IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CONSITUTIONAL REDRESS CASE NO: HBM 63/2020

IN THE MATTER of an application for Constitution Redress pursuant to Section 44 of the Constitution.

BETWEEN: **PENI TUILASELASE** - a serving prisoner of Maximum Correction Centre, Naboro

APPLICANT

A N D: **ISOA WAQABACA** – Ba Correction Centre, Ba

1st RESPONDENT

A N D: **LEKIMA BANUVE** – Emergency Control Unit, Nabua

2nd RESPONDENT

A N D: **THE COMISSIONER OF FIJI CORRECTIONS CENTRE** – FBEU Building, 62 Gordon Street, Suva

3rd RESPONDENT

A N D: **ATTORNEY GENERAL** – Suvavou House, Victoria Parade, Suva

4th RESPONDENT

Appearance : Applicant appeared in person
Ms. Geraldine Naigulevu with Mr. Yovin Naidu for the Respondents.

Hearing : Wednesday, 13th July, 2022 at 2.30 p.m.
Decision : Thursday, 01st September 2022 at 9.00am.

Decision

(A) INTRODUCTION

[1]. The applicant, a prisoner serving a term at Maximum Correction Centre at Naboro alleges that on 26.12.2019, he was verbally abused by the first

respondent and on 28.12.2019 around 7.00am, the first respondent assaulted him with fist and he was beaten with a hose pipe on his back by the second respondent, at the Naboro Correction Centre. He say that he fell down on the floor as a result of this unexpected attack and while he lay fallen the first respondent kept on punching his face and head whilst the second respondent started kicking his left ribs.

[2]. The applicant filed Form HCCR-1 the application for Constitutional Redress on 18.03.2020. He filed notice of motion on 18.05.2022. He relies on Article 44(3) of the constitution. The affidavit in support of the notice of motion was sworn on 30.05.2022. The applicant's notice of motion and the supporting affidavit was served on the respondent and on the Attorney General.

[3]. The application for constitutional redress was strongly opposed by the respondent and the Attorney General.

[4]. On 13.07.2022, the matter was taken up for hearing and the applicant and the counsel represented the Attorney General presented oral submissions.

(B) TIME BARRED

[5]. It was contended that the application for constitutional redress is time barred.

[6]. The alleged assault has taken place on 28.12.2019.

[7]. The High Court [Constitutional Redress] Rules, 2015, Rule 3(2) provides;

> *"An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a Judge finds there are exceptional circumstances and that it is just to hear the application outside of that period."*

[8]. As I can tell from the record, the application for constitutional redress was filed on 18.3.2020. The sixty (60) day expired on 27.2.2020 and therefore the application is made out of time.

[9]. Rule 3(2) of High Court Rules [Constitutional Redress] Rules 2015 allows the High Court to accept any application for constitutional redress outside 60 day time period, under exceptional circumstances.

[10]. It was argued by Counsel for the respondent that the affidavit in support of the application does not contain any exceptional circumstances. Counsel submitted that the applicant has failed to show cause and satisfy the Court that exceptional circumstances prevented him from filing within the prescribed time.

The first thing came to my mind is the Fiji Court of Appeal decision in **Pita Tokoniyaroi v Commissioner of Police**[1]

In "Pita" (supra), the Notice of Motion refers to an incident dated 19-11-2010 where the appellant was allegedly assaulted by the police. The Notice of Motion for constitutional redress was filed on 11-03-2016. The appellant stated that he made a complaint to Fiji Human Rights Commission on 21-11-2011 but provided no any other information. The Court of Appeal laid down that "it is the appellant who should satisfy Court that the circumstances prevented him from bringing this application within the time period of 60 days". The Court of Appeal held that the learned High Court Judge did not commit an error in dismissing the application on the ground that it is out of time.

[11]. With respect, I am unable to accept the submissions of counsel for the respondent. It is important to appreciate the distinction between those who are imprisoned and those who are not imprisoned because different considerations apply to those who are imprisoned. Those who are imprisoned are unable to attend the Court buildings for filing of documents. Those who are not imprisoned are able to attend the Court buildings for filing of documents. Persons who are in prison do not have this liberty. I fully agree with the applicant that some latitude should be extended to the applicant in the case before me because he applied in person whilst in prison with limited resources and limited knowledge of the law. In the context of the matter before me, I refer to **Koro v State**[2].

[12]. In **Koro v State** Justice Scutt sitting as a single judge in the Court of Appeal stated that *"the general approach of this Court has been to extend latitude up to three months, however, beyond that time an extension becomes more difficult and discretion becomes less likely to be exercised. In any event, reasons for extending time must be provided by an appellant or at least be evident from the material before the Court".*

[1] (2018) FJCA 235, ABU 30. 2017 (Judgment delivered on 30.11.2018)
[2] (2008) FJCA 17, AAU0028.2008 (14-05-2008).

In **Koro** the appellant had appealed from inside prison well over the time period including the 3 months latitude usually allowed by the Court of Appeal and Her Ladyship granted leave to appeal out of time and discussed the difficulties faced by the appellants inside prison as opposed to the appellants outside.

[13]. Her Ladyship said at paragraph 1.19:

> *"As explained in **Soloveni Tubuitamana v. The State,** by reason of imprisonment persons seeking to appeal against conviction and/or sentence by the Magistrates Court and/or High Court is disadvantaged relative to persons who are not imprisoned. Those who are not imprisoned who seek to appeal have access to the court system in ways persons who are imprisoned do not – whether by ability to freely purchase stamps and envelopes, attend at the General Post Office (GPO) or a local post office or mailing box, and send their petition through the mail system, or travel to the Court of Appeal Registry itself. If in the latter case the appellant arrives at the Magistrates Court Registry or the High Court Registry in error, she/he will be alerted to this and directed to the Court of Appeal Registry. If in the former – posting – the petition goes astray, the petitioner is not in as disadvantaged position in that she/he has not been reliant on the petition's travelling through the prison bureaucracy as well as the court bureaucracy or (sometimes) vagaries of the postal system. In any event, a person outside prison is able to send a petition by registered or certified mail, so will have a receipt showing the date of posting. If they have no receipt, they are still able to affirm to the Court that they posted the petition on a particular date. A prisoner is not able to so affirm – but can affirm as to when the petition began its journey through the prison system".*

[14]. In **"Pita's"** case (supra) the applicant was not imprisoned. The applicant was not a prison inmate. Therefore, he was able to attend court buildings for filing of documents.

[15]. **I cannot uphold the preliminary objection.** I find the fact that, by reason of imprisonment the applicant was disadvantaged and he did not have liberty to attend the court building for filing of documents relative to a person who was not imprisoned. Next, turning to the period of delay, in my view, a delay of 19

days is not long. The delay is excusable. I have no hesitation in reaching the conclusion that the disadvantaged position of the applicant is an exceptional circumstance and it is just to hear the application outside of 60 days period.

[C] ALTERNATIVE REMEDY

[16]. It was contended by the respondents, that the applicant has an alternative remedy.

[17]. For the sake of completeness, let me go on to consider whether adequate alternative remedy is available to the applicant. The applicant's constitutional redress application was filed pursuant to article 44(3) of the constitution.

Article 44(3) provides;

(3) The High Court has original jurisdiction-

(a) to hear and determine applications under subsection (1); and

(b) to determine questions that are referred to it under subsection (5), and may make such orders and give such directions as it considers appropriate.

[18]. It is pertinent to note Article 44(1) and 44(4) of the constitution;

(1) If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.

(4) The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.

[19]. Therefore, the Court has discretionary power to refuse relief under Article 44(4) of the constitution if an adequate alternative remedy was available.

[20]. In the present case, as far as the alleged assault is concerned, the applicant has following alternative remedies available to him.

(a) *Complain to police about assault and initiate criminal proceedings;* ***(Criminal Trial)***

(b) File writ in the High Court for damages for his injuries. ***(Civil litigation for tort)***

[21]. As far as the allegation that he was denied access to proper medical treatment is concerned, the applicant could have complained to the Visiting Justice or written to the Chief Magistrate instead of seeking constitutional redress. Under **Regulation 8 (1) of the Corrections Service Regulations 2011** the Visiting Justice amongst other things is required to hear and inquire into complaints by prisoners and ensure that any abuse which come to their knowledge are brought to notice of the Controller. **Regulation 8 (2)** contains powers of visiting justices. These empower a Visiting Justice to visit every cell, inspect and test the quality of food, inquire into complaint or request by a prisoner and even inquire into the state of prison buildings and report to Controller if there is need for repairs.

[22]. The applicant has an adequate alternative remedy. Therefore, the constitutional relief was premature and inappropriate and that the application was an abuse of process of the Court. It is for these reasons the application for constitutional redress is dismissed and relief refused.

[23]. **In the matter of an application for constitutional redress by Josefa Nata**[3], Singh J declared:

> *"...the Constitution provides that a Court may refuse to grant relief if adequate alternative remedy is available to the person concerned". The Redress Rules do not provide a parallel procedure to be invoked where alternative remedy is available. 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* – **Harrikissoon v. Attorney General – (1979) 3 WLR 62.**

[24]. The judgment of the Court of Appeal in **Abhay Kumar Singh v Director of Public Prosecution and Anor**, cited Lord Diplock in **Harrikissoon v A.G**[4] as follows:

[3] Civil Action no. HBM 35 OF 2005

[4] [1980]AC 265 at pg 268

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..., 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.

[25]. In **Abhay Kumar Singh v D.P.P. and the Attorney General** (supra) it was held:

"We note that the Privy Council has constantly laid down that where an adequate alternative remedy is available then constitutional redress will be refused. It has regarded an application for constitutional relief in these circumstances as an abuse of process and as being subversive of the Rules of Law which the constitution is designed to uphold and protect."

[26]. In **Aiyaz Ali v Attorney General**[5] (supra) Singh J. made the following observations:

"An isolated incident of assault is an offence under the Penal Code and may also be subject of damages in tort. To elevate these under the evocative banner of abuse of human rights is really an abuse of process. The redress Rules do not provide a parallel process where other remedies are available. To use the constitutional redress process as a substitute for normal procedure is to devalue the utility of this constitutional remedy. The applications under the Redress Rules are not a short cut or a system to by-pass existing mechanisms in law. Section 41 (of the then 1997 Constitution) is not an Aladin's cave which contains all the remedies for all the ills and the Redress Rules the magical words "open sesame, which are keys to those remedies".

[5] [2005] FJHC. HBM 0079 of 2004

[27]. The respondent denies assault allegation and put the applicant to strict proof. The alleged assault is a disputed question of fact which requires resolution in accordance with well-established common law procedure. An application for constitutional redress is not a suitable vehicle for the disposal of such issues. The proper forum is the criminal and civil trial. The Privy Council decision in **Thakur Prasad Jaroo v Attorney-General** [6] is also cited in **Abhay Kumar Singh,** (supra) and held;

> *"Their Lordship wish to emphasize that the originating motion procedure under Section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary Courts under the common law."*

ORDERS

[1]. Preliminary objections upheld.

[2]. The application for constitutional redress is refused.

HIGH COURT OF FIJI SUVA

Jude Nanayakkara
JUDGE

High Court - Suva
Thursday, 1st September, 2022.

[6] [2002] 5 LRC 258