IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Civil Action No. 282 of 1982

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Between:

SEFANAIA MASI KAUMAITOTOYA Plaintiff

and

1. THE CONTROLLER OF PRISONS
2. THE ATTORNEY GENERAL OF FIJI Defendants

Mr. H.K. Patel for the Plaintiff.
Miss G.M. Fong & E.D. Powell for the Defendants.

DECISION

The plaintiff seeks the following relief:

(a) A DECLARATION that the first defendant on the face of the official records of the Diciplinary Tribunal erred in law and in fact in finding the plaintiff guilty of the purported disciplinary offences.

(b) A DECLARATION that on a fair and objective reading of the relevant provisions of the Prisons Legislations under which the plaintiff was charged bearing in mind the evidence heard and recorded by the Disciplinary Tribunal, the first defendant could not be justified in law for reducing the plaintiff's rank to that of a Prison Officer Class B.

(c) A DECLARATION that before the Controller of Prisons, the first defendant in this case, could have recourse to his discretionary power under section 15(1)(c) of the Prison Act, Cap. 86, he must be satisfied that in fact the prison officer he is dealing with is unlikely to be or has ceased to be, an efficient officer; the facts upon which the Controller of Prisons, the first defendant in this case, bases his decision must be real and proved in his mind beyond doubt.

(d) A DECLARATION that in the circumstances of the allegation, suspension from duties and disciplinary proceedings against the plaintiff, the first defendant is not justified in law or in fact in his intention to act under section 15(1)(c) of the Prisons Act; his decision being therefore unfair in law and in fact.

Mr. Powell, at one of the hearings, queried whether the plaintiff could seek relief without the leave of the Court. He said the application was one for judicial review and under Order 53 Rule 3(1) Rules of the Supreme Court it is mandatory to seek such leave before applying for judicial review.

Mr. Patel, in reply, pointed out that the summons on the face of it indicates the application is under Order 15 Rule 16. He said the plaintiff was not seeking relief by way of judicial review.

The plaintiff is a Prison Officer and, as can be gathered from the relief sought, disciplinary proceedings were taken against him under the Prisons Act. While I would agree with Mr. Powell that a more appropriate remedy would have been for the plaintiff to seek to set aside the Controller of Prison's finding of guilt and reduction in rank, by applying for an order of certiorari, he is not

precluded from seeking a declaration.

It is mandatory under Order 53 to seek leave where an order of mandamus, prohibition or certiorari is sought.

An application for a declaration may be made by way of an application for judicial review in which event leave of the court must first be obtained. It is a permissive provision.

The present application is not one for judicial review but for a declaratory judgment.

Mr. Powell's argument is that the application is one for judicial review and that the law applicable is the law of judicial review. In other words Mr. Powell argues relief, other than by appeal, can only be granted by way of judicial review, and in the instant case no leave has been obtained and the application should therefore be dismissed.

A similar argument was raised in Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1960] AC. 260.

Lord Goddard at p. 290 said:-

> "I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari."

The plaintiff is not debarred from seeking the relief he is claiming.

I turn now to the facts of the case which are not in dispute.

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The plaintiff, before he was demoted, held the rank of Principal Prison Officer. He was suspended from duty with effect from 29.1.82 and, pending the outcome of disciplinary proceedings against him, was interdicted from duty by the Controller of Prisons on 15.2.82.

Pursuant to section 29 of the Prison Act the plaintiff was charged with two offences the details of which need not be stated.

The offences were duly investigated by a Superintendent of Prison who was appointed the Tribunal. Witnesses were called and evidence taken by theTribunal in the presence of the plaintiff who also gave evidence and called witnesses.

The Tribunal, being of the belief at the conclusion of his hearing, that the gravity of the offences were such that the plaintiff would not be adequately punished by the punishment the tribunal was empowered to impose transmitted the proceedings to the Controller in accordance with the provisions of section 35 of the Prisons Act which is in the following terms:-

> "35. In any case where it appears to the supervisor or senior officer who is inquiring into an alleged offence against discipline, that the offence alleged to have been committed would not, by reason of its gravity, or by reason of previous offences, or for any other reason, be adequately punished by any of the punishments that he is empowered to impose by section 30 such supervisor or senior officer shall, without recording any finding, stay the proceedings and transmit the proceedings to the Controller. The Controller may hear the determine the case himself or direct that it be dealt with by the supervisor or senior officer who transmitted it, or by any other supervisor or senior officer. "

The section specifically provides that the senior officer enquiring into the alleged offence against discipline shall not record a finding. It differs from

section 222 of the Criminal Procedure Code where a Magistrate after a conviction where he considers his powers of punishment are not adequate, can commit a person to the Supreme Court for punishment.

The Controller under section 35, on transmission of the proceedings to him, decided to determine the case himself. The section empowerd the Controller to "hear and determine the case himself".

It is clear from the Controller's affidavit sworn the 13th day of July, 1982 that he determined the case merely by considering the record of the proceedings heard by the senior officer which was transmitted to him. The Controller admitted that he did not hold an oral hearing or call any witnesses in view of the original Tribunal having done so and having recorded the evidence.

The Controller acquitted the plaintiff of one alleged offence but found him guilty of the other. He notified the plaintiff he intended to demote him to Prison Officer Class "B". The plaintiff was also notified of his rights under section 32 of the Act of making representation to the Secretary of the Public Service Commission within 14 days.

The plaintiff made no such representation but within 14 days commenced these proceedings.

The Controller did not "hear" the plaintiff's case. He certainly purported to "determine" it but such determination in my view was a nullity as he had not complied with section 35 which required him to hear the case if he elected to hear it himself.

Section 30 of the Act deals with trials of offences against discipline. Subsection (2) of that section provides as follows:-

"30(2) No officer of the Prison Service shall be convicted of an offence against discipline unless the charge has been read and investigated in his presence and he has been given sufficient opportunity to make his defence thereto. "

When the Controller decided to "hear and determine" the case himself he became the Tribunal trying the case. He was obliged to start de novo and heard the charges against the plaintiff in the usual manner. This he did not do.

While it is appreciated that this involved duplication of work that is what the law requires if the proceedings are not sent back to the Tribunal to conclude. The express prohibition of a record of any finding by the Tribunal who first hears the case is intended to prevent any preconceived views the ultimate Tribunal hearing the case might have gained from perusing the record made by the first Tribunal.

The Controller could have sent preceedings back to the Tribunal and directed him to deal with the case. He could then under section 31 have reviewed the proceedings and if necessary increased the punishment meted out by the Tribunal. He elected not to do so.

It is clear from the evidence before me that the question of the guilt of the plaintiff was very much a case of which side the Tribunal believed.

The Controller, not having seen or heard any witnesses, was in no position merely from reading the proceedings to decide on the issue of credibility or the guilt or otherwise of the plaintiff where there was a conflict of evidence.

In an affidavit sworn by Supt. Apolosi Vosanibola he stated he did not believe the plaintiff and that he believed a prisoner, one Edward Shiu Narayan, as against the plaintiff and his two witnesses.

I have not seen the proceedings but if such views were expressed by the Tribunal in the proceedings he recorded they would constitute "findings" which he was expressly precluded by the section from recording.

I am in no doubt at all that the purported conviction of the plaintiff was irregular. There was not in fact a hearing by the Controller and it follows he was not empowered to convict the plaintiff.

I propose to grant the plaintiff the first declaration sought in amended form.

It is not necessary to grant the second declaration sought which in effect is tantamount to an appeal against sentence. Since there has been no lawful conviction the Controller was not empowered to impose any punishment.

The relief sought by the last two declarations cannot be granted but my views may be of assistance.

The plaintiff has apparently not yet been dismissed, and while the Controller has in his last

affidavit stated facts that in his opinion justify the view he has formed, the final step has not been taken.

On the evidence before me it is clear that contemporaneously with the notification to the plaintiff of his conviction and punishment the Controller by a letter of the same date informed the plaintiff that he, the Controller had reached the firm conclusion that he had ceased to be and was unlikely to become an efficient officer.

Section 15(1)(c) empowers the Controller to discharge a prison officer at any time:-

> "If the Controller is satisfied that he is unlikely to become, or has ceased to be an efficient officer. "

I cannot see how the Controller can be satisfied as to both the alternative situations covered by the provisions.

If the plaintiff was unlikely to become an efficient officer that implies he has never been an efficient officer.

Conversely if he has ceased to be an efficient officer it implies that he had attained efficiency at some time but that he was no longer efficient.

I consider the plaintiff is entitled to know the proper reason for his dismissal so that he can make representations to the Secretary of the Public Service Commission. It is hardly satisfactory or indeed fair to say in effect to the ~~prisoner~~ plaintiff "I cannot make up my mind, but I am dismissing you either because you are unlikely to become efficient or because you were once efficient but are now no longer efficient."

I am of the view that the Controller should have stated precisely the grounds on which he proposed to

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dismiss the plaintiff.

Unless there is any time limit for trial of prison offences, as to which I have made no research of the legislation, the proceedings against the plaintiff can be continued.

The virtually contemporaneous conviction of the plaintiff and his proposed dismissal raises a very strong inference to an onlooker that the conviction triggered off the proposed dismissal.

There is nothing to prevent the Controller from disregarding his prior action under section 15(1) and now reconsidering whether he should dismiss the plaintiff after deciding precisely on what grounds he proposes to do so. The plaintiff would then be able to make representations to the Secretary of the Public Service Commission so that the Commission can make a decision on the matter.

I can only express my views which the Controller is not bound to follow. The plaintiff has not been dismissed at this stage and until he is I cannot see that this Court can grant either of the declarations sought.

I have indicated that the Controller may not have properly exercised his powers under section 15(1). He has on the facts before me decided the plaintiff should be dismissed but he has not come to any decision as to which limb of section (c) he proposes to apply to the plaintiff's proposed dismissal.

I declare that the Controller of Prisons erred in law in finding the plaintiff guilty of an offence under the prison regulations by failing to hear and determine the case against the plaintiff as required by section 35 of the Prisons Act.

The plaintiff is to have the costs of these proceedings.

R.G. Kermode

(R.G. Kermode)
JUDGE

SUVA,

17 August, 1982.