

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL MISC NO: HAM 075 OF 2020

BETWEEN : STATE

AND : SAILOSI CABENALAWA NAIVALURUA

Counsel : Ms S Tivao for the State
Ms L Manulevu & Ms S Hazelman for the Respondent

Date of Hearing : 24 April 2020

Date of Ruling : 8 May 2020

RULING

[Detention beyond 48 hours]

- [1] The Director of Public Prosecutions by a Notice of Motion seeks an order to detain the respondent in police custody for more than 48 hours pursuant to section 13(1) (f) of the Constitution and on the grounds set out in an affidavit of Acting Sergeant Jitendra Chand. The main reason advanced for an order for detention beyond 48 hours is for the police to conclude their criminal investigations against the respondent.
- [2] Due to the urgency of the matter the application was heard on the same day it was filed (24 April 2020). At the hearing, the respondent was produced in court and was represented by duty solicitors from the Legal Aid Commission.
- [3] After hearing both parties, the Court deferred its decision to allow the parties to file written submissions on the question whether the courts have power to grant an order to detain a suspect in police custody beyond 48 hours without a charge for the police to carry out their investigations. Those submissions were filed on 29 April 2020.

[4] I am mindful that my decision on this application has been overtaken by the events after the respondent was charged with murder and produced in court on 27 April 2020. I proceed to give my ruling, as the question of jurisdiction of the courts to order detention of a suspect in police custody for more than 48 hours without a charge for the purpose of criminal investigations may reoccur in the future and is a question of great public importance.

Arrest and detention of the respondent

[5] Part III of the Criminal Procedure Act sets out the arrest powers and procedures in general. Section 10(1) of the Criminal Procedure Act states that to make an arrest, the arresting police officer is to actually touch or confine the body of the person to be arrested, unless the person submits to custody by word or action. Section 18 of the Criminal Procedure Act sets out the circumstances in which the police officers may arrest a person without an order from a magistrate and without a warrant. On many instances, the arresting police officer is required to form a belief on reasonable grounds to justify an arrest without a warrant.

[6] The respondent is an adult male. He was arrested and detained on 22 April 2020 at around 9.30am after he surrendered himself at the Valelevu Police Station on a suspected case of assault in which the victim was injured and hospitalized. Since no warrant of arrest was produced in Court, I assume that the arrest was made without a warrant in one of the circumstances set out in section 18 of the Criminal Procedure Act.

[7] As part of the investigation, on 22 April 2020, the police interviewed the respondent under caution after he had spoken to a legal aid counsel. On 23 April 2020 at 3.30pm, the alleged victim passed away in the hospital while the respondent was in police custody without a charge or without being brought before a court. Forty eight hours expired on 24 April 2020 at 9.30am and the respondent remained in police custody without a charge. That is when the Director of Public Prosecutions filed this application for an order to detain the respondent in police custody for another three days.

Analysis of the constitutional right

- [8] The proper approach to interpreting the meaning of the rights and freedoms guaranteed by the Constitution is to adopt a purposive analysis (*Singh v The State* [2000] FJHC 115; Haa0079j.2000s (26 October 2000)).
- [9] Section 4 of the Constitution states that the rights and freedoms of individuals are enforced through the courts. The courts function is to enforce the rights and freedoms of individuals by promoting values that underlie a democratic society. Realization of rights and freedoms by individuals reflects respect for human dignity and rule of law. Without realization of human rights, the rights and freedoms provided by the Constitution are a dead letter.
- [10] One of the fundamental rights promoted and protected by the Constitution is the right to personal liberty. The constitutional safeguards accorded to a person arrested and detained without a judicial warrant have evolved around the right to personal liberty. The right to a prompt judicial hearing is one of those safeguards. In Fiji that right is constitutionally protected since independence.
- [11] Section 5 of 1970 Constitution provided the following protection to a person arrested or detained for the purpose of criminal investigations:

(3) Any person who is arrested or detained -

(a)

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,

and who is not released, shall be afforded reasonable facilities to consult a legal representative of his own choice and shall be brought without undue delay before a court.

(4) Where any person is brought before a court upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further

held in custody in connection with those proceedings or that offence save upon the order of a court.

[12] Section 6 of the 1990 Constitution accorded a similar protection to a person detained following an arrest by the law enforcement agencies. In fact, the wording of section 6 is exactly same as its predecessor.

[13] In the 1997 Constitution, a 48-hour cap was added to the detention period. Section 27(3) (b) that provided the safeguard was worded as follows:

Every person who is arrested for a suspected offence has the right:

(b) to be brought before a court no later than 48 hours after the time of arrest or, if that is not reasonably possible, as soon as possible thereafter;

[14] The 2013 Constitution retained the 48-hour cap for the detention period following an arrest. Section 13(1) (f) of the 2013 Constitution states:

Every person who is arrested or detained has the right-

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.

[15] The question is what is the purpose of the right accorded to a person by section 13(1) (f) of the Constitution. To answer that question the court may, if relevant, consider how that right has been interpreted in jurisdictions having a similar constitutional provision (s 7 of the Constitution).

[16] In giving effect to the purpose of the 48-hour rule contained in the Malawi Constitution, the High Court of Malawi in *[I]n Re: S 42 (2) (e) of the Constitution of the Republic of Malawi and Republic v Leveleve* (195 of 2000) [2000] MWHC 20 (09 August 2000) said:

To the citizen, the forty-eight hour right affords the citizen a prompt opportunity to assert and sample rights the Constitution creates for the citizen and test the reasonableness of the state's deprivation of those rights. The framers set forty-eight hours as the efficiency standard for our criminal justice to bring the citizen under judicial surveillance. (per Mwaungulu J)

[17] Article 11(3) of the Namibian Constitution also provides for a 48-hour rule as follows:

All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.

[18] In explaining the purpose of the 48-hour rule, the High Court of Namibia in *Sheehama v Minister of Safety and Security* 2011 (1) NR 294 said at [5]:

The 48-hour rule is therefore one of the most important reassuring avenues for the practical realization of the protection and promotion of the basic right to freedom of movement guaranteed to individuals by the Namibian Constitution. (per Parker J)

[19] The Namibian Supreme Court endorsed the above view in a subsequent case of *Minister of Safety And Security v Kabotana* (SA 35/2012) [2014] NASC 2 (26 March 2014). In that case the Court said at [31]:

...the 48-hour requirement must act as a flashing red light in the minds of the officers processing suspects for onward transmission to court. This is the vigilance with which we must guard this fundamental right to appear in court within 48 hours after being arrested unless it is not reasonably practical to do so. (per Shivute CJ with whom Mtambanengwe AJA and O'Regan AJA concurring)

[20] Recently, in *Kpedu v Attorney General* (J1/22/2016) [2019] GHASC 90 (18 December 2019) the Supreme Court of Ghana held that the 48-hour rule in Article 14(3) of their Constitution should be complied with on public holidays, weekends, periods of strike action or civil unrest, provided the safety of the judicial staff is not compromised. The Court identified the object of the 48-hour rule at pp17-18 as follows:

It is in this spirit that we have in our Constitution Article 14(3), which protects the right to personal liberty by requiring that even where such rights are curtailed by lawful means, the custodian is obliged to bring the arrested or detained person before a Court of law within 48 hours of arrest or detention, or release the person conditionally or unconditionally. This is clearly the intent and purpose of Article 14(3). (per Akuffo CJ)

[21] Both parties have made reference to a local case of *State v Dhamendra* [2016] FJHC 386; HAM58.2016 (10 May 2016) in their written submissions on the question of whether the courts have power to grant an order to detain a suspect in police custody for more than 48 hours without a charge. In that case, a magistrate had granted an ex-parte order to detain two adults and a juvenile for more than 48 hours for the police to carry out their investigations against the suspects. The High Court of its own motion reviewed that order and held that in the absence of any express statutory or constitutional power, the learned magistrate did not have jurisdiction to order detention of the suspects for more than 48 hours pending a charge. The learned High Court judge said at [42]-[43]:

[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.

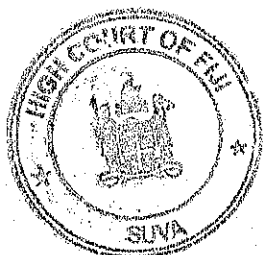
- [22] Counsel for the respondent submits that the above opinion of the learned judge could be taken to suggest that the High Court has power to order detention of suspects for more than 48 hours without a charge. Counsel for the State takes that submission further by submitting that since the first appearance for a person arrested without a warrant is in the Magistrates' Court, the reference to 'court' in section 13(1) (f) of the Constitution means the Magistrates' Court. While there is some force in this submission, section 13(1) f does not confer to either a magistrate or a judge an express power to order detention of suspects for more than 48 hours without a charge.
- [23] The case of *Dharemendra* has decided that there is no express statutory or constitutional power to detain a person for more than 48 hours without a charge, and therefore, the learned judge's opinion that such jurisdiction existed with the High Court only is strictly obiter as the Court was not required to consider the issue of the High Court having such power.
- [24] I note that Article 11(3) of the Namibian Constitution expressly provides a magistrate or a judicial officer with authority to detain a person in custody beyond 48 hours following an arrest. Other common law jurisdictions where the powers for detention of suspects in custody pending criminal investigations are governed by legislations also provide the courts with express legislative authority to extend the time limits that are set out in the legislations for detention periods.
- [25] Under the 1970 and the 1990 Constitutions, the courts had an express power to order a suspect to be detained in custody without a charge after he or she was brought before a court without undue delay. The power given was worded as save upon the order of a court. The framers of the 1997 and 2013 Constitutions removed that express power and placed a time limit on the detention of persons arrested or detained for criminal investigations. By removing the express authority of the courts, the framers have clearly intended not to give the courts power to order detention of a suspect beyond 48 hours without a charge. The 48 hours cap placed on detention of a person without a judicial

inquiry is designed to strike a reasonable balance between the individual's right to liberty and the need for the society to be protected from crime. That is the purpose and intent of the 48-hour rule.

[26] The constitutional protection accorded by section 13(1) (f) is plain and unambiguous. A person arrested or detained must be brought before a court as soon as reasonably possible, but in any case not later than 48 hours after the time of arrest. If the purpose of the 48 hours constitutional limit is to prevent the abuses and the excesses of a police state, then the courts function is to give effect to that purpose so that the right not to be detained without a charge for more than 48 hours can be fully realized. Any power having the capacity to undermine the 48-hour time limit needs a constitutional basis.

Result

[27] For these reasons the application is dismissed for want of jurisdiction.



A handwritten signature in black ink, appearing to be "DG", followed by a horizontal line.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused