IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CIVIL PETITION NO: CBV0017 OF 2019
Court of Appeal No. ABU 0030 of 2017

BETWEEN : **PITA TOKONIYAROI**

Petitioner

AND : **COMMISSIONER OF POLICE**

1st Respondent

COMMISSIONER OF CORRECTIONS SERVICES

2nd Respondent

DIRECTOR OF PUBLIC PROSECUTIONS

3rd Respondent

THE ATTORNEY GENERAL OF FIJI

4th Respondent

THE SOLICITOR GENERAL

5th Respondent

Coram : **Hon. Mr. Justice William Calanchini, Judge of the Supreme Court**
: **Hon. Mr. Justice Filimone Jitoko, Judge of the Supreme Court**
: **Hon. Mr. Alipate Qetaki, Judge of the Supreme Court**

Counsel : **Petitioner In Person**
: **Mr. J. Mainavolau for the Respondents**

Date of Hearing : **15 June 2023**
Date of Judgment : **30 June 2023**

JUDGMENT

Calanchini J

[1] I have read in draft form the judgment of Jitoko J and agree that leave to appeal should be refused.

Jitoko J

[2] This is an application for special leave to appeal against the judgment of the Court of Appeal of 30 November 2018, dismissing the petitioner's appeal against the Ruling of the High Court at Lautoka, in dismissing the petitioner's application for constitutional redress under section 44(1) of the Constitution.

The Proceedings

[3] The petitioner was found guilty of the offences of murder and robbery with violence in the Lautoka High Court in 2000. He was sentenced in May 2005 to life imprisonment for the murder and, 4 years for robbery with violence to run concurrent with his life sentence. He was to serve 12 years minimum term.

[4] The petitioner's application for constitutional redress was filed in the Suva High Court on 13 February, 2016, but transferred to the High Court in Lautoka. The petitioner's grievances, the subject of the petition, relate to a series of physical abuse and assaults allegedly committed by the police following his arrest at Nawaka, Nadi around 7pm on 19 November, 2000, and further physical assaults in both the Nadi and the Lautoka Police Stations, throughout the time of his interrogations. He also alleged an unfair trial.

[5] The matter came before Madigan J on 23 February, 2017 who summarily dismissed the petition as it was filed out of time of the 60 days requirement under Rule 3 (2) of the High Court (Constitutional Redress) Rules 2015.

[6] In the court's five (5) paragraphs Ruling it stated:

> *"Ruling*
>
> *[1] By way of Notice of Motion and accompanying affidavit, the applicant applies for constitutional redress for improprieties at the hands of the Police and for an unfair trial subsequent to his arrest on the 19th November 2000.*
>
> *[2] He deposes in his Affidavit that he has been twice to the Court of Appeal and once to the Supreme Court but is still aggrieved.*
>
> *[3] The application is dated 13 February 2016 and the Affidavit is dated 28 January 2016. It was originally filed in the High Court in Suva but has been transferred to this Court.*
>
> *[4] The High Court (Constitutional Redress) Rules 2015 provide by section 3 (2) as follows:*
>
> *"3(2) An application ..... 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."*
>
> *[5] This application is obviously out of time by over 16 years and it is dismissed.*

[7] On 5 April 2017, the petitioner filed his application for appeal against the Ruling to the Court of Appeal (Civil Appeal No. ABU 30 of 2017), arguing that the dismissal of his constitutional redress application by the High Court without him being heard, amounted to a denial of his constitutional rights to redress under Chapter 2 of the Constitution.

[8] The Court of Appeal on 30 November 2018 heard and dismissed the Petitioner's appeal on the ground that his complaints to various Government agencies including the Human Rights Commission, the Police, the Prisons were, or appeared to have been discontinued, and in any event, the appeal was without merit. Importantly, the Court found that the learned judge had correctly exercised his powers in summarily dismissing the petitioner's application.

[9] The petitioner sought special leave to the Supreme Court to appeal the decision of the Court of Appeal, but was prevented from proceeding further as his application for the $5,000.00 security for costs fixed by the Chief Registrar, to be dispensed with, was refused.

[10] The petitioner wrote to the Chief Justice on 10 July 2020 requesting that the security for costs be dispensed with given that he was in prison and was impecunious. The Chief Justice placed the matter before the Supreme Court.

[11] In a clearly-reasoned judgment, Hon Justice Lokur considered thoroughly the nature and the purpose of security for costs and in the end ordered that the Chief Registrar's Order for security for costs be set aside and that it be dispensed with, clearing the way for the petitioner's application for special leave to appeal the judgment of the Court of Appeal to this court.

Constitutional Redress – History Practice and Procedure

[12] The individual's right to redress of a grievance in a court of law is a fundamental human right protected in the Bill of Rights under Chapter 2 of the Constitution of the Republic of Fiji. Section 6(1) and (2) of the Constitution set out the reach of the application of the protection and obligations as follows:

> *"Application*
> *6 – (1) This Chapter binds the legislative executive and judicial branches of government at all levels, and every person performing the functions of any public office.*
>
> *(2) The State and every person holding public office must respect, protect, promote and fulfil the rights and freedoms recognized in this Chapter."*

[13] The historical roots of constitutional redress can be traced back to the English right to petition the King and later Parliament, and very much later, the Government, for a redress of grievances. Its origin therefore precedes its codification under the Magna Carta of 1215. At the same time and running complementary to the petition, is the development of the right to a remedy from

the courts. This latter right is codified in Chapter 40 of the 1215 charter that states: *"To no one will we sell to no one deny or delay right or justice."*

[14] Over the centuries these concepts have found homes in many of our common law jurisdictions. For example, in the United States of America, constitutional redress is anchored under its First Amendment, otherwise referred to as the *"Petition Clause"* that recognizes and protects the right *"to petition the Government for a redress of grievances,"* including the right to court access.

[15] In Fiji, these complimentary right to petition and the right to court access is encapsuled under section 44(1) of the Constitution. It states:

> *"Enforcement*
>
> *44: - (1) If a person considers any of the provisions of this Chapter [Bill of Rights] has been or is likely to be contravened in relation to his 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 the person (or the other person) may apply to the High Court for redress."*

[16] Thus any person who is aggrieved alleging that any of his or her rights under Chapter 2 of the Constitution, including rights of arrested and detained persons (section 13), rights of accused persons (section 14), access to courts and tribunals (section 15), and right to executive and administrative justice (section 16), are entitled to seek Constitutional redress by petitioning the Government and being granted access to the courts, under the enforcement section 41(1) of the Constitution. Ubi jus ibi remedium – *"where there is a right there should be a remedy."*

[17] The Chief Justice, pursuant to his powers under section 41(10) of the Constitution, had made rules, High Court (Constitutional Redress) Rules 2015 (LN41 of 2015) to regulate the practice and procedure of filing of petitioners in the High Court *"including rules with respect to the time within which applications are made to the High Court."*

[18] The Rules came into force on 13 March, 2015. Of particular importance is the form as specified under Rule 3:

> *"Application for redress-*
>
> *3. (1) An application to the High Court for redress under section 44(1) of the Constitution of the Republic of Fiji may be made by a motion supported by affidavit.*
>
> *(a) claiming a declaration,*
> *(b) praying for an injunction,*
> *(c) claiming for praying for such other order as may be appropriate.*
>
> *(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."*

[19] Rule 4 (3) is relevant to whit:

> *"(3) A notice of motion under Rule 3 (1) must state:-*
>
> *(a) concise nature of the claim; and*
> *(b) the relief or remedy required."*

[20] Finally Rule 7 is relevant to the practice and procedure as to the jurisdiction and powers of the High Court, in dealing with a petition.

> *"Practice and procedure*
>
> *7. Except as otherwise provided in these Rules, the jurisdiction and powers conferred on the High Court in respect of applications made by any person in pursuance of either section 44 (1) or 44 (5) of the Constitution of the Republic of Fiji are to be exercised in accordance with the practice and procedure, including any rules of the Court, for the time being in force in relation to civil proceedings in the High Court, with any variations the circumstances regime."*

[21] All these Rules are intended to regulate and circumscribe the powers of the individuals in exercising their rights.

Consideration

[22] I have had the opportunity to carefully go over the High Court, Court of Appeal and the Supreme Court files. The Chief Registrar's certificate as to the High Court record has only 8 type-written pages, understandably given the summary dismissal by the Court of the petitioner's application for constitutional redress. The High Court file does nevertheless contain the petitioner's Notice of Motion and supporting affidavit for constitutional redress. There is no receipt date by the High Court Registry, but the affidavit was signed by the petitioner before a Commissioner for Oaths on 11 March 2016. Importantly, the intituling and filing of Notice specifically sets out the exact sections in the Bill of Rights which the petitioner claimed the Government through its agencies, had breached namely:

> *"In the Matter of an Application for Constitutional Redress on the Basis of Section 15(1), (3), 11(1), (2), (3), 17(1), 24(1), 26(1), (2), 44(1) of 2013 Constitution..."*

[23] In support of his contentions of the breaches of the Bill of Rights provisions, the petitioner pointed to the following:

> *"(i) Inadequate time and facilities*
>
> *(ii) Inordinate delay four (4) years four months for non-trial.*
>
> *(iii) After four (4) years and four (4) months and I received my full case documents before the proceeding of proper trial which only two weeks given to an unlearned accused to access to the record.*
>
> *(iv) Alibi witness were not allowed to give evidence*
>
> *(v) Medical practitioner was not allowed to give evidence*
>
> *(vi) Second medical report of your humble applicant was lost in the hands of the Director of Public Prosecutions."*

[24] While it is a difficult task for a lay person such as the petitioner, to specifically link the alleged breaches to the Bill of Rights provisions, it is, to a trained eye in the law, enough to appreciate

the broad outline of the alleged breaches and the redress being sought. It is not for this court to step into the shoes of the petitioner and argue his cause.

[25] As to the somewhat languid pace of the prosecution one can well appreciate the long delay from the time of arrest, to charging, to trial followed by another long delay before the petitioner's application for constitutional redress was filed some 15 years later, make a very unhappy reading.

[26] In the former, there is much left to be desired in the movements and proper receipting of legal documents between the prison authorities and the court registries and vice versa. In the latter in my view, much of the blame for the delay in the filing of the constitutional redress, lay with the petitioner himself.

Jurisdiction and Discretion

[27] Under section 44(1) of the Constitution, the High Court has the original jurisdiction to hear constitutional redress. The High Court (Constitutional Redress) Rules 2015 and specifically Rule 3 sets out the procedure.

> *"Application for redress*
>
> *3. (1) An application to the High Court under section 44 (1) o the Constitution of the Republic of Fiji may be made by a motion supported by affidavit –*
>
> *(a) claiming a declaration*
> *(b) praying for an injunction*
> *(c) claiming or praying for such other order as may be appropriate*
>
> *(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 the period."*

[28] The petitioner's motion dated 11 March 2016 for redress, the Court notes, does not strictly comply with any of Rule 3(1), (a), (b) and (c) requirements. Neither does it meet the requirements of Rule 4 (3) that states:

> *"(3) A notice of motion under Rule 3 (1) must state:*
> *(a) concisely the nature of the claim and*
> *(b) the relief of remedy required*

It merely states that the grounds for the application are:

> *"i. discrimination*
> *ii. unfair proceedings*
> *iii. ill treatment (in state custody)*
> *iv. inordinate delay*
> *v. abuse of process."*

[29] Even if the Court were to assume that these grounds were suggestive of declaratory orders, being sought, there were not sufficient details in the supporting affidavit to sway the court to that end. Neither was there injunctive relief sought. Instead the petitioner merely asked:

> *"THAT: An order is granted to the applicant in regards to an constitutional redress in Criminal Action No: HAC 0012/1, Criminal Appeal No: CAV0004/2013"*

[30] By praying for constitutional redress in criminal actions and proceedings, the Petitioner seem to confusing his rights protected under s.44 (1) of the Constitution, from his legal rights to appeal against the judgments of the Courts. This is clearly set out under s.44 (2) as follows:

> *"(2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have."*

[31] Section 44 (1) application by the Petitioner is only concerned with his allegations of physical and ill treatment while in custody and the delay in the trial. Court judgments and any appeals therefrom fall under section 44 (2) of the Constitution. Additionally, there is discretion in the

High Court under section 44(4) to refuse a section 44 (1) application if it considers that an adequate alternative remedy is available.

The 60 Day Rule

[32] Rule 3 (2) of the High Court (Constitutional Redress) Rules 2015 requires an application to be filed within 60 days *"from the date when the matter at issue first arose unless a Judge finds there are exceptional circumstances...."*

[33] The exercise of the discretionary powers by the court in dismissing a constitutional redress application simply because it had failed to meet the 60 day deadline, should be exercised with the greatest care, given that one is dealing with the fundamental rights of the individual under the Constitution. It is not a statutory limitation as argued by the respondent. The proviso to Rule 3 (2) permits the court to hear the application outside the 60 days, if there are exceptional circumstances.

[34] In this case the *"matter at issue"* arose in November 2000. The Court of Appeal had correctly summarized what it believed are the essence of the grievance, per Lecamwasam JA at paragraphs [5] and [6]:

> *"[5] From the material provided it appears that the complaint is related to a date in November 2000. The Appellant states that he made the complaint to Fiji Human Rights Commission on 21st November 2001. He also gives reference number as HAC 0012/01. However, the appellant has not provided us with any other information regarding the same. The only application that is before us is the notice filed dated 11th March 2016. This motion refers to an incident dated 19th November 2000 where the Appellant was allegedly assaulted by the police.*
>
> *[6] However there appears to be no continuation and these inquires appear to have been abandoned. There is no record of any previous cases. Therefore I am of the view that the learned Judge had no alternative but to dismiss the application on the ground that it is out of time"*

[35] In our view, there are no exceptional circumstances submitted by the petitioner, that would convince the Court to extend the 60 days requirement. As observed by the Court, *"This application is obviously out of time by over 16 years...."*

[36] Furthermore in his most recent submissions dated 26 May 2023, the petitioner re-submitted:

> *"THAT – the learned High Court judge and the appeal judge erred in law for disregard my Constitutional right to make an application to the High Court outlined in section 44 (2), (1), (3) and (4) of the Constitution."*

[37] This argument goes to the merit whether it, together with the petitioner's other grounds, provide exceptional circumstances for the Court to grant redress outside the 60 days rule. Unfortunately, it too falls short of the threshold requirement.

Summary Dismissal

[38] The discretion for summary dismissal by the High Court in both criminal and civil proceedings are found under its inherent jurisdiction as well as under High Court (Constitutional Redress) Rules 2015.

[39] So long as there are no statute or Rules limitations, the Court has inherent jurisdiction imbued with general powers to control its own procedure to stop it being abused: **Bremer Vulcan Schiffbau Und Maschinenfabrik v South India Shipping Corp. Ltd** [1981] AC 909.

[40] In **Abhay Kumar Singh v DPP & Or** (AAU0037 of 2003S) the Court of Appeal accepted the exercise of discretion of the trial judge in a criminal proceedings; to summary dismiss an application for constitutional redress under the 1998 High Court (Constitutional Redress) Rules.

[41] As for civil proceedings, the jurisdiction and powers in practice and procedure conferred on the High Court for constitutional redress is clearly set out under Rule 7 of The High Court

(Constitutional Redress) Rules 2015, allowing practice and procedure in relation to civil proceedings in the High Court to be applied.

[42] There is no doubt that the High Court at Lautoka had acted within its powers in dismissing the petitioner's application on 23 February 2017.

Conclusion

[43] In the end, for all his determination and fortitude, the petitioner has failed to convince this Court that there are exceptional circumstances to overturn the Lautoka High Court Ruling that dismissed his application for constitutional redress.

[44] Nevertheless, our courts must not be seen as stifling or inhibiting the grant of constitutional redress under section 44 (1) where the claim for grievance is clearly established and the alternative relief is not available, bearing in mind Lord Diplock's timely warning in **Maharaj v A-G of Trinidad and Tobago (No.2)** [1978] 2All ER 670 and echoed by Lord Bingham in **Hinds v. Attorney General & Or** [2001] UKPC 287 at p.303:

> *"...a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds has been made and rejected."*

[45] Finally, the Court notes that the petitioner was sentenced to life imprisonment with the trial judge setting a 12 years minimum term to be served. In his letter dated 13 February, 2016 the petitioner sought clarification on its meaning. He certainly will not, as he suggested, be released after 12 years of imprisonment.

[46] It simply means that the authorities are at liberty to consider after the stated period, should they think it appropriate, and having taken all the necessary factors such as prisoner's conduct, age, and physical and mental health, alternative forms of sanctions.

[47] The petitioner has been incarcerated for over 17 years, and while this Court is mindful of the very serious offences he had been found guilty of in a court of law, it can only counsel the petitioner to seek the intervention and forebearance of the Mercy Commission.

[48] **Qetaki J**

I agree with the judgment, the reasoning and conclusions.

[49] **Orders**

1. *Leave to appeal is refused.*
2. *Appeal is dismissed.*
3. *No order as to costs.*

.....
Hon. Mr. Justice William Calanchini
Judge of the Supreme Court

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Hon. Mr. Justice Filimone Jitoko
Judge of the Supreme Court

.....
Hon. Mr. Justice Alipate Qetaki
Judge of the Supreme Court