

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBM 18 of 2016

BETWEEN : **GUSTON FREDERICK KEAN**

APPLICANT

AND : **ATTORNEY GENERAL OF FIJI** having its registered office in
Suvavou House, Suva.

FIRST RESPONDENT

AND : **SOLICITOR GENERAL OF FIJI** of Suva, Fiji

SECOND RESPONDENT

AND : **THE DIRECTOR OF PUBLIC PROSECUTION** of Suva, Fiji

THIRD RESPONDENT

R U L I N G

1. Guston Frederick Kean filed a Notice of Motion dated 22 September 2016.
2. He seeks, and I quote, “Constitutional Redress and/or Interpretation” of the following:

“...for an Order and Interpretation whether Guston Fredrick Kean is entitled to raise a new point or new ground in the supreme court of Fiji and whether the Supreme Court is entitled to hear and entertain a new point and new ground of appeal for the first time and for such further or other relief or Orders that this honourable court may deem fit, equitable, expedient and necessary in the circumstances of the case
3. The Notice of Motion is supported by an affidavit sworn by Kean on 22 September 2016. The said Affidavit outlines the following:
 - (i) That he had filed a petition to the Supreme Court of Fiji seeking special leave to appeal.
 - (ii) That the grounds of appeal were new points or grounds. They were not raised in the Court of Appeal.
 - (iii) The Supreme Court had refused to hear and consider his new grounds of appeal.
4. He argues that:
 - (i) He has a right of appeal to the Supreme Court on any new grounds.

- (ii) To deny him by not hearing the new grounds is a substantial and grave injustice.
5. He raises the following issue in his affidavit at paragraphs 11 and 12:
11. That the question asked is, whether the Supreme Court on appeal has the jurisdiction to hear and determine any new ground or new point raised for the first time? If yes, what type of new grounds or new points that is the Supreme Court on appeal hear and determine (sic).
 12. That section 14(2)(N) of the Constitution gives me the right to a fair trial.
6. He then prays for the following in paragraph 16:

An Order that the new grounds or new points raised for the first time on appeal in the Supreme Court involving a miscarriage of justice should be heard and determined.

An interpretation whether the Supreme Court on appeal is entitled to hear and determine new grounds and new points involving miscarriage of justice.

An Order that the review application for special leave to appeal that was refused containing new grounds or points of appeal be relisted for a proper hearing and determination in the January 2017 call over.

7. I agree with all the submissions of the Office of the Solicitor General. The Supreme Court is the final appellate Court in Fiji. Its decision cannot be reviewed in any lower Court. The applicant is attempting to relitigate issues.
8. In this case before me, if I were to even begin to consider the issues raised by Kean, I would be sitting in judgment of the Supreme Court's decision from the viewpoint of an appellate court. That is not the function of a constitutional redress court.
9. In Singh v Director of Public Prosecutions [2004] FJCA 37; AAU0037.2003S (16 July 2004), the Fiji Court of Appeal said (emphasis mine):

In *Chokolingo v. Attorney General of Trinidad and Tobago* [1981] 1 WLR 106 the appellant had been committed to prison for 21 days for contempt. He did not appeal against that committal. Two and half years later, he made an application for constitutional redress seeking a declaration that his committal was unconstitutional and in breach of human rights and fundamental freedoms. This applicant was also unsuccessful in all courts. In dismissing the appeal to the Privy Council Lord Diplock stated at pp.111-2:

"Acceptance of applicant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had

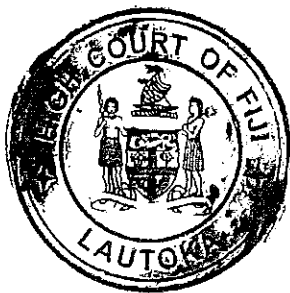
made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under section 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under section 6(1) is stated to be "without prejudice to any other action with respect to the same matter which is lawfully available." The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter 1 of the Constitution an interpretation which would lead to this result would, in their Lordship's view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine".

We note that Mr. Shankar cited portion of this passage in his submissions but that he omitted the last sentence which we consider highly relevant to the proper application of s.41(4) and the application of the Constitution as a whole.

In *Hinds v Attorney General and Another*[2002] 4 LRC 287 – one of the cases cited by Shameem J. in her ruling – the appellant had been charged with and convicted of arson in a trial where his application for legal representation was refused by the trial judge. The Court of Appeal dismissed his appeal. The appellant then applied for constitutional redress. Section 24 of the Constitution of Barbados contains a provision which is similar to s.41(4). In dismissing the Appellant's application the Privy Council held:

"As it is a living document, so must the Constitution be an effective instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional redress does not ordinarily offer an alternative means of challenging a conviction or judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The appellant's complaint was one to be pursued by way of appeal against the conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on s.24."

10. Application dismissed.



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Anare Tuilevuka
JUDGE
19 January 2018