STATE v SENIJIELI BOILA and Anor (HAC0032 of 2004S)

HIGH COURT — CRIMINAL JURISDICTION

SHAMEEM J

15, 25 October 2004

Criminal Law — bail — application for bail — conditions of custody — refusal of bail — escape from police custody — unlikeliness to surrender — whether Applicants custody while awaiting trial inhumane and degrading — Constitution of the Republic of Fiji ss 25, 25(1) — Bail Act ss 19, 19(2)(b) — European Convention on Human Rights Art 3 — International Convention on Civil and Political Rights — Penal Code (Cap 17) ss 292, 293(1)(a)(b) — Universal Declaration of Human Rights — United Nations Standard Minimum Rules Pt C.

The Applicants, Senijieli Boila (A1) and Pita Nainoka (A2), were jointly charged with robbery with violence and unlawful use of motor vehicle. A1 made two previous applications for bail in which he succeeded on one but was refused on the second application for escaping from police custody. He was again refused bail on the third application on the ground that his previous escape showed that he was unlikely to surrender before the court. On the other hand, A2 made three previous applications for bail which were likewise refused as his escape from police custody also showed that he was unlikely to surrender to police custody.

A1 and A2 described the conditions in which they were held while awaiting trial as inhumane and degrading in that: (a) each cell was the size of the assessors' box; (b) there were three mattresses in each cell and one bucket latrine; (c) they were released 40 minutes each day for bath and change; (d) they were locked up in the cell with two other detainees. A prison visit was conducted and findings were made as to the Applicants' conditions inside the prison.

At the hearing, the Attorney-General and the proceedings commissioner for the Human Rights Commission were invited to become parties to the application. Counsel for the DPP filed three affidavits to the effect that the Applicants had previous convictions for offences of violence, that they faced multiple charges, had previously failed to honour bail conditions and that they had both escaped from lawful custody while awaiting trial.

The commissioner of Prisons filed an affidavit stating that all the remand prisoners formerly accommodated at the awaiting trial block were now accommodated in a separate dormitory-style building with beds, mattresses, blankets and pillows, and a separate ablution block for toilet and bath needs. However, the Applicants denied that they were moved to the dormitory.

Held — (1) It was not in the public interest to release the Applicants pending trial. They both had a history of escaping, had previous convictions and the offences with which they were charged were serious and there was a real risk of reoffending while on bail. The bail application was denied as there was doubt as to the likelihood of surrender to custody.

(2) In deciding whether the conditions of the Applicants while in police custody were severely humiliating, that they were debased and forced into a situation of degradation, the court held that the Applicants were not vulnerable nor sensitive because neither was a stranger to prison or to the criminal justice system nor was very young or very old. The Applicants were mature and healthy young men who awaited trial on multiple charges relating to violence. However, after having conducted a visit to the cell in which they were detained, the court found that the circumstances of custody were serious in that: they share the cell with two other inmates; foul smell from the damp bedding and the bucket latrine; wet washing hanging inside the cell; lack of adequate light; mosquitoes; 23 hours spent in the cell without fresh air and exercise; and the fact that the Applicants, ate, slept, relieved themselves and lived in that condition day after day without relief, dehumanised and

degraded them as human beings. Prisons Department was in breach of s 25 of the Constitution of the Republic of Fiji. Breaches of s 25 can never be justified on the basis that Fiji is an underdeveloped country, or that the people of Fiji are accustomed to be treated with inhumanity or disrespect. That inmates, and detainees despite the crimes they have done, deserve to be confined in custody with no further degradation than is necessary. Remand prisoners are presumed innocent until proven guilty, and they are confined because there is a real risk that they will not attend court for trial. As long as the Applicants remained in the dormitory, they will not be in inhumane and degrading conditions.

Application dismissed.

Cases referred to

Assenov v Bulgaria (1998) 28 EHRR 652; *Sailasa Naba v State* [2001] FJHC 127; *State v Eugene T. M. C. Ladpeter* [2005] FJHC 25; *Taito Rarasea v State* [2000] FJHC 146; *Tyrer v UK* (1978) 2 EHRR 1; [1978] ECHR 2, cited.

Pratt v Attorney-General for Jamaica Privy Council (Appeal No 10 of 1993); *Selcuk v Turkey* (12/1997/796/998-999), considered.

P. Madanavosa for the State

First and second Accused in person

K. Keteca for the Attorney-General's Chambers

Ratu Joni Madraiwiwi for the Human Rights Commission

Shameem J. The two Applicants make further applications for bail pending trial. They are jointly charged with robbery with violence, and unlawful use of motor vehicle. The Information reads as follows:

FIRST COUNT

Statement of Offence

ROBBERY WITH VIOLENCE: Contrary to Section 293(1)(a)(b) of the Penal Code, Cap 17

Particulars of Offence

SENIJIELI BOILA and PITA NAINOKA together with others on the 1st day of March 2004 at Nasinu in the Central Division, being armed with cane knives, robbed AMINIASI SOLOMONE, of the sum of $48,878.47 in cash and $17,201.05 in cheques, all of the total value of $66,079.52, the property of RB Patel Supermarket and immediately before the time and at the time of the robbery did use personal violence on the said AMINIASI SOLOMONE.

SECOND COUNT

Statement of Offence

UNLAWFUL USE OF MOTOR VEHICLE: Contrary to Section 292 of the Penal Code, Cap 17.

Particulars of Offence

SENIJIELI BOILA and PITA NAINOKA and others on 29 February 2004 at Nasinu in the Central Division, unlawfully and without a colour of right but not so to be guilty of stealing, took for their own a private motor vehicle registration number DD696 the property of RAFFLES TRADEWINDS HOTEL.

The first Applicant (A1) has made two previous applications for bail. He succeeded in the case of one, but when it was later brought to my attention by State counsel that he escaped from police custody on 27 August 2004, I refused to grant bail when he made his second application. He made a third application on 14 September 2004 but I refused bail on 16 September saying that his attempt to escape in August showed that he was unlikely to surrender to the custody of the court. That finding is still valid. However he now raises a new ground, that the conditions of his custody at the Korovou Prison are inhumane and degrading.

The second Applicant (A2) has made three previous applications for bail, all of which have been refused. The last refusal was on 6 September 2004 when I said that his escape from police custody showed that he was unlikely to surrender to police custody.

Each Applicant described the conditions in which they were held. They said that each cell was the size of the assessors' box, that there were three mattresses in each cell and one bucket latrine. He said he was only released for 40 minutes each day for a bath and change, and was otherwise kept in the cell locked up with two other detainees. A1 said that their conditions were in breach of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Convention Against Torture and the UN Standard Minimum Rules for the Treatment of Prisoners. He invited me to visit the facilities to see them for myself. A2 echoed these submissions.

The prison visit was conducted on 5 October 2004. A full record of the scene visit is annexed to this judgment. Initially the Commissioner of Prisons refused to allow the judges to enter the complex despite written and verbal communication to him and his officers from 1–5 October apprising him of our visit. However, after I spoke to him on the telephone explaining the purpose of the visit, he permitted the Chief Operations Officer to escort us around the complex. The officer was most helpful and professional throughout the visit.

The findings as to A1's conditions were as follows:

> Cell block with three occupants namely:
>
> 1) Senijieli Boila;
> 2) Charles William;
> 3) Iosefa Kaliova.
>
> At the Red Wing as you turn right when you enter, right to the far end on your left is the cell;
>
> — The door had only a hole which you are able to look through;
> — 3 mattresses, 3 pillows and 3 blankets;
> — One bucket to relieve themselves;
> — One light bulb;
> — One window — high up at the wall;
> — One water can;
> — No mosquito nets;
> — No medication given for Senijieli's fractured hand;
> — Damp mattresses are moist from the floor;
> — They had their blanket spread on the floor;
> — They change the bucket which they relieve in when they are told;
> — They do not go and have dinner at the mess but have their dinner in their cell;
> — The cell has a filthy smell;
> — 24hrs in their cell (only 5 minutes to bath);
> — They empty their toilet bucket 2 times a day;
> — No exercise;
> — Newspaper they have stuck on the window of the cell by using rice because a lot of mosquitoes."

The findings in respect of A2 were as follows:

> — Cell is on the first floor;
> — Only prisoner in that cell;
> — 1 mattress, pillow and blanket;
> — One bucket to relieve himself;
> — One light bulb;
> — One window — high up at the wall;

— During the day time remand prisoners get excess to two toilet room with half door situated outside the cell block building.

On the next date for hearing, the Attorney-General and the Proceedings Commissioner for the Human Rights Commission were invited to become parties to the application. A number of affidavits were filed. Counsel for the DPP has now filed three affidavits sworn by DC 1173 Jemesa Luvena to the effect that the Applicants have many previous convictions for offences of violence, that they are facing multiple charges, that they have previously failed to honour bail conditions and that they have both escaped from lawful custody while awaiting trial. I accept the contents of these affidavits. As I have said in my earlier rulings there is a very high risk of absconding in respect of both Applicants, and I would have no hesitation in refusing this application forthwith, if they had not raised breaches of s 25 of the Constitution.

The Commissioner of Prisons in an affidavit filed on 13 October 2004, states that on 8 October 2004, all remand prisoners formerly accommodated at the awaiting trial block are now accommodated in a separate building. The building has dormitory-style accommodation and the remand prisoners sleep on beds with mattresses. Each prisoner has a blanket and a pillow. The prisoners no longer use a bucket to relieve themselves, and they have a separate ablution block for toilet and bath needs. The building is well-ventilated, and has its own separate eating facility. There is a master plan with the Public Works Department for the building of further remand facilities around the Naboro area. The affidavit states that the Applicants are now housed in the new dormitory.

In response to my questions in court, counsel for the Attorney-General said that the dormitory was formerly used to house convicted prisoners. The convicted prisoners have now been shifted to the awaiting trial block. Counsel for the DPP said that she would like to be assured that the dormitory accommodation for the remand prisoners was to be permanent. The Proceedings Commissioner said that he would like a similar assurance and that there should be a clear court order that there was to be no return to the awaiting trial block.

The Applicants both denied that they had been moved to the dormitory. A2 said that he was in another cell where convicted prisoners used to be kept, and that the two prisoners who share his cell are convicted prisoners. A1 said he had not been shifted at all and that although he had initially been taken to the dormitory, he was unable to run for his food because of his injured hand, and he was then taken back to his old cell. He now shares it with one Serevi, and one Sekonaia Yabaki. He said that the move to the dormitory was only a temporary one in response to this bail application and that the status quo would be restored after this ruling is delivered.

I then gave counsel for the Attorney-General, time to check on these matters. I also gave the Proceedings Commissioner time to file submissions on the remand facilities in relation to the UN Standard Minimum Rules, and on the meaning of the words "inhuman and degrading treatment" under s 25 of the Constitution.

The law

Section 19(2)(b) of the Bail Act provides that conditions of custody are relevant to the question of whether or not bail should be granted. Relevant issues are the circumstances of that custody, access to a solicitor, facilities to prepare a defence, and any breaches of the UN Standard Minimum Rules. These conditions must be balanced with other considerations listed in s 19 of the Bail Act. The predominant consideration is whether the applicant will surrender to custody for

trial. I applied this test in *State v Eugene T. M. C. Ladpeter* [2005] FJHC 25 and granted bail on the basis that the applicant was likely to surrender to custody and the conditions of custody (similar to the Applicants in this case) were such that there was a compelling case in favour of bail. In that case, the applicant had only one minor, previous conviction, a settled family home and no history of escaping. Bail was granted on a straightforward application of s 19 of the Bail Act, and it was not necessary to consider s 25 of the Constitution.

Section 25(1) of the Constitution provides:

> Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.

The words "cruel, inhumane, degrading … treatment or punishment" are identical to articles in many international instruments and conventions. They can be found in the Universal Declaration of Human Rights, the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Unlike other rights (for instance the right to freedom of expression, or the right to equality) the right to freedom from cruel and inhuman treatment is an unqualified non-derogable right. It cannot be qualified in an emergency. There can never be any reason which might justify treating a person in a cruel inhuman or degrading manner.

In *Tyrer v UK* (1978) 2 EHRR 1; [1978] ECHR 2, the European Court of Human Rights considered whether a judicial order for corporal punishment on a juvenile offender on the Isle of Mann, constituted inhuman or degrading treatment under Art 3 of the European Convention on Human Rights. The court held that the words "inhuman" and "degrading" meant two different things, and that the word "degrading" means that there is a level of humiliation and debasement attaining a particularly severe level. To be degrading, the acts complained of must attain that level of debasement and severity, and must be assessed in the circumstances of the case and in the context of the treatment. The reason given for the treatment is irrelevant because breaches of Art 3 can never be justified. The court held that the nature of the punishment and the institutional nature of the inflicted physical violence whereby the offender was treated as an object led to a finding that the punishment had an element of humiliation which satisfied the required level inherent in the notion of degradation.

In *Selcuk v Turkey* (unreported, 12/1997/796/998-999, 24 April 1998), Reports of Judgments and Decisions 1998 Strasbourg, the European Court found that soldiers who had deliberately burnt the homes of Kurdish Turks, had subjected the Kurdish Turks to "inhuman treatment". The court said of the right under Art 3:

> Article 3, as the Court has observed on many occasions, enshrines one of the most fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms, torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation.

On the meaning of the words "inhuman or degrading" the court said:

> … ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the

> circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim …

In *Assenov v Bulgaria* (1998) 28 EHRR 652, the European Court considered whether the conditions of custody of a young detainee held in pre-trial detention for 11 months, was inhuman and degrading. It concluded that there was insufficient evidence before it to conclude that the conditions were sufficiently severe to conclude that there had been an Art 3 breach.

In *Sailasa Naba v State* [2001] FJHC 127, Prakash J granted bail to several accused persons awaiting trial for murder, on the basis that the conditions at the Natabua Remand Centre contravened Art 5 of the Universal Declaration of Human Rights, Art 10 of the ICCPR and s 27 of the Fiji Constitution which guarantees the right of every detained person to be treated with humanity and respect of his inherent dignity. In that case also, Prakash J visited the remand centre for himself and found several significant breaches of the United Nations Standard Minimum Rules for the Treatment of Prisoners 1957.

In *Pratt v Attorney-General for Jamaica Privy Council* (unreported, Privy Council Appeal No 10 of 1993), the Privy Council held that a 16-year wait from arrest to final appeal from a sentence of death constituted inhuman or degrading treatment which was contrary to s 17 of the Jamaican Constitution. The court said:

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time. But before their Lordships condemn the act of execution as "inhuman or degrading punishment or other treatment" within the means of section 17(1) there are a number of factors that have to be balanced in weighing the delay. If delay is due entirely to the fault of the accused such as an escape from custody, or frivolous or time wasting resort to legal procedures which amount to an abuse of the process the accused cannot be allowed to take advantage of that delay for to do so would be to permit the accused to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime.

In *Taito Rarasea v State* [2000] FJHC 146, Madraiwiwi J held that the reduction of food rations and the lengthening of the prison term of an inmate by the Commissioner of Prisons, was cruel, inhumane or degrading treatment, and also constituted disproportionately severe punishment. He said that any treatment or punishment "that impinges upon the inherent dignity of the individual will contravene section 25".

To what degree of seriousness conditions of custody need to be before they become inhuman and degrading, must remain a question of fact in each case, and in the personal circumstances of each offender. Breaches of the UN Standard Minimum Rules are relevant although it does not inescapably follow that the conditions are inhuman and degrading. Part C of the Rules relates specifically to untried prisoners although the Rules generally apply to all prisoners. Part C reads:

> 84.
>
> (1) Persons arrested or imprisoned by reason of a criminal charge against them, who are detained either in police custody or in prison custody (jail) but have not yet been tried and sentenced, will be referred to as "untried prisoners", hereinafter in these rules.

(2) Unconvicted prisoners are presumed to be innocent and shall be treated as such.

(3) Without prejudice to legal rules for the protection of individual liberty or prescribing the procedure to be observed in respect of untried prisoners, these prisoners shall benefit by a special regime which is described in the following rules in its essential requirements only.

85.

(1) Untried prisoners shall be kept separate from convicted prisoners.

(2) Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.

86. Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate.

87. Within the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside, either through the administration or through their family or friends. Otherwise, the administration shall provide their food.

88.

(1) If he wears prison dress, it shall be different from that supplied to convicted prisoners.

(2) If he wears prison dress, it shall be different from that supplied to convicted prisoners.

89. An untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it.

90. An untried prisoner shall be allowed to procure at his own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution.

91. An untried prisoner shall be allowed to be visited and treated by his own doctor or dentist if there is reasonable ground for his application and he is able to pay any expenses incurred.

92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

93. For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

The Rules require that one prisoner should be kept in one cell, that there should be adequate sanitary facilities, and access daily to fresh air and exercise. The greater the departure from the Rules, the greater the likelihood of a finding of a breach of s 25 of the Constitution.

The applications

There can be no doubt at all, that it is not in the public interest to release these Applicants pending trial. They both have a history of escaping. They have many previous convictions. The offences with which they are charged are serious and there is a real risk of reoffending while on bail. If I were to consider conditions of custody, shameful though they are as merely one of the factors relevant to bail, I would refuse this application. This is because there is a real doubt as to the likelihood of surrender to custody. The State's concern in this regard is valid.

However, the second step for consideration is whether the conditions are so severely humiliating that they sap at the inherent dignity of the human person or that they debase the Applicants and force them into a situation of degradation. In considering this second step, I am aware that neither Applicant is particularly vulnerable or sensitive. Neither is a stranger to prison or to the criminal justice system. Neither is very young nor very old. Both are mature and healthy young men who await trial on multiple charges relating to violence.

However, I have visited the prison cell in which both Applicants were expected to await trial. The circumstances of custody which I witnessed were serious. The sharing of the cell with two other inmates, the foul smell from the damp bedding and the bucket latrine, the wet washing hanging inside the cell, the lack of adequate light, the mosquitoes, the 23 hours spent in the cell without fresh air and exercise and the fact that the Applicants, ate, slept, relieved themselves and lived in that atmosphere day after day without relief, lead me to the conclusion that the conditions of their custody dehumanise the Applicants and degrade them as human beings. I consider that the level of severity of such degradation to be such that the Prisons Department are in breach of s 25 of the Constitution.

In hearing this application, I was heartened by the fact that no counsel in these proceedings attempted to justify these conditions on the basis of limited resources. They were right not to do so, just as they were right not to argue that the people of Fiji deserve some lesser form of human rights than the inhabitants of other more developed countries. The right of each man, woman and child in Fiji to be treated with dignity, is an inalienable right. Breaches of s 25 can never be justified on the basis that Fiji is an under-developed country, or that the people of Fiji, because of their poor or simple backgrounds, are accustomed to be treated with inhumanity or disrespect. The inmates, and detainees of Korovou Prison despite the crimes they might have committed against society, deserve to be confined in custody with no further degradation than is necessary in the act of confining itself. The punishment for serving prisoners is the confinement itself. In the context of Fiji society, that is punishment enough. In the case of remand prisoners, they are presumed innocent until proven guilty, and they are confined because there is a real risk that they will not attend court for trial. There can be no excuse for confining them in conditions which sap at their inherent dignity and degrade them as individuals.

There appeared to be a consensus among all counsel, that the conditions of custody in the awaiting trial block, were inhumane and degrading. The Proceedings Commissioner filed submissions with an attached report, saying that the cells in which the Applicants were held, failed to satisfy international prison standards. In particular the commissioner submits:

> It is the Commission's respectful submission that the cell where the Applicants are currently held, and the conditions attendant thereupon, amount to a breach of section 25(1) of the Constitution. In the light of the conclusions [above] and the first principle of constitutional interpretation, there is no balancing act to be done. The Constitution as supreme law must prevail.

The commissioner concluded that if however this court is satisfied that the alternative arrangements are adequate, then bail could be refused subject to review if the Applicants are shifted back to their previous cells. Counsel for the DPP agreed with these sentiments but was unable to say with any certainty, that the Applicants had indeed been shifted. In the face of such conflict of

information, counsel for the Attorney-General arranged for the oral evidence of the officer-in-charge of the Korovou Prison to be called. The Applicants also gave evidence.

The Applicants' evidence was that although they had been shifted to the dormitory after my prison visit, they were shifted back into the cells until the day before their evidence was heard (on 20 October 2004). A2 agreed that the conditions were better in the dormitory but said that the prison complex itself was condemned and that the conditions remained unacceptable.

Assistant Superintendent Joape Cagidaveta then gave evidence. He is the officer-in-charge of the Korovou Prison Complex. He said that on 8 October 2004, both Applicants had been shifted to the dormitory. The dormitory was formerly used for convicted prisoners who needed minimum supervision. He then described the dormitory facilities in some detail. On 20 October, he discovered that the Applicants had, as a result of administrative error, been locked up in the main cell block. He then ensured that they were moved to the dormitory. He assured me that they would remain in the dormitory until trial, that A1 could receive medical treatment on request and that the move of remand prisoners to the dormitory was permanent.

In response to my questions, he expressed the view that remand prisoners should be kept at a separate locality under the supervision of the police. He said he was aware of no plan to accommodate remand prisoners in the future, and that the recent Prisons Review, conducted by the Law Reform Commission and assisted by AUSAID, did not include review of the conditions of custody of remand prisoners. He agreed that overcrowding and lack of resources were real problems in the administration of the prisons, and that the accommodation of the CRW soldiers prior to their trials had stretched their resources even further. He said that the dormitory could accommodate a total of 52 remand prisoners but that the remaining remandees would have to be accommodated in the awaiting trial block until better facilities were found for them. He then said that some remandees preferred to be in the block because of the company.

As a result of the evidence of the assistant superintendent, there is now far better evidence before me of the conditions in which the Applicants are kept. If they had remained in the awaiting trial block, I would not have hesitated to grant bail to both today. However, although I continue to harbour doubts about their exact location from 8 October to 20 October 2004, I am satisfied that they are now in conditions which satisfy the Standard Minimum Rules, and s 25 of the Constitution. Although the OHS Report is damning in relation to the structural condition of the prison, I am satisfied that as long as the Applicants remain in the dormitory, they are not in inhumane and degrading conditions. Further, although the OHS Report is certainly relevant in the granting or refusing of bail under s 19 of the Bail Act, it is not sufficient to displace my real apprehension that the Applicants are unlikely to surrender to custody if granted bail.

Bail is therefore refused. However, if the Applicants in the future complain about being shifted again to the main cell block or the awaiting trial block, and I am satisfied of this on any evidence put before me, I will not hesitate to grant bail.

Application dismissed.