

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**HBM 086 of 2021**

**BETWEEN** : **KELEPI SALAUCA**  
**Applicant**

**AND** : **CHIEF REGISTRAR**  
**First Respondent**

**HON. JUSTICE PREMATILAKA**  
**Second Respondent**

**SENIOR COURT CLERK, FIJI COURT OF APPEAL**  
**Third Respondent**

**SENIOR COURT CLERK, HIGH COURT REGISTRY**  
**Fourth Respondent**

**ATTORNEY-GENERAL OF FIJI**  
**Fifth Respondent**

**HUMAN RIGHTS COMMISSION**  
**Amicus Curiae**

**Counsel** : **Applicant in Person**  
**Ms A Harikishan for 1<sup>st</sup> and 5<sup>th</sup> Respondents**  
**Mr P Sharma for Human Rights Commission**

**Hearing** : **12 March & 19 April 2024**

**Judgment** : **12 July 2024**

## **JUDGMENT**

### **(Summons to Strike Out Applicant's Claim)**

- [1] Mr Kelepi Salauca has filed proceedings seeking constitutional redress under s 44 of the Constitution of Fiji 2013.
- [2] Mr Salauca was found guilty in the High Court of aggravated robbery. He appealed from the conviction and sentence to the Court of Appeal.<sup>1</sup> He seeks orders in the present proceeding that he has had his constitutional rights infringed in respect to the criminal proceeding. He claims that he has been denied access to a copy of the audio recording of the High Court trial as well as denied access to legal representation from the Legal Aid Commission in the Court of Appeal.

#### **Background**

- [3] In the early hours of 11 October 2015, Mr Kavitesh Prasad and his pregnant wife were sound asleep in their bed. They were awoken by the terrifying sound of three persons breaking into their home. Mr and Mrs Prasad subsequently suffered a horrendous ordeal, being interrogated, threatened and physically manhandled. The offenders demanded to know the whereabouts of the couple's valuables. Following this terrible experience, the three offenders fled the house with the couple's vehicle and their personal belongings which included jewellery, phones, credit cards, clothes, alcohol and cash.
- [4] Three persons were later charged with aggravated robbery. Mr Salauca was one of the three persons. He was found in possession of Mr Prasad's belongings. Following a defended hearing, during which Mr Salauca exercised his right to give evidence as well as call two witnesses, he and his two co-accused's were found guilty and convicted. On 10 July 2018, Mr Salauca was sentenced to imprisonment for 10 years 11 months and 7 days with a non-parole period of 9 years.
- [5] On 30 July 2018, Mr Salauca filed an application for leave to appeal to the Court of Appeal against conviction and sentence.

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<sup>1</sup> The proceeding is now in the Supreme Court.

- [6] Pursuant to s 21 of the Court of Appeal Act a person convicted before the High Court may appeal against his conviction on any ground of appeal which involves a question of law but requires leave of the Court of Appeal where the appeal against his conviction involves only a question of fact or a mixed question of fact and law. It appears that Mr Salauca also exercised his right to file an appeal (without leave) against conviction on 30 May 2019.
- [7] The application for leave was heard before a single judge and a ruling delivered on 20 April 2020. The Court of Appeal declined leave on the basis that there was no reasonable prospect of Mr Salauca succeeding with his appeal.
- [8] Following the Court of Appeal's decision in April 2020, Mr Salauca applied for legal assistance from the Legal Aid Commission (LAC) with respect to his appeal to the Full Court of Appeal. The application to LAC was made in August 2020 and it appears to have been granted on 2 September 2020, but on 14 December 2020 LAC wrote to Mr Salauca to advise that his application was unsuccessful.
- [9] Mr Salauca subsequently wrote to the Solicitor-General seeking to challenge LAC's decision. Mr Salauca was advised by the Solicitor-General's office that he needed to write to LAC if he wished to challenge their decision. Mr Salauca did so, writing to LAC on 21 March 2021.
- [10] Over this same period Mr Salauca was in communication with the Court of Appeal Registry seeking a copy of the audio recording of the trial in the High Court. The Registry wrote to LAC on 12 April 2021 to advise:

*The Honourable Mr Justice Prematilaka has directed as follows:*

- i. *The appellant namely Kelepi Salauca is entitled to be present, if he desires it) on the hearing of his appeal by the full court.*
- ii. *The court is requesting Mr Fesaitu of LAC to attend to the following:*
  - a. *Appellants seems to doubt the sound recording of what transpired in court, during trial, hence, His Lordship has*

*directed our registry to consult your good self who is looking after the appellants to resolve this issue by verifying the correctness of the transcripts*

### **Present proceeding**

- [11] Whilst Mr Salauca's appeal was still pending in the Court of Appeal he filed the present application for constitutional redress. It was filed in October 2021, supported by his affidavit. Mr Salauca identified two concerns, both related to the criminal proceedings in the Court of Appeal. The concerns were:
- i. Mr Salauca believes that the transcript of the audio recording of the High Court trial is not accurate. By way of relief, he seeks a copy of the audio recording. He relies on s 14(2)(k) & (m) and s 15(1) of the Constitution.
  - ii. Ms Salauca complains that he did not have access to legal representation from the Legal Aid Commission to assist him with his appeal in the Court of Appeal and argues that this was a breach of his right to representation under s 14(2)(d) of the Constitution.
- [12] The Second, Third and Fourth Respondents have taken no part in these proceedings. Their position is that they should not have been joined. I agree. The First and Fifth Respondents are represented by the Attorney-General's Chambers. The Human Rights Commission is also involved as Amicus Curiae.
- [13] A Summons to strike out Mr Salauca's claim was filed by the First and the Fifth Respondents on 23 December 2022. The basis for the application is that there is no reasonable cause of action advanced by Mr Salauca.
- [14] While the present application has been on foot, Mr Salauca's appeal in the Court of Appeal has been determined. The appeal was heard in May 2023 and a decision issued by the Court of Appeal on 6 June 2023. The Court of Appeal considered each of the twelve grounds advanced by Mr Salauca, including a complaint that the transcript and audio record of the High Court trial was inaccurate and incomplete. The Court of Appeal dismissed each of Mr Salauca's grounds.

[15] Mr Salauca advised at the hearing before me on 12 March 2024 that he has filed an application for leave to appeal to the Supreme Court from the Court of Appeal's decision and will, again, be pursuing the question about the audio recording.

### **Arguments by the Parties**

[16] Ms Harikishan submitted:

- i. With respect to the audio recording it was pointed out that Mr Salauca has received what he seeks by way of relief (being a copy of the audio recording) and, therefore, continuing to pursue the issue here is an abuse of process.
- ii. Notwithstanding, the determination by the Court of Appeal on 6 June 2023 answers Mr Salauca's complaint. Progressing this proceeding any further is both futile and a waste of precious judicial resources.
- iii. There is an adequate alternative avenue available for Mr Salauca. The criminal proceedings is the proper forum to determine the audio recording issue. With respect to the issue of representation, he can raise this with a visiting judge or magistrate during one of their regular prison visits.

[17] Mr Sharma, for the Human Rights Commission, pointed out that there were provisions in the Court of Appeal Act for the furnishing of material from the trial court. The Court of Appeal also has power to recommend that Legal Aid be granted and to assign counsel where the court considers this to be desirable and in the interests of justice and where the party does not have the financial means to fund their own representation. Mr Sharma was baffled by the decision of the Legal Aid Commission to decline to represent Mr Salauca in his appeal before the Court of Appeal.

[18] At the conclusion of the hearing on 12 March 2024, I directed the parties to file further submissions on the following two matters:

- i. Identifying the legislation that sets out the procedure for the Legal Aid Commission where it makes a decision on legal representation.

- ii. Whether the Legal Aid Commission's decision to decline representation of Mr Salauca is a matter properly within the scope of Constitutional Redress.

[19] I have since received further written submissions from the First and Fifth Respondents and the Human Rights Commission.<sup>2</sup> Mr Salauca produced his additional written submissions in court on 19 April 2024. LAC also attended on 19 April to explain what had happened with Mr Salauca's application for legal aid assistance in 2020. LAC produced a letter dated 26 July 2022 wherein LAC informed Mr Salauca of the outcome of his appeal from LAC's decision of 14 December 2020.<sup>3</sup> LAC also provided its physical file for the Court's perusal. Mr Salauca confirmed to me that he consents to the court perusing the physical file.

### **Decision**

[20] An applicant who believes that their rights under Chapter 2 of the Constitution have, or are likely to be, contravened may apply to the High Court under s 44 of the Constitution for redress. Section 44(2) provides:

*The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.*

[21] Subsection (4) further provides:

*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.*

[22] In *Radrodro v The Chief Registrar* [2024] FJHC 229 (12 April 2024) Ameratunga J considered an application for constitutional redress by a prisoner who was raising the same issues in his constitutional redress claim that he was raising in a separate criminal appeal from his conviction. Ameratunga J stated:

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<sup>2</sup> The First and Fifth Respondent's Supplementary Submissions are dated 19 March 2024. The Human Rights Commission's Supplementary Submissions are dated 26 March 2024.

<sup>3</sup> Mr Salauca informed the court that he had not previously received this letter.

[28] ... it can be deduced that for determination of abuse of process public policy and interest of justice are material. Section 44(2) of the Constitution must be read along with Section 44(4) of the Constitution. Section 44(2) allows a party to seek CR 'without prejudice to any other action with respect to same matter..'. At the same time discretion is granted to the court to restrict CR in terms of Section 44(4) when there is 'adequate alternate remedy is available'. There should be a balance between the said provisions but these provisions were not meant to allow parallel litigations to create confusion on settled law. Public policy and interest of justice guides the use of discretion of the court in the exercise of powers under Section 44(4) of the Constitution.

[29] So Plaintiff must show that the alternate remedy by way of an appeal against the conviction is not adequate. This is an uphill task as the appeal process against conviction is comprehensive as to procedure and the law including and not limited to the allegation of denial of Fair Trial enshrined in Section 15(1) of the Constitution.

[23] Mr. Salauca seeks the following declarations:

- i. That he has been denied access to the audio recordings of his criminal trial in breach of s 14(2)(c),(e),(k) and (m) of the Constitution.
- ii. That he has been denied legal representation in breach of s 14(2)(d) of the Constitution.

[24] Mr Salauca seeks orders that the Chief Registrar provide the said audio recording and that Mr Salauca receive legal representation for his appeal in the Court of Appeal.

#### **Right to audio recording of trial**

[25] Pursuant to s 14(2)(m) of the Constitution, every person charged with an offence has a right to a copy of the record of proceedings within a reasonable period of time and on payment of a reasonably prescribed fee.

[26] Mr. Salauca has been provided with a copy of the audio recording. Nevertheless, he complains that the recording is inaccurate and incomplete.

[27] In my view, Mr. Salauca has an adequate alternative remedy available in respect to his appeal from the conviction and sentence in the High Court. He has exercised that right and advanced the issue of his access to an accurate/complete copy of the recording. Significantly, the Court of Appeal has addressed Mr Salauca's complaint on the matter. The Court of Appeal stated in its decision of 6 June 2023:

[40] Ground 8

*“That the court record provided by the Registry claimed to be transcript is inadequate, most of the questions and answers are incomplete, inconsistent and insufficient record of what transpired during the trial, thus will affect the fairness assessment of the Appellant’s main complain issue about arguments of evidence he has been ambushed with during the trial”*

*This ground is to connected to ground 9. The appellant states that having heard the recordings and the transcripts of the proceedings they are inadequate, while the person who prepared the recording has manipulated the recording to the appellant’s detriment. He indicated the next step to take should his appeal fail. Paragraph [8.3] of his submission on this ground states:*

*“Therefore, on this ground, I wish to respectfully submit in this Court that I wish to reserve the ground for Supreme Court determination if this appeal will not in my favor in the full Court hearing”*

*While this issue will be drawn to the notice of the Office of the Chief Registrar given its nature, it is observed that the other co-appellant who could have raised this issue -(Tui Lesi Bula AAU 0077 of 2018) had, for some reason not done so. I venture to observe on this point that criminal trials are held in open court and to assert something sinister against those who keep and maintain records of criminal proceedings is a serious matter. This court will decide on the record*



available to it from the Records of the High Court of Fiji. The appellant has not assisted this court by not divulging in detail what evidence he had in relation to the allegation of manipulation of the record in the form of tapes and transcripts if he were serious about the allegations. This ground is dismissed; On the totality of the evidence no miscarriage of justice occurred. This ground is unarguable.

[41] **Ground 9**

*“That if the court record provided by the court registry claimed to be judges Note (copy) is the true record of what the Trial judge noted during trial then, it affected the decision to find Appellant guilty. Because of inadequate, incomplete and insufficient record in the Judges Note (some questions and answers are incomplete, inconsistent and inadequate, which resulted in grave substantial miscarriage of justice.)”*

*The appellant had not been specific on what he claimed to be inadequate, incomplete and insufficient that affected the unanimous verdict of the assessors. He was at the trial and at liberty to participate fully. According to the record he was assisted by the trial judge earlier on in the trial in the preparation stage of his case. It is submitted by the prosecution and also my understanding that the Judges Notes are a summation of the adduced evidence and need not be verbatim. The appellant had indicated his intention to reserve this ground for the Supreme Court should his appeal fail. The appellant had submitted that grounds 8 and 9 be dealt with after an inspection is carried out. This court is concerned to make a determination on the evidence at the trial and any other evidence lawfully before it. It cannot speculate on what is not before it. This court has dealt with the other grounds of appeal on the basis of the Record of the High Court of Fiji and evidence. On the totality of the evidence this ground is dismissed. No miscarriage of justice occurred. The ground is unarguable.*

[28] The criminal proceeding is now in the Supreme Court. I am satisfied, pursuant to s 44(4) of the Constitution, that his appeal is an adequate alternative remedy. Indeed, I would go further. It is inappropriate for this Court to make any findings or orders on a matter that is live before the Supreme Court.

### **Right to legal representation by Legal Aid Commission**

[29] Pursuant to s 14(2)(d) of the Constitution a person charged with an offence has a right, where '*the interests of justice so require*', to the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission. The right to representation by the Legal Aid Commission is not unfettered.

[30] The obligations on the Legal Aid Commission with respect to representation are prescribed under the Legal Aid Act 1996. Sections 8 and 9 prescribe the circumstances where legal aid assistance is available and sets out a merit test based on a person's reasonable prospects of success in the litigation. LAC must make a decision on an application for assistance and, pursuant to s 14, any decision is subject to a review which must be exercised by the applicant within three months of the decision. The review is determined by the Commission, or a Review Committee set up by the Commission which must confirm, vary, or set aside the original decision by LAC. If it is set aside, the Review Committee must if requested substitute its own decision for the original decision. Pursuant to s 14(8), the Review Committee must provide a written statement of the reasons for its decision to the person affected. Pursuant to s 16(2), the Review Committee's decision is final.

[31] The material timeline is as follows:

- 15 June 2018: Mr Salauca and two others found guilty of aggravated robbery.
- 10 July 2018: Mr Salauca is sentenced by the High Court to imprisonment for 10 years 11 months and 7 days.
- 30 July 2018: Mr Salauca files an application for leave to appeal to Court of Appeal against conviction and sentence.

- 30 May 2019: Mr Salauca files an appeal against conviction to Court of Appeal.
- 20 April 2020: Single Judge of the Court of Appeal issues a decision refusing leave to appeal against conviction (Mr Salauca abandoned his application for leave to appeal against sentence).
- 8 May 2020: Mr Salauca files application for leave to adduce fresh evidence with respect to his pending appeal in the Court of Appeal.
- 31 August 2020: Mr Salauca completes an application form for assistance from LAC.
- 2 September 2020: LAC writes to Mr Salauca to advise him that his application is granted.
- 15 October 2020: The Court of Appeal revokes Mr Salauca's entitlement to be present in court due to misconduct.
- 8 December 2020: LAC internally considers the merits of Mr Salauca's appeal to the Court of Appeal. An internal decision is made to refuse Mr Salauca's application for representation.
- 14 December 2020: LAC writes to Mr Salauca to advise that his application for assistance is unsuccessful. The letter reads:

*2. After a careful consideration of the application together with the information and documents provided, I regret to inform you that your application seeking representation has been unsuccessful.<sup>4</sup>*

*3. You are entitled to appeal this decision to the Commission, in writing within three months of the date herein.*

- December 2020: Mr Salauca writes to the Solicitor-General seeking to appeal LAC's decision of 14 December.

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<sup>4</sup> It is difficult to reconcile this advice with LAC's letter of 2 September 2020 granting his application.

- March 2021: Solicitor General informs Mr Salauca that he should send his appeal to LAC.
- 21 March 2021: Mr Salauca writes to LAC seeking to appeal its decision of 14 December 2020.
- 26 July 2022: LAC writes to Mr Salauca to advise that the Review Committee has reviewed his appeal and that he is unsuccessful. No reasons were offered for the Review Committee's decision. It appears that LAC's letter was emailed to Corrections on 27 July 2022 with a request for the letter to be handed to Mr Salauca.<sup>5</sup>

[32] In August 2020, Mr Salauca applied to LAC for legal assistance with his appeal in the Court of Appeal. On 14 December 2020, LAC issued a decision advising Mr Salauca that his application for assistance was declined. There were, to my mind, two obvious problems with LAC's decision letter. Firstly, LAC had determined three months earlier, on 2 September 2020, that it had, in fact, granted Mr Salauca's application. Secondly, no reasons were provided by LAC for its decision to effectively revoke its grant of assistance to Mr Salauca.

[33] Mr Salauca exercised his right of appeal, albeit a little late as he had sent his initial appeal to the Solicitor-General. LAC does not appear to have taken issue with the lateness as its Review Committee proceeded to consider the appeal determining that the appeal should fail. Advice of this was conveyed to Mr Salauca by LAC in its letter of 22 July 2022. Leaving aside whether the letter was handed to Mr Salauca by Corrections in July 2022 (Mr Salauca says he did not receive the letter) there is no question that the decision by the Review Committee is in breach of s 14 of the Legal Aid Act. Mr Salauca was entitled to make written submissions in support of his appeal as well as entitled to request a statement of the reasons for the decision by the Review Committee. Mr Salauca was not afforded any opportunity to make written submissions. No reasons were contained in LAC's letter for its decision on 22 July 2022 and nor did LAC inform Mr Salauca that he could request the reasons for the Review Committee's decision. In all, a poor performance by LAC of its statutory duties under the Legal Aid Act.

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<sup>5</sup> A copy of the email was supplied to this Court by LAC on 19 April 2024.

[34] Mr Salauca has now lost his opportunity for representation from LAC for his appeal in the Court of Appeal. The Court of Appeal issued its decision on 6 June 2023 dismissing the appeal. The matter is no longer in the Court of Appeal, but instead in the Supreme Court.

[35] That said, Mr Salauca's application for constitutional redress cannot succeed. The reasons are these:

- i. Mr Salauca does not have an unfettered right to representation from LAC. LAC cannot provide representation for all persons in Fiji who seek its assistance. It has a finite resource which it must manage responsibly and in accordance with its statutory obligations under the Legal Aid Act.
- ii. Mr Salauca has an adequate alternative remedy in the form of his appeal from LAC's decision to decline to provide assistance. He has exercised that right and has received a decision by the Review Committee. In line with the Legal Aid Act, this decision is final. I would think that recourse, if any, from the Review Committee's decision is by way of an application for leave to apply for Judicial Review and not constitutional redress. As Nanayakkara J stated in *Sharma v Legal Aid Commission* [2018] FJHC 301 (20 April 2018):

*I consider that “judicial review” is an adequate alternative remedy for the applicant. The applicant can apply for judicial review of the Legal Aid Commission's decision. It is an administrative action performed by the Legal Aid Commission in the exercise of functions vested in them by the Legal Aid Act, 1996. I cannot shut my eyes to the fact that the value of the constitutional remedy will be diminished if it is used as a general substitute for normal judicial review procedures. The right to apply to the High Court under Section 44(1) of the Constitution for redress when any constitutional right or human right is likely to be contravened, is an important safeguard of those rights; 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 over administrative actions.*

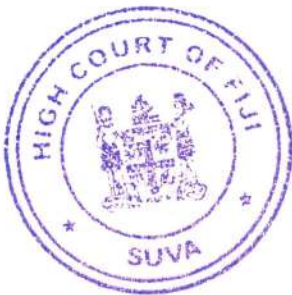
*I regard that an application for constitutional redress in these circumstances as an abuse of process of the Court.*

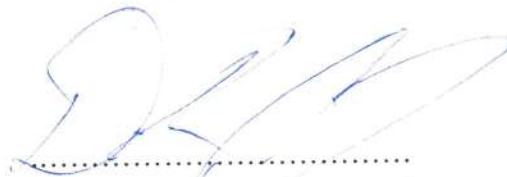
[36] Finally, in light of the fact that the appeal before the Court of Appeal has concluded, the appropriate course, if it has not happened already, is for Mr Salauca to make a fresh application to LAC for legal assistance for his appeal in the Supreme Court.

### **Orders**

[37] For the reasons provided, the following orders are made:

- i. Mr Salauca's application for constitutional redress is struck out.
- ii. There is no order as to costs.



  
D. K. L. Tuiqereqere  
JUDGE

### **Solicitors:**

Office of Attorney-General's Chambers for the 1<sup>st</sup> & 5<sup>th</sup> Respondent

Office of Human Rights and Anti-Discrimination Commission for Amicus Curiae