

IN THE HIGH COURT OF FIJI AT SUVA

**THE PROCEEDINGS COMMISSIONER
on behalf of HUMAN RIGHTS AND
ANTI-DISCRIMINATION
COMMISSION**

Applicant

**CASE NO: HAM. 363 of 2018
[HAC 433/2018]**

Vs.

THE STATE

1st Respondent

KELEPI DURI TAUTAUMACALA

2nd Respondent

SELEMA TIKOENABUREVERE

3rd Respondent

**Counsel : Mr. R. Vananalagi for the Applicant
Mr. M. Vosawale for the 1st Respondent
Ms. B. Malimali for the 2nd Respondent
Mr. A. Naco for the 3rd Respondent**

Hearing on : 27 March 2019

Ruling on : 15 April 2019

RULING

1. The applicant seeks to intervene in High Court Criminal Case HAC 433 of 2018 where the above named second and third respondents are charged with the offence of murder contrary to section 237 of the Crimes Act 2009. The three respondents object to the application.

2. The orders sought according to the relevant motion filed by the applicant are as follows;

1. AN ORDER that the Applicant be granted leave to intervene and be joined as Amicus Curiae and/ or as an interested party in this proceeding.
2. ANY other ORDER as the High Court thinks fit, just and fair in all the circumstances.

3. Black's Law Dictionary (6th edition) defines the term 'Amicus Curiae' as follows;

"Means, literally, friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such amicus curiae briefs are commonly filed in appeals concerning matters of a broad public interest; e.g. civil rights cases. Such may be filed by private persons or the government. In appeals to the U.S. courts of appeals, such brief may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof."

4. I consider it appropriate in this case to reproduce the facts deposed to in the supporting affidavit filed on behalf of the applicant ("affidavit"). The said affidavit states thus;

AFFIDAVIT IN SUPPORT OF ASHWIN RAJ

I, **ASHWIN RAJ** of Level 2 Nabhati House, 9 Goodenough Street, Suva, Director of the Human Rights and Anti-Discrimination Commission make oath and say as follows:-

1. I am the Director of the Human Rights & Anti-Discrimination Commission (the Commission) the Applicant herein and by virtue of my position, I am duly authorized to swear this affidavit on behalf of the Applicant and the matters deposed herein are within my own knowledge and from information obtained during the investigation of this substantive matter before this Honourable Court.

2. *My office had conducted an independent investigation into this matter upon receipt of the complaint lodged by Joseua Lalauvaki's (the deceased) immediate family members after his demise on 11th October 2018.*
3. *It is prudent that the Applicant be joined as Amicus in this proceedings and to also lend assistance to this Honourable Court on the issue of violation of human rights under the Constitution.*
4. *Accordingly I humbly pray for Order in terms of the Notice of Motion filed hereof.*
5. According to the said affidavit, this application is made for two reasons. First, the deponent has formed the view that it is prudent for the applicant to be joined as *Amicus* in the aforementioned criminal case. Secondly, the applicant expects to lend assistance on the issue of violation of human rights under the Constitution. The affidavit does not provide any facts or information that either explains or justifies the said reasons which in fact forms the basis of the present application.
6. When this matter was taken up for hearing, initially, the counsel for the applicant simply wanted this court to make a ruling based on the written submissions filed. The counsel however was invited to make oral submissions.
7. The simple but the obvious question the counsel for the applicant needed to answer was:
 - a) What is the basis for the applicant being the Human Rights Commission to intervene in the criminal case HAC 433 of 2018 at this stage?
8. The essence of the submission on behalf of the applicant was that, Case No. HAC 433 of 2018 being a murder case, article 8 of the Constitution which provides for the right to life has been violated and therefore the applicant has the power to intervene in the case in terms of section 39 of the Human Rights and Anti-Discrimination Act 2009.
9. Section 39 of the Human Rights and Anti-Discrimination Act reads thus;

Right of Proceedings Commissioner to appear in High Court

39.— (1) The Proceedings Commissioner may appear and be heard in the High

Court or the Court of Appeal in relation to any proceedings under section 38, whether or not the Proceedings Commissioner is or was a party to the proceedings.

(2) With leave of the court, tribunal or arbitrator, the Proceedings Commissioner may appear and be heard in relation to any proceedings before a court, tribunal or arbitrator in which human rights are in issue.

(3) If the Proceedings Commissioner appears before any court, tribunal or arbitrator he or she may, unless the rules of procedure of the court, tribunal or arbitrator otherwise provide—

(a) appear in person or by a legal practitioner;

(b) adduce evidence and cross-examine witnesses, unless the proceedings are by way of appeal.

[Emphasis added]

10. It is plain from the above provisions that the applicant has a right to appear in relation to any proceeding under section 38 of the Human Rights and Anti-Discrimination Act [section 39(1)], but should obtain leave to appear in relation to any other proceedings in which human rights are in issue [section 39(2)].
11. The provisions of section 38 of the Human Rights and Anti-Discrimination Act is confined to civil proceedings before the High Court and therefore section 39(1) is not applicable to the present case. In terms of the provisions of section 39(2) above, in order for the applicant to appear and be heard in HAC 433 of 2018 being a criminal case; firstly, the proceedings of that case should involve an issue on human rights and secondly, the applicant should demonstrate why the applicant should be granted leave to appear and be heard in that case.
12. At the moment there no issue that has arisen in the case, HAC 433 of 2018 which concerns human rights. There may however be a possibility as in any other criminal case for the accused in that case to raise issues concerning the breach of constitutional rights guaranteed by the Constitution. Based on the material submitted in this present case, the applicant does not appear to be interested in the rights of the accused in Case

No. HAC 433 of 2018.

13. In a criminal case the prosecution is required to prove the elements of the relevant offence(s) against the accused beyond reasonable doubt. A criminal court may have to deal with the rights of an accused guaranteed under the 2013 Constitution to ensure a fair trial to the accused. However, in a criminal trial, the court is not expected to decide on any right of the relevant victim either living or deceased. A criminal trial is not about determining the rights of the victim, but about determining whether an accused is guilty or not guilty of the offence(s) the accused is charged with. Therefore, I can say with absolute certainty that there is no possibility even in the future for an issue concerning any right of the deceased to arise in Case No. HAC 433 of 2018, the purported rights the applicant has shown an interest in.
14. It was further submitted that the applicant should be allowed to intervene on behalf of the deceased's family. Needless to say, the family members of the victim have no role to play in the substantive case unless any such member is a witness in the case. However, a witness in a criminal case even if that witness is the victim, does not have a *locus standi* to be joined as a party to that case.
15. All in all, it is manifestly clear that this application is grossly misconceived. The application is accordingly dismissed.
16. When a lawyer is consulted by a party or a client, that lawyer is required to exercise care, diligence and skill, in providing a sound legal opinion to the client and also in making any application to court representing the client. A lawyer is expected to know the difference between a criminal case and a civil case.
17. The affidavit and the written submission filed and the oral submissions made by the counsel for the applicant in this case does not reflect that the said counsel has exercised the standard of care, diligence, and skill of a reasonable lawyer in similar circumstances.
18. This conduct of the counsel for the applicant as a result of which this court's time and

resources were wasted, was improper. However, I have decided not to award costs against the counsel for the applicant in terms of section 150(4) of the Criminal Procedure Act this time. Instead he is hereby warned to refrain from repeating such conduct in the future.




Vincent S. Perera
JUDGE

Solicitors:

R. Vananalagi & Associates, Suva for the Applicant
Director of the Public Prosecutions for the 1st Respondent
Pacific Chambers, Suva for the 2nd Respondent
Naco Chambers, Suva for the 3rd Respondent