

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Constitutional Redress Application No. HBM 35 of 2017

ERONI VAQEWA

[APPLICANT]

vs.

THE COMMISSIONER OF POLICE

[1ST RESPONDENT]

&

ATTORNEY GENERAL OF FIJI

[2ND RESPONDENT]

Counsel : Applicant in Person
: Mr. J. Mainavolau for the Respondents
Date of Hearing : 16^h March, 2018
Date of Ruling : 9th April, 2018

DECISION

1. This is a timely application for constitutional redress pursuant to section 44 of the Constitution and the High Court (Constitutional Redress) Rules 2015.
2. The grounds for seeking constitutional redress by the applicant are set out in his affidavit sworn on 12th September, 2017 and filed in support of the application.
3. The applicant states that he was brutally assaulted, tortured and inhumanely treated by the Police during the arrest and subsequent to their investigation. It is also alleged that he was detained for more than 48 hours before being produced in Court and the Police denied Medical treatment despite numerous orders were made by the Magistrate.
4. Accordingly, in his Notice of motion he prays for the following reliefs:

- a. *“A declaration that my right to freedom from torture of any kind including police brutality during my arrest and subsequent to its investigation was in breach of section 11 (1) (2) of the Constitution 2013”.*
 - b. *“A declaration that my right to be brought before a Court of law within 48 hours or soon thereafter was in violation of section 13(1) (f) of the Constitution “,*
 - c. *“A declaration that my right to be treated equally and fairly was in breach of section 26 (1) (2)”.*
5. The State, having filed the acknowledgment of service on 26th September 2017, filed an affidavit in opposition sworn by ASP SULIANO MOCEILEKUTU, the Divisional Crimes Officer of Western Division. The Officer in paragraph 8 of his affidavit, among other things, avers;
- a. The applicant was detained by Villagers in Momi, Sigatoka on 17th August, 2017, and had been assaulted by his captors as he had resisted the arrest with a kitchen Knife in hand and by the time the Police arrived the applicant was in the captive of the Villagers.
 - b. As he was hiding in the bushes around Momi, after committing a string of robberies in Tavua, Lautoka and Nadi on 16th and 17th of August, 2017, the Police had earlier sent words to the Villagers of Momi and surrounding residents to be on the lookout for the applicant and his assailants.
 - c. The Police took the applicant from the Villagers, brought him to Nadi Police Station by 18.45 hours on 17th August, 2017 and placed him in the cell at Nadi Police Station. He was not immediately caution interviewed as he was brought only in the evening and most of the Police officers were still in the field looking for the applicant’s assailants. Police vehemently denies assault or torture during and/or subsequent to his arrest.
6. In paragraph 9 of the affidavit in response, it has been averred that the caution interview began on 18th, August, 2017, first one being at Lautoka Police station at and subsequently at Tavua and Nadi Police Stations respectively, as he had committed aggravated robberies in those areas. By the time the last caution interview was over at Nadi Police station, it was already 4 pm and as it was closing hours of the court and he had to be taken to Lautoka Magistrate’s Court, he could not be produced on 18th August, 2017 Friday. However, after spending the weekend in the Cell, he was produced at Lautoka Magistrate’s Court on 21st August, 2017 Monday, where he was formally charged and the Magistrate who remanded him ordered the Doctor at Natabua prison to medically examine the applicant. The respondents move to strike out the applicant’s motion.
7. The applicant by his affidavit in response, for which the Court assisted him to obtain the copies of station Diaries from all relevant police stations to ascertain the relevant dates and times, has admitted his initial capture by the Villagers in Momi and subsequently

being officially arrested by Nadi Police. He also admits facing the relevant caution interviews. As regard to the Kitchen knife, he says one of the Villagers used it during the scuffle and he managed to confiscate it acting in his self- defence. As regard to the production before the Magistrate, he alleges due to the delay in obtaining caution interviews, producing him before the Magistrate was delayed.

Hearing

8. At the hearing before me, learned Counsel for the Respondents made lengthy oral submissions, giving reason for the failure in producing the applicant within 48 hours of the arrest. Counsel also drew the attention of the Court to the relevant provisions of the Constitution that permits the delay and particularly to the section 44 (4), which provide discretion to the High Court not to grant relief, if the Court considers that an alternative remedy is available for the person concerned.
9. The applicant opted not to make oral submissions and stated that he relies on the averments of his affidavits filed in support and response.

Discussion:

10. The applicant admits that he was initially apprehended by the Villagers in Momi and **there was a scuffle in the process**. His assertion that one of the Villagers had a kitchen knife and he confiscated it **during the scuffle**, in his self defence, cannot be believed and relied upon. Because, in the same breath he says that there was a peaceful dialog by Villagers for his surrender along with his assailants, which is highly improbable.
11. On production before the Lautoka Magistrate on 21st August, 2017, the learned Magistrate has ordered only Medical attention to be given by the Doctor at the Natabua Correction Centre for all 4 suspects produced including him. Not a specific Medical report has been ordered by the Magistrate. The document filed by the applicant annexed to his affidavit in response marked as **EV-1** is only a letter dated 25th October issued by the Magistrate for the 2nd and 3rd named accused persons therein to be escorted to the Lautoka Hospital for Medical examination and not in respect of the Applicant. The applicant has not complained or brought to the notice of the Magistrate about the alleged assault or torture in order to call for a Medical Report. He has not moved for a Medical examination report at least through the Correction Centre by obtaining an order from the Magistrate, to substantiate his alleged torture or assault.
12. If he was subjected to torture, assault or any inhuman treatment he could have very well drawn the attention of the Magistrate on 21st August 2017 or thereafter. There is no proof even for taking any treatment.
13. He admits his caution interview at three different Police stations situated, considerably, at faraway places and last of it ended in the evening hours of 18th Friday, August, 2017. The reason adduced by the Police for delay in producing him appears to be justifiable.

Article 13 (1) (f) of the Constitution states as follows:

“Every person who is arrested or detained has a right to be brought before Court as soon as reasonably possible, but in any case, not later than 48 hours, after the time of the arrest or if that is not reasonably possible , as soon as possible thereafter.”
(Emphasis mine)

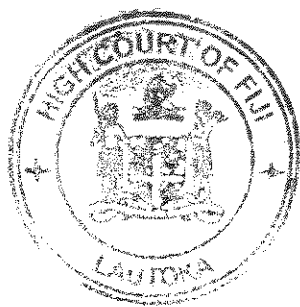
14. The above provision has an exception that in the event the production of the arrested or detained person is impossible within 48 hours, to produce him as soon as possible thereafter. The Counsel for respondent states that unless it is an urgent, special or high priority case there is no arrangement to produce before the Magistrate out of the office hours, weekends and Holidays.
15. I am satisfied with the explanation given by the State’s Counsel for the delay in producing the applicant. It is true that there is no any arrangement for the production of ordinary suspects after hours or on weekends or holidays. However, there is no evidence to establish that any serious injustice or prejudice was caused to the applicant by his detention during the weekend, which is justifiable, in view of the facts that the applicant was, allegedly, engaged in series of aggravated robberies in 3 different areas with some other suspects, who were still to be apprehended, the police were to conduct proper investigations and record lengthy caution interviews at 3 different places. This has not been refuted by the applicant.
16. It is well recognized that while an accused has a right to seek redress for alleged breaches of his or her constitutional rights in criminal proceedings, an application for constitutional redress is not a suitable vehicle for the resolution of disputed questions of fact ahead of a criminal trial (*Abhay Kumar Singh v The Director of Public Prosecutions & The Attorney General unreported Cr App No AAU0037 of 2003S; 16 July 2004*). In *Singh’s case*, the Court of Appeal agreed with the High Court that an application for constitutional redress on questions of disputed facts ahead of a scheduled criminal trial will fragment the criminal process and will delay it. Later cases on constitutional redress followed *Singh (Nata Civil Action No HBM 35 of 2005, 4 May 2006; Ligavai v DPP HBM No 28 of 2014, 28 April 2015; Silatolu v State Misc. Case No HAM163 of 2014, 23 June 2015)*.
17. More recently, in a criminal case of *State v Lal & Ors unreported Case No HAR001 of 2015; 2 June 2015, Madigan J said at [10]*:

“...where reliance is placed on the breach of a constitutional right precedence must be given to whatever “parallel and collateral remedies” are available with respect to the same matter.”
18. The applicant’s third relief is a declaration that his right to be treated equally and fairly was in breach of section 26 (1) (a) of the Constitution. There are no credible averments in his supporting affidavit in this regard.

19. The redress that the applicant herein seeks on the strength of his affidavit evidence before this Court is few declarations. This affidavit evidence is not subjected to cross examination before this Court. The Applicant is a person who stands charged for series of aggravated robberies. In my judgment, the relief sought by the applicant is misconceived. The trial is pending in the Magistrates' Court. Most of the facts and the circumstances surrounding the applicant's arrest and detention are disputed facts. Any declaration of the above nature granted by this Court totally relying on the mere unsupported affidavit evidence would, probably, threaten the proceedings before the Magistrate Court.
20. As far as his allegations of alleged assault, torture and inhumane treatment are concerned, the correct forum for him to complain was the Magistrate Court. In relation to his allegation about the delay in producing him before the Court within 48 hours, I am satisfied that the Police has acted within the relevant provisions of the constitution by producing him on 21st August, 2017 which was the earliest possible opportunity made available.
21. When a person charged with this type of serious offences, moves for Constitutional redress, the Court has to be extra vigilant as a declaration of this nature or anything similar to it by the High Court could, probably, defeat or sabotage the criminal proceedings against the applicant before the Magistrate Court or at a Higher forum.
22. Adequate alternative remedies are available to the applicant in respect of his prayer (a) and (c) above (1 and 3 in his Motion) and for the reasons adumbrated above the application for constitutional redress fails.

Order of the Court:

The application for constitutional redress is dismissed.



At Lautoka
9th April, 2018

A.M. Mohammed Mackie

Judge