

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

HAM No 58 OF 2016

BETWEEN : THE STATE

Applicant

AND : BOBBY DHARMENDRA
SHWETA PRASAD
RESHMI PRASAD

Respondents

FIJI HUMAN RIGHTS AND
ANTI DISCRIMINATION COMMISSION

As Amicus Curiae

Counsel : Ms. J. Fatiaki for the State
Mr. Ikanikoda for Respondents
Miss S. Nasedra for the Fiji Human Rights and
Anti-Discrimination Commission

Date of Hearing : 3rd of May 2016

Date of Ruling : 10th of May 2016

RULING ON EXTENSION OF POLICE CUSTODY

1. The Police have filed an *ex - parte* notice of motion seeking an order to extend the period of police custody of the above named three Respondents for further investigation purpose. The third respondent is a juvenile. Having heard the submissions made by the police prosecutor on 31st of March 2016 the learned Magistrate has granted an order extending the period of detention of the three respondents in police custody for another seven days.

2. This court by its own motion called this matter for revision pursuant to Section 262 (1) of the Criminal Procedure Decree in order to determine the accuracy and the legality of the said order of the learned Magistrate dated 31st of March 2016. The court invited the Fiji Human Rights and Anti-Discrimination Commission to make their submissions as *amicus curiae* during the course of the hearing of the revision. The matter was taken up for hearing on 3rd of May 2016, where the State, the three respondents and the Fiji Human Rights and Anti-Discrimination Commission filed their respective written submissions. Having carefully considered the respective submissions of the parties, applicable laws and principles pertaining to the issue under consideration and the record of the proceedings in the Magistrate's court, I now proceed to pronounce my ruling as follows.

3. Having considered the nature of the notice of motion filed by the police and the subsequent order of the learned Magistrate, I find two main issues which this court has to determine in this review proceedings, *inter alia*:
 - i) Whether the learned Magistrate has jurisdiction to extend the period of pre-charge detention in police custody? If so, whether it was the correct procedure to grant such an order *ex-parte* in the absence of the three respondents.

 - ii) Whether the Police and the learned Magistrate has correctly and appropriately applied the constitutional and procedural requirements as stipulated under the Constitution and the Juvenile Act in respect of the juvenile Respondent.

4. The learned counsel for the State in her submissions contended that the Resident Magistrate has the jurisdiction to extend the period of the pre-charge detention in police custody beyond 48 hours pursuant to Article 13- (1)(f), (g) and (h) of the Constitution. Article 13-(1) (f), (g) and (h) of the Constitution states that;
 - f) *“to be brought before a court as soon as reasonably possible, but in any case not later than 48 hours after the time of arrest, or if that is not reasonably possible, as soon as possible thereafter,*
 - g) *at the first court appearance, to be charge, or informed of the reasons for the detention to continue, or to be released,*
 - h) *to be released on reasonable terms and conditions, pending a charge or trial, unless the interest of justice otherwise require;”*
5. The learned counsel for the state submitted that pursuant to Article 13-(1) (g) of the Constitution, the learned Magistrate has jurisdiction to inform the detainee the reasons for the continuous detention. The learned counsel further submitted that Article 13-(1) (h) of the Constitution allows the learned Magistrate to detain a person not only pending the trial but also pending a charge on the ground of interest of justice.
6. The Fiji Human Right and Anti-Discrimination Commission in their submissions mainly focused on the issue of the rights of the juvenile respondent. The Human Rights Commission did not make any elaborative submissions on the issue whether the learned Magistrate has jurisdiction to make this impugn order.

7. Before proceeding further to determine on the above mentioned two main issues, I find that it is lucrative to perceive the founding values of the State and the principles of interpretation of the Constitution.
8. Article 1 of the Constitution states that the Fiji is a sovereign democratic State founded on the values of respecting human rights, freedom, rule of law and human dignity among other values as stipulated.
9. Article 2-(4) of the Constitution states that the constitutional provisions must be enforced through the courts. The court in executing the said power must ensure that the laws and conducts are in consistent with the Constitution, the rights and freedoms are protected and the duties stipulated under the Constitution are performed.
10. Article 3- (1) and (2) of the Constitution articulate the principles of constitutional interpretation. It states that the approach of interpretation of the provisions of the Constitution must be founded on to promote the spirit, purpose and objective of the Constitution as a whole in order to enhance the democratic society based on human dignity, equality and freedom.
11. Moreover, Article 7 of the Constitution states that the court is allowed to consider and apply the principles of international laws and common law pertaining to the protection of the rights and freedoms in interpreting the provisions of the Bill of Rights as stipulated under Chapter 2 of the Constitution.
12. Bearing in mind the founding values of the State and the principles of interpretation of the Constitution, I now turn onto discuss the first main issue of this revision, that is whether the learned Magistrate has jurisdiction to extend the

period of pre-charge detention in police custody beyond the limit as stipulated under Article 13-(1), (f) of the Constitution.

13. The personal liberty of a person can be deprived on the ground of reasonable suspicion of committing an offence pursuant to Article 9-(1),(e) of the Constitution. If a person is arrested or detained on such ground, he must be brought before a court as soon as a reasonably possible, but in any case not later than 48 hours pursuant to Article 13-(1) (f) of the Constitution.

14. The principle embodied in Article 13-(1) (f) derives from Article 9 (3) of the International Covenant of Civil and Political Rights (ICCPR), and it states that;

“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

15. In view of the Article 9 (3) of the ICCPR, anyone who is arrested or detained must promptly be brought before a judge and is entitled to a trial within a reasonable time or to be released.

16. The requirement of promptly producing an arrested or detained person in court has been incorporated into the European Convention of Human Rights, where Article 5 (3) of the Convention states that;

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to released pending trial. Release may be conditioned by guarantees to appear for trial”.

17. The Human Rights Committee in Zhanna Kovsh v Belarus (ccpr/c/107/D/1787/2008) has discussed the principles constituted under Article 9 (3) of the Covenant, where it was held that;

“The Committee recalls that pre-trial detention should be an exception and should be as short as possible. To ensure that this limitation is observed, article 9 requires that the detention be brought promptly under judicial control. Prompt initiation of judicial oversight also constitutes an important safeguard against the risk of ill-treatment of the detained person. This judicial control of detention must be automatic and cannot be made to depend on a previous application by the detained person. The period for evaluating promptness begins at the time of arrest and not at the time when the person arrives in a place of detention.

..... The Committee further recalls that it has recommended on numerous occasions in the context of consideration of the States parties’ reports submitted under article 40 of the Covenant, that the period of police custody before a detained person is brought before a judge should not exceed 48 hours. Any longer period of delay would require special justification to be compatible with article 9, paragraph 3, of the Covenant”

18. European Court of Human Rights in Brogan v United Kingdom (Ser. A. No 145-B, 11 EHRR 117) has given a comprehensive and inclusive elucidation of

Article 5 (3) of the European Convention of Human Rights, where it was held that;

“The assessment of “promptness” has to be made in the light of the object and purpose of Article 5 (art. 5) (see paragraph 48 above). The Court has regard to the importance of this Article (art. 5) in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty (see the Bozano judgment of 18 December 1986, Series A no. 111, p. 23, para. 54). Judicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5 para. 3 (art. 5-3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, “one of the fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention” (see, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, pp. 25-26, para. 55) and “from which the whole Convention draws its inspiration” (see, mutatis mutandis, the Engel and Others judgment of 8 June 1976, Series A no. 22, p. 28, para. 69). /C/107/D/1787/2008”

19. In view of the above discussed international laws and judicial precedents, the rights enunciated under Article 13(1)-(f) is encompassed with three main components, *inter alia*;
 - i. The arrested person must be brought under the judicial control as soon as reasonably possible, but in any case not later than 48 hours,
 - ii. The judicial scrutiny must be automatic. It should not depend on an application by the detainee,

iii. The arrested person must be heard by the judicial officer in person,

20. In this instant case, the Police have not produced the three respondents before a court within 48 hours of their arrest. Instead of that, the Police has filed this *ex - parte* notice of motion seeking an order to extend the detention of the respondents in police custody. The respondents were not given an opportunity to make their representation before the court during the hearing of this *ex - parte* notice of motion. Furthermore, the police have not given any reasons for not producing the three respondents during the hearing apart from stating that the police need further time for investigation. In view of Article 13(1) - (f), (g) and (h) of the Constitution, the police is not required to conclude the investigation and charge the arrested person within 48 hours. The police is required only to produce them in a court in order to bring the arrested person under the judicial control and monitoring.
21. Cook J in **R v Te Kira (1993) 3 NZLR 257**; has discussed the practical reality of forming the charge, where His lordship held that;

“The requirement “promptly” (as set out in section 23 (2) of the Bill of Rights Act) and “as soon as possible” must be interpreted realistically. For example, a reasonable time may be needed for a decision whether or not to charge a person arrested (as by reference of the case to a senior officer) and, if the person is to be charged, for the process of laying the charge and incidental matters. Further, if having been given the information required by s 23 (1) (a) and (b) and s 23 (4) the person wishes to make a statement or to wait for the arrival of a lawyer, a reasonable time may be allowed for either of those stages”

22. Section 23 (2) of the Bill of Rights Act of New Zealand states that the arrested person has a right to be charged promptly or released. Section 23 (3) of the Bill of Rights Act requires that the arrested person must be brought as soon as possible before a court if he is not released under Section 23 (2) of the Act.

23. The Court of Appeal of New Zealand in R v Rogers (1993) 1 HRNZ 282 held that;

“ It was pointed out that s 23 is designed to ensure that an arrested person is not held in custody at the will of the police, but is entitled to be released or to be brought before a court; for it is the court that is the proper authority to decide whether there is to be continuing custody”

24. Having being guided by the above discussed judicial precedents, I find that Article 13-(1) (f) of the Constitution does not allow the Police to detain the Respondents beyond the limitation of 48 hours merely on the ground of continuation of further investigation. Accordingly, I find that the rights of the three respondents as enunciated under Article 13- (1) (f) of the Constitution have been breached and violated.

25. I now draw my attention to determine whether the learned Magistrate has jurisdiction to extend the period of detention in police custody. In doing that, it would be prudent to review the practices and approaches of few leading common law jurisdictions in respect of the pre-charge detention in police custody.

26. Section 41 (1) of the Police and Criminal Evidence Act 1984 of United Kingdom has permitted the police to detain a person in police custody only for less than 24

hours without him being charged. However, Section 42 of the Act has authorised that a police officer of the rank of Superintendent or above could extend the period of police detention without charge to further time of less than 36 hours. In order to extend the detention period as such, the police officer must satisfy that there is a need to such extension of the detention on the following three grounds that;

- i. The detention of that person without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him,
- ii. An offence for which he is under arrest is an indictable offence; and
- iii. The investigation is being conducted diligently and expeditiously,

27. Moreover, if the police needs further extension of time of detention without charge, they could make an application to a Magistrate's court pursuant to Section 43 of the Police and Criminal Evidence Act, of 1984. If the Magistrate is satisfied with the three grounds that were mentioned in above paragraph, the magistrate could extend the period of police detention in a warrant. However, such extension must be less than 36 hours. Section 44 of the Act allows the Magistrate to further extend such period of detention up to 96 hours , if he is satisfied that there are valid reasons for such an extension.

28. Section 23C of the Crimes Act 1914 of Australia, has limited the period of police investigation for 2 hours for a commonwealth offence, if the detainee is a person under the age of 18 or an Aboriginal person or a Torres Islander. Whereas for other persons who are detained for a commonwealth offence, the investigation

period is 4 hours. If the person is not released within the investigation period, the person must be brought before a judicial officer within the investigation period.

29. The investigating officer is allowed to make an application for an extension of the investigation period to a Magistrate pursuant to Section 23D of the Crimes Act. Such application for extension is only allowed for serious commonwealth offences. Section 23 DA of the Act has entrusted with the power of jurisdiction to the Magistrate to extend the investigation period for further 8 hours if he is satisfied with the application for extension. However, Section 23 DA (7) of the Act has stated that such extension of investigation period must not be extended more than once.
30. Section 167 of the Criminal Procedure Code of India allows that a person could be held in the custody of the police for a period of 15 days on the orders of a magistrate. A judicial magistrate could remand a person either in police custody or judicial custody extending up to 15 days. An executive magistrate may order for a period of custody extending up to 7 days. The police custody may extend only up to a period of 15 days from the date custody begins but judicial custody may extend to a period of 90 days for a crime which entails a punishment of death, life imprisonment or period of imprisonment exceeding 10 years and 60 days for all other crimes if the magistrate is convinced that sufficient reasons exists.
31. In view of the approaches adopted by United Kingdom, Australia and India, it appears that the jurisdiction of extending the detention in police custody have specifically been vested in the Magistrate's court by specific legislative provisions.

32. European Court of Human Rights in McKay v United Kingdom (543/03 (2006) ECHR 820) has expounded that the limitation imposed on the pre-charge police detention has left with little flexibility in interpretation. The court found that;

“The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious wearing of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision”.

33. The Human Rights Committee which monitors the implementation of the International Covenant of Civil and Political Rights in its General Comments No 35 on Article 9 (Liberty and Security of Persons) dated 16th of December 2014 recommended that if the court is satisfied for further detention pending investigation, it should not return the arrested person back to the police detention but rather to a separate facility. The Human Right Committee states that;

“Once the individual has been brought before the judge, the judge must decide whether the individual should be released or remanded in custody for additional investigation or to await trial. If there is no lawful basis for continuing the detention, the judge must order release. If additional investigation or trial is justified, the judge must decide whether the individual should be released (with or without conditions) pending further proceedings because detention is not necessary, an issue addressed more fully by the second sentence of paragraph 3. In the view of the Committee, detention on remand

should not involve a return to police custody, but rather to a separate facility under different authority, where risks to the rights of the detainee can be more easily mitigated.

34. Having considered the above discussed approaches of the European Court of Human Rights and the three leading commonwealth jurisdictions, and the recommendation of the Human Rights Committee, I find that the interpretation of the limitation of pre- charge detention in police custody is founded on a restricted but purposive approach. Hence, it is my opinion that interpretation of Article 13 (1) - (f), (g) and (h) of the Constitution should be founded on such a restricted and purposive approach in order to promote and protect the human dignity, equality and freedom as required under Article 7 of the Constitution.

35. The Magistrates court of Fiji derives its jurisdiction by written law. Article 101 (2) of the Constitution states that;

"The Magistrates court has such jurisdiction as conferred by a written law".

36. The scope of the criminal jurisdiction of the Magistrates court has been stipulated under Section 17 of the Magistrates court Act, where it states that;

"In the exercise of their criminal jurisdiction magistrates shall have all the powers and jurisdiction conferred on them by the Criminal Procedure Code, this Act or any other law for the time being in force"

37. Neither the provisions of Criminal Procedure Decree nor any other legislation in force for the time being have conferred jurisdiction to the Magistrates Court to extend the period of detention in police custody beyond the limitation as enunciated under Section 13 (f) of the Constitution.

38. In the absence of specific legislation in Fiji entrusting with the specific jurisdiction to the Magistrate Court, I hold that that the Magistrates Court has no jurisdiction to extend the period of detention in police custody beyond the limitation as stipulated under Article 13 (1) (f) of the Constitution.
39. Hence, the second limb of Article 13 (1)(g) of the Constitution, that is “ *informed of the reasons for the detention to continue*” and Section 13(1) (h) of the Constitution should not be interpreted as conferring the jurisdiction to the Magistrate’s court to extend the period of detention in police custody.
40. If the arrested person is charged with an offence at the first appearance in the court, the Magistrate has a discretion either to release him on bail or remand him in custody pursuant to the provisions of Bail Act. The court is further allowed to detain a person pending a charge or trial on the ground of interest of justice pursuant to Article 13(1) (h) of the Constitution. Having concluded that the Magistrates Court has no jurisdiction to extend the detention in police custody beyond the limitation as stated under Article 13(1) (f), I now turn onto determine whether the Magistrates Court has jurisdiction to detain a person in remand custody pending a charge pursuant to Article 13 (1) (h) of the Constitution.
41. There is no legislative provisions in Fiji for the time being conferring specific jurisdiction on the Magistrate to detain a person without a charge in remand custody. Hence, it is my opinion that the Magistrates Court has no jurisdiction to detain a person pending a charge on the ground of interest of justice either in police custody or remand custody.

42. In the absence of specific legislation entrusting the jurisdiction to the Magistrates Court, either to extend the period of detention in police custody or to detain an arrested person pending a charge in remand custody, it is my opinion that such an application should be made in or referred into the High Court.
43. The High Court has unlimited original jurisdiction to hear any civil and criminal proceedings and also unlimited jurisdiction under the Constitution and any written law pursuant to Article 100 (3) of the Constitution. Moreover, the High Court has original jurisdiction in any matter arising under the Constitution or interpretation of the Constitution pursuant to Article 100 (4) of the Constitution.
44. I now move on to the second issue of this ruling, that is whether the Police and the Learned Magistrate has correctly and appropriately applied the constitutional and procedural requirements as stipulated under the Constitution and the Juvenile Act in respect of the juvenile Respondent.
45. The third respondent is a juvenile. She was also arrested and detained with the first and second respondents on the 29th of March 2016. The first and second respondents are the parents of the juvenile. The learned Magistrate, having considered the *ex-parte* notice of motion filed by the Police on 31st of March 2016, extended the detention of the juvenile in police custody for further seven days.
46. Article 41 (1) (e) of the Constitution has recognised that the detention of a child is a measure of last resort. The Article 41 (1) (e) states that;

"Every child has the right -

e. not to be detained, except as a measure of last resort, and when detained, to be held -

i. only for such period of time as it necessary; and

ii. separate from adults, and in conditions that take account of the child's sex and age

47. Moreover, Article 41 (2) of the Constitution states that the best interest of the child is the primary and fundamental consideration in any matter concerning the child.

48. The principles that are enunciated under Article 41 (1) (e) of the Constitution stem from the Article 37 (b) of the United Nation Convention on Rights of the Child, where it states that;

b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

49. According to Section 4 of the Juvenile Act, the police officer in charge of the police station is required to release a juvenile forthwith on condition if a juvenile was arrested with or without a warrant and cannot be produced forthwith before a court. However, if the officer in charge of the police station is satisfied that the juvenile is charged with an offence of murder or any other serious crime, or the removal of the juvenile from the association of certain individuals is in the interest of the juvenile or the release of the juvenile will defeat the ends of the

justice, he can detain the juvenile at a place of safety until the juvenile is produced before a court pursuant to Section 5 of the Juvenile Act

50. If the officer in charge of police is certified that the detention in place of safety is impracticable to do, or the juvenile is an unruly character and it is unsafe to detain the juvenile in such a place or it is unsafe to detain the juvenile in such a place of safety due to the medical condition of the juvenile, the police is permitted to detain the juvenile in police custody. If the police detained the juvenile in police custody, the officer in charge must produce a certificate to the court explaining the reasons for detaining the juvenile in police custody.
51. In this instant case, the officer in charge of the police station has not released the juvenile on bail as required under Section 4 of the Juvenile Act. The Juvenile was not arrested for an offence of murder or any serious nature. She was suspected of being involved in an offence of Theft and Obtaining Financial Advantage by Deception.
52. It is the duty of the learned Magistrate to inquire the police about the reason for not releasing the juvenile pursuant to Section 4 of the Juvenile Act. If the Magistrate is satisfied that the refusal of the police to release the juvenile is founded on no reasonable grounds, he must promptly release the juvenile on bail. In view of the record of the proceedings in the Magistrate's court, it appears that neither the police presented such information nor the learned Magistrate has inquired of such reasons. Hence, I do not find the existence of any acceptable reason preventing the officer in charge of the police station to release the juvenile on bail pursuant to Section 4 of the Juvenile Act.

53. Having considered the record of the proceedings in the Magistrate's court, I find that the officer in charge of the police station has not produced a certificate stating the reason for not keeping the juvenile in a place of safety as required under Section 5 of the Juvenile Act.
54. In view of the reasons discussed above, I find that there is no specific reasons justifying the detention of the juvenile as the last resort. Hence, I find the detention of the juvenile in the police custody and the subsequent order of the learned Magistrate in extending such detention for further seven days is in contravention to the rights of the juvenile as stipulated under Article 41 (1) (e) of the Constitution.
55. In conclusion, I hold that the order of the learned Magistrate extending the period of detention of the three respondents in police custody by seven days is in breach of the rights of the three respondents as guaranteed under Article 9, 13 (f), and 41 (1) (e) of the Constitution. I accordingly reverse the order of the learned Magistrate pursuant to Section 262 (1) (b) of the Criminal Procedure Code.




R. D. R. Thushara Rajasinghe

Judge

At Lautoka
10th of May 2016

Solicitors : Office of the Director of Public Prosecutions
Vakaloloma & Associates for the Respondents,
Fiji Human Rights and Anti Discrimination Commission