IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBM 57 OF 2020

IN THE MATTER of a Constitution Redress application under section 44(1) of the Constitution of Fiji 2013.

BETWEEN	**LIVAI KAIVITI RATABUA**	**APPLICANT**
AND	**WAISEA TABUAVUA**	**1ST RESPONDENT**
AND	**MEDICAL ORDERLY**	**2ND RESPONDENT**
AND	**THE ATTORNEY GENERAL OF FIJI**	**3RD RESPONDENT**
BEFORE	Hon. Mr. Justice Mohamed Mackie	
APPEARANCES	Applicant in person Mr. J. Mainavolau, for the Respondents.	
DATE OF HEARING	18th September, 2023	
DATE OF JUDGMENT	2nd November, 2023	

RULING

1. The Applicant filed his form HCCR-1 Application on 26th October 2020, and subsequently filed his Notice of Motion on 16th February 2021 seeking for the Applicant to be heard for Constitutional Redress and/ or interpretation of the constitution that his rights under section 11(1) and 13(1)(j) of the Constitution have been breached by the First and Second Respondents, and for the following reliefs:

   i. *That a Declaration that the Applicant's right to be free from torture of any kind whether physical, mental or emotional and from cruel, inhumane degrading or disproportionately severe treatment or punishment has been breached by the First Respondent.*

   ii. *A Declaration that the Applicant's right to medical treatment was breached by the Second Respondent,*

   iii. *A Declaration that the Applicant has retain and is entitled to the rights in section 13 as provided in section 13(3) of the Constitution.*

2. The Applicant in support of the notice of motion has sworn and filed his affidavit on 6th June 2022. The Applicant's notice of motion and the supporting affidavit were served on the Respondents and on the Attorney General.

3. The Attorney General on 27th November 2020 filed an Affidavit in response sworn by one **Kolaia Nabaro** (the Superintendent of Corrections. Thereafter, on 9th April 2021 filed a Supplementary affidavit sworn by one **Waisea Tabuarua**, and finally on 1st August 2022 filed an Affidavit in response sworn by one **Apolosa Veve**. The Applicant filed his Affidavit in reply on 6th September 2022.

4. As per the Affidavits by the Respondents, the Applicant being a prisoner serving his term at Medium Correction Centre, was on Sunday 18th October 2020 transferred to Lautoka (Natabua) Correction Centre, in order to be produced at High Court Lautoka on Tuesday 20th October 2020.

5. Officers at Lautoka correction Centre on Monday 19th October 2020 conducted a snap search operation, including strip search of the inmates, at the Block 2 -A wherein he was held awaiting his production in Court on the next day 20th October 2020, as the contrabands were suspected to be hidden in the accommodation and in the body.

6. During the search operation, the Applicant with the other inmates were individually called into the Bathroom and were stripped searched out of the sight of other inmates. When the Applicant was called for his turn, he hurriedly went into the Bathroom and pulled down his pants and squatted before he was instructed on the procedures.

7. When the relevant officers instructed him to stop and first listen to the procedures of strip search, the Applicant swore at the COC Tabuarua (the Officer) saying *"magaitininamu"* which means "your mother's vagina" in Itaukei, on which the Officer Patted the Applicant's cheek telling him not to swear.

8. The Applicant immediately rushed out of the Bathroom towards the officer in charge of the command of the Lautoka Correction Centre and complained that he was punched by the search officer.

9. The Applicant's version of events, as per his Affidavit in support, is that during the snap search on 19th October 2020, he was ordered to remove his clothing and having done so he squatted 3 times in front of the Correction Officer Tabuarua inside the Bathroom. That, after squatting for 3 times, as he was ordered to continue squatting naked, he told that he had already squatted 3 times, on which the Officer Tabuarua swore at him saying "*Sona Levu*" which means "a big ass hole" and punched on his right eye nose and face 3 times causing to bleed.

10. That when he requested to call the Medical Orderly, the COC refused, and thereafter when he was produced before the High court judge Hon. Maraias, on 20th October 2020, he complained to the judge, who ordered him to be taken to the Hospital for the examination and treatment. Though, he was finally taken to the Lautoka Hospital by his escorting officer

for an X- Ray, he was not subsequently taken back to the Doctor to show the result of the X-Ray. Further, his request for him to be taken to the Police station to make a complaint was refused.

11. The Application for constitutional redress is strongly opposed by the Respondents and the Attorney General.

12. On 19th September 2023, the matter was taken up for hearing, the Applicant and the counsel for the Respondents presented oral submissions.

ALTERNATIVE REMEDY

13. It was contended on behalf of the first and the second Respondents that the Applicant has an alternative remedy.

14. At this juncture, I must consider whether an adequate alternative remedy was / is available to the Applicant. The Applicant's constitutional redress Application was filed pursuant to article 44(1) of the constitution.

> Article 44(3) of the Constitution 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.*

15. It is pertinent to note Article 44(1) and 44(4) of the constitution state as follows;

> *(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.*

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

17. In the present case, as far as the alleged assault is concerned, the Applicant has had the 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)

18. As far as the allegation that he was punched on his face to bleed and 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 order what is needed to be done.

19. The Applicant has an adequate alternative remedy. Therefore, the constitutional relief was premature and inappropriate and that the Application is an abuse of process of the Court. It is for these reasons the Application for constitutional redress is dismissed and relief has to be refused.

20. In the matter of an Application for constitutional redress by **Josefa Nata Civil Action no. HBM 35 OF 2005** 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.*

21. 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:

> *"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.*

22. In ***Abhay Kumar Singh v D.P.P. and the Attorney Genera***l (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."*

23. 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".

24. The Respondents deny the allegation of punching 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]. The Application for constitutional redress fails.
[2]. The Application for constitutional redress is dismissed.

HIGH COURT OF FIJI
LAUTOKA

A.M. Mohamed Mackie
Judge

At the High Court of Lautoka on this 2nd day of November, 2023.

SOLICITORS:
The Applicant appeared in person.
For the Respondent: Attorney General's Office