

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CONSTITUTIONAL JURISDICTION

Constitutional Redress Application (HBM) No. 23 of 2017

BETWEEN SITIVENI WAQA

APPLICANT

AND COMMISSIOER OF FIJI CORRECTIONS SERVICE

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

COUNSEL: Applicant in Person
Ms. M. Faktaufon with Mr J. Mainavolau for Respondents

Date of Decision: 21st February, 2018

DECISION

1. By way of Notice of Motion and accompanying Affidavit, the Applicant applies for constitutional redress pursuant to section 44(1) of the Constitution of the Republic of Fiji.

2. The grounds for seeking redress are set out in the affidavit filed in support of the application. The Applicant states that he was remanded for some criminal matters by the Magistrates Court and has been detained at the old segregation block (Block 1) of Natabua Remand Centre since December, 2015. The Applicant further states that the segregation block where he is detained lacks basic facilities (electricity, water, toilets, room, proper ventilation) and not suitable for human habitation. Applicant further submits that he is not provided warm cloths, adequate food, time for sun bath and physical exercises and is being kept in a cell room with three other inmates.

3. The Applicant seeks following orders:
 - I. A declaration that his Constitutional Right to be free from torture of any kind whether physical, mental or emotional has been breached.
 - II. A declaration that his constitutional right to be held separately from convicted prisoner has been breached.
 - III. A declaration that his constitutional right to conditions of detention that are consistent with human dignity, including at least the opportunity to exercise regularly and the provision, at State expense, of adequate accommodation, nutrition, and medical treatment has been breached.
 - IV. A declaration that his constitutional right to be given adequate time and facilities to prepare a defence has been breached.
 - V. A declaration that his constitutional right to be free from hunger and to have adequate food of acceptable quality according to law has been breached.
 - VI. A declaration that his constitutional right to be presumed innocent until proven guilty according to law has been breached.
 - VII. An order for compensation for all the above breaches.

4. Respondents have filed an affidavit in response. The Officer-in-Charge of Natabua Remand Centre (OIC) in his affidavit has denied the allegation that the Applicant is being kept in remand under inhuman and degrading conditions. He has also denied that the Applicant was denied his basic necessities like food and toilet facilities. The Respondents seeks to strike out the application on the

grounds that it discloses no reasonable cause of action, and that there are alternative remedies that have not been exhausted.

5. The most forceful argument was made on the ground that there are alternative remedies available to the Applicant and these must be exhausted before the Applicant can resort to Section 44 (1) application under the Constitution.
6. Section 44 (4) of the Constitution states that the High Court has discretion not to grant relief if it considers that an adequate alternative remedy is available.
7. In *Harikissoon v. Attorney General of Trinidad and Tobago* [1979] 3 WLR 62, it was said that *“to use the Constitutional Redress process as a substitute for normal procedure is to devalue the utility of this Constitutional remedy. Mere allegation of constitutional breach was insufficient to invoke this remedy”*
8. In *Harikissoon* (*supra*) the Appellant was transferred in his employment without the required 3 months’ notice. Instead of availing himself of the review procedure available in the Regulations, the Appellant applied to the High Court for constitutional redress. He sought a declaration that his rights had been violated. He was unsuccessful in the High Court, the Court of Appeal and the Privy Council. In delivering the opinion of their Lordships, Lord Diplock said at p.64:

“The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the

appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

9. According to Applicant's affidavit, he has been in remand since December, 2015 hence his remand period has exceeded two years. Therefore, under Section 13 (4) of the Bail Act, Applicant is entitled to be released on bail had he sought bail at the Magistrates Court. It is not clear why the Applicant is complaining about the condition of the remand when a redress under the Bail Act was available to him.
10. Furthermore, there is a complaint procedure whereby an inmate could bring his or her grievances to the notice of prison authorities. Every inmate has the right to make a request or complaint to the Officer-in Charge of the Remand Centre or Visiting Justice.
11. Applicant in his affidavit states that he raised his concerns about the condition and treatments to the Officer- in-Charge and Supervisor- Western Division but no action was taken about his complaint.
12. The Officer-in-Charge of the Natabua Remand Centre has categorically denied that the Applicant had made any request or complaint to the management at the Lautoka Remand Centre.
13. There is no credible evidence before this court that the Applicant had made a request or complaint to the Officer-in Charge of the Remand Centre. If no action was taken as the Applicant alleges about his complaint or request by the management of the Remand Centre, Applicant could easily have complained to the Visiting Justice or Magistrate when he was produced at the Magistrates Court. There is no evidence that such a complaint was made to the Visiting Justice or Magistrate.
14. It is an established practice, almost equivalent to a rule of law that all remandees need to be produced before a judicial officer fortnightly for extension of remand period. This practice is being followed to ensure that the communication

between the judicial officer and the remandee is maintained so that former can hear grievances and receive complaints, if any, from the latter. Applicant does not say that he was not produced before the Magistrate according to this established practice. Therefore, I am compelled to believe that no formal complaint had been made to the relevant authority by the Applicant before coming to this Court for Constitutional Redress.

15. In his affidavit filed in reply, the Applicant admits that three other inmates who were sharing the remand cell with him are remandees and that they have already been granted bail or moved out of his cell.
16. The right guaranteed under Section 13 (1) (e) of the Constitution will be violated only when a remandee is detained with serving prisoners. The section states that: *'to be held separately from persons who are serving a sentence'*. Since other inmates who had been sharing with the Applicant are remandees and not *'persons who are serving a sentence'*, Section 13 (1) (e) does not apply to Applicant's grievance.
17. The Counsel for Respondents heavily relies on the decision of *Josefa Nata* (Civil Action No. 35 of 2005 (4 May 2006)). The court in that case has discussed alternative remedies available to a convicted prisoner and the statement *'A person lawfully convicted by court must realize that some of his constitutional rights must necessarily be abrogated or suspended'* does not apply to the Applicant because he has not been convicted.
18. In *Naba v State* (2001) FJHC 127; HAC 0012 2000L (4 July 2001) the court discussed the rights of a convicted prisoner and preferential treatment to be given to a remand prisoner in following terms:

"Prisoners are not captives of Prison officers nor the Prison service. They are in prison due to a judicial determination. Most are in prison due to a conviction. The punishment is imprisonment. Their liberty has been restricted. That is the punishment. The circumstances of imprisonment should not be used as an additional punishment. The role of the Prison Service is to look after the welfare of the Prisoners while in State custody, cognisant of their social and cultural development. As for the unconvicted prisoners they are to be presumed

innocent until proven guilty according to law. Apart from being kept separately from convicted persons they are to be treated with humanity and with respect for his or her inherent dignity (Sections 27(1)(t) and (4) of the Constitution). They are to be treated in a special regime conducive to their status as innocent persons. For them life in prison should be made as close to normal life, in keeping with their social and cultural requirements. (emphasis added)

19. OIC, Natabua Remand Centre states that Block 1 is part of the Lautoka Remand Centre and it remains to be used as an accommodation for remand inmates despite the commissioning of the new wing in April, 2017.
20. There is no credible evidence that Block 1 is not suitable for human habitation or that it is overcrowded even after commissioning of the new wing. However, the true ground situation can be known only after an inspection.
21. This Court has made several orders to the Human Rights and Anti-Discrimination Commission to visit and inspect the condition of the old wing of the Natabua Remand Centre. Visiting Magistrate is also supposed to make regular (monthly) visits under the Corrections Service Act 2006.
22. The Corrections Service Act 2006 (Act) and Corrections Service Regulations 2011 (Regulations) made thereunder contain certain provisions for the benefit of addressing issues which concern the welfare of the inmates. By virtue of Section 2 of the Act those provisions are applicable to convicted prisoners as well as remand prisoners. It is worthwhile to reproduce the relevant provisions of the Act and Regulations for easy reference so that the Chief Magistrate can issue necessary directions to the magistrates concerned.
23. Section 18 of the Act mandates a monthly visit to every prison in Fiji by a magistrate. Regulation 8 of the Corrections Service Regulation outlines the functions and duties of the Visiting Justice pursuant to Section 18 of the Act.

Visiting Justices (Section 18)

- (1) *The Visiting Justice for each prison situated in a Division shall be:*
 - (a) *The most senior Magistrate assigned to that Division;*
or
 - (b) *Any other Magistrate within a Division appointed by the most senior Magistrate in the Division.*
- (2) *Each Visiting Justice shall conduct an inspection of each prison within the Division for which he or she is responsible, at least once every month.*
- (3) *When visiting prisons, Visiting Justices shall perform such functions and make such reports as are prescribed by regulations.*

Functions and duties of Visiting Justices (Regulation 8)

8. (1) *On each visit to a prison, a Visiting Justice shall:-*
 - (a) *hear and inquire into every complaint made by any prisoner;*
 - (b) *pay special attention to separated prisoners and prisoners receiving medical treatment;*
 - (c) *consider all reports concerning the mind or body of any prisoner likely to suffer injury or illness arising from prison discipline, and make reports where necessary to the Commissioner;*
 - (d) *ensure that any abuses or breaches of regulations or Commissioner Orders relating to the proper management of the prison and the treatment of prisoners are reported to the Commissioner.*
 - (e) *furnish information in relation to such abuses and breaches if requested by the Minister;*

- (f) *make inquiry into any matter referred by the Minister or the Commissioner;*
 - (g) *discharge any other prescribed or delegated function or responsibility; and*
 - (h) *keep records of all visits, and of observations, suggestions and recommendations made during a visit.*
- (2) *A Visiting Justice may visit a prison at any time and may: -*
- (a) *call for any books, papers, records, returns and registers related to the management of the prison and inspect those records and documents;*
 - (b) *visit every part of a prison;*
 - (c) *converse with any prisoner of corrections officer;*
 - (d) *inspect the quality and quantity of food and drink provided to prisoners;*
 - (e) *ascertain the compliance or breach of all legal requirements applying to the management of the prison;*
 - (f) *inquire into any complaint made by a prisoner as the Visiting Justice thinks fit; and*
 - (g) *inquire into the state of the prison buildings and facilities and make appropriate reports to the Commissioner.*
- (3) *On the completion of every visit, a Visiting Justice shall enter into the Official Visitors Book such remarks, suggestions and recommendation as he or she considers*

appropriate for the information of the officer in charge, any follow up action or resolution of the issue shall be recorded by the Visiting Justice at a subsequent visit.

- (4) *A copy of the entry made by a Visiting Justice under sub-regulation (3), together with any comments made by the officer in charge, shall be forwarded to the Commissioner immediately after the inspection has taken place.*

24. Section 20 of the Act provides for visits by Judicial Officers and Officers of the Human Rights and Anti-Discrimination Commission and the Accountability and Transparency Commission.

- (1) *Judicial Officers may enter and inspect a prison at any time, and may exercise any of the powers prescribed for Visiting Justices.*

- (2) *Officers of the Human Rights and Anti-Discrimination Commission shall have the right to visit prisons and prisoners for the purpose of undertaking any investigation or inquiry in accordance with the Human Rights and Anti-Discrimination Commission Act 2009.*

[subs (2) am Act 31 of 2016 s 46, opn 1 Dec 2016]

- (3) *Representatives of the Accountability and Transparency Commission shall have the right to visit prisons and prisoners in the lawful discharge of their responsibilities*

[subs (3) am Act 31 of 2016 s 46, opn 1 Dec 2016]

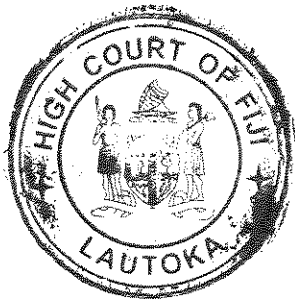
25. These are wide provisions. It gives the Visiting Justice power to hear a complaint from a prisoner and make enquiry about it. The powers given are wide and quite capable of addressing the concerns of the Applicant. Visiting Justice can talk to the prisoners and look at conditions of the prison, inspect the quality of food and other basic facilities. Given these provisions, there is no need for the High Court to conduct an enquiry at the Court House as the applicant suggests by calling of witnesses. The visiting magistrate can see first-hand for himself the conditions in prison and take necessary actions.


26. In view of the above, the Court holds that the Applicant has adequate alternative remedies for him to exhaust before invoking the jurisdiction of this Court. Further, Application does not disclose a reasonable cause of action and it constitutes an abuse of the process of this Court.

27. Orders

- i. Application for Constitutional Redress is dismissed.
- ii. Copies of this Decision are issued to the Chief Magistrate, Chairman of the Human Rights and Anti-Discrimination Commission and Commissioner for Corrections Service for necessary actions.

28. 30 days to appeal to the Court of Appeal.




Aruna Aluthge
Judge

At Lautoka
21st February, 2018