003s (decided 16.7.2004) was a case where accused challenged the evidence obtained by way of CR while the trial was pending before the court. The judge

had struck off CR after hearing of preliminary objections summarily. Full Court of Appeal affirmed the summary dismissal by judge on the basis of availability of adequate alternate remedy. It was held,

‘applying principles so firmly established by the Privy Council in the line of authority set out above to the circumstances of this case the appellant’s application for constitutional redress was an abuse of process and was properly dismissed.’

[37] This application for CR is struck off for abuse of process as there is an adequate alternative remedy in terms of Order 18 rule 18 of HCR read with Section 44(4) of the Constitution. Cost of this application is summarily assessed at \$ 2,000 to be paid by Plaintiff (Applicant) to second Respondent. No costs awarded for first Respondent and interested parties considering circumstances of the case.

Final Orders

- a. Application for Constitutional Redress struck off.
- b. Cost is summarily assessed at \$ 2,000 to be paid by Applicant to second Respondent.



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Deepthi Amaratunga
Judge

At Suva this 12th day of April, 2024.

Solicitors:

Karunarathna Lawyers

Attorney-General Chambers

FICAC