

**IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA**

Miscellaneous Case No: 02 – 2019

Re: Application for the Involuntary Committal of JITENDRA KUMAR

For The Applicant : IP Lenaitasi S. [Police Prosecution]
For The Respondent : In Person
Hearing : 28th May 2019
Date of Decision : 31st May 2019

DECISION

BACKGROUND

1. There is an application before me by way of a notice of motion seeking that the Respondent Jitendra Kumar aged around 47 years old, be sent for psychiatric evaluation.
2. The application is supported by the sworn affidavit of a police officer namely Police Constable [PC] 5272 Asish Chandra of the Tavua police station.
3. The application was filed and called before me on the same day, that is, on Tuesday the 28th of May 2019 and I heard the application the same day.
4. The defendant was produced under police custody, being in custody for 5 days.
5. I had a conversation with the Respondent in court and he said that he is taking his medication, he lives with his father at Tavua and his brother is at Lautoka. He said that his daughter is working and is staying somewhere else and their relationship is good. He says that he ate breakfast and his level of education is up to form 4.
6. The Respondent said that he has received the application or Notice of Motion and the affidavit. In response, he says that he wants to go home.

7. Also present in court was Dr. Vishneel Goundar. I took unsworn evidence from him too. He is based at the Tavua hospital. He has received training by the ministry in relation to mental health. His report is annexed to the affidavit of PC Chandra.
8. Amongst other things, Dr. Goundar relates that the Respondent is a known patient and is under review with the Tavua Hospital. The Respondent has been diagnosed with paranoid schizophrenia and hypertension. The respondent was last reviewed on the 27th of May 2019 after he was brought into the hospital by police. The Respondent appeared well kempt, oriented to time and place but was exhibiting defensive behaviour during the examination. Dr. Goundar found him normal though. The Respondent's father was interviewed too who related that the Respondent was being aggressive and violent at home. Dr. Goundar recommends that the Respondent be taken to St. Giles for further evaluation and assessment. Dr. Goundar suggests that more senior personnel may be able to assess the Respondent better.
9. The Respondent did not have any question for Dr. Goundar but said that he wanted to be released.
10. My observation of the defendant at the hearing seem to be consistent to what Dr. Goundar had observed when he interviewed the Respondent earlier. I found the Respondent to be responsive and normal.
11. PC Chandra in his affidavit states that the Respondent was sentenced on the 26th of June 2017 by the Magistrates' Court at Tavua with a bound over order in the sum of \$100 to keep the peace. It was for an offence of theft.
12. Also referred to in the affidavit is that on the 17th of October 2017, the Respondent was again sentenced with a bound over order and a domestic violence restraining order was imposed on the Respondent. This time, the charge was for assault occasioning actual bodily harm.
13. Also in the affidavit, but this time on the 10th of September 2018, the Respondent was sentenced to 4 months imprisonment but which was suspended for 2 years. A domestic violence restraining order was imposed on the Respondent. This was for another case of assault occasioning actual bodily harm.
14. This last case of assault occasioning actual bodily harm, I am familiar with as I passed the sentence on the Respondent. I have taken judicial notice of that case. The sentence is for Tavua Criminal File [CF] number 260 – 17. In that case, I found that the Respondent was fit to take his plea and that he was not mentally impaired at the time he committed the offence. The victim is his 76 year old father. The Respondent punched his father on the back after his father asked him to keep the noise down as the Respondent was singing and shouting early in the morning. His father did not receive any visible injury but felt pain as a result of being punched. The Respondent

was in remand for a few months prior to being sentenced and the primary reason for him being in remand was that he was committed for psychiatric evaluation and that was pursuant to the **Criminal Procedure Act 2009**.

15. In the affidavit of PC Chandra, the police statement of the Respondent's father is exhibited. The police statement asserts fresh accounts of violence by the Respondent as recently as the 23rd of May 2019. The father in his statement recounts that the defendant after drinking grog, took the father's wallet containing \$280, tied the father's legs and hands with a rope. The respondent told the father that if the father doesn't listen to the Respondent, he will get beaten. The father wants police assistance and for 'my son Jitendra to be treated and sent home when he is normal.'
16. The defendant has not been charged with any offence for this recent allegation.
17. I reserved any decision from Tuesday 28th May 2019 and said that I will give my decision today that is Friday the 30th May 2019.
18. The Respondent was further detained in police custody in the meantime.
19. I am informed by Dr. Goundar that the facilities at Tavua Hospital may not be suited to keep a patient from escaping if any detention is made there as for example, the windows are not barred or secured.
20. Priority has been given to ensure an early return date to the Respondent for my determination of the application as the Respondent is in police custody and has been in police custody which by now will be for a week.
21. I am fully aware that being in police custody may not be comfortable or convenient to the Respondent or any other person for that matter especially if it is over a course of 7 days but the options in this Division is limited and the practicalities must be weighed together with the safety of the community and balancing that with the rights of the Respondent.

ANALYSIS

22. A person must not be deprived of personal liberty. Personal liberty can be restrained or denied if for example the person is reasonably suspected of committing an offence or if it is for the purpose of the person's care or treatment or for the protection of the community if he or she is, or is reasonably suspected to be of unsound mind [section 9 (1) (e) and (h) of the **2013 Constitution**].

23. The **Convention on the Rights of Persons with Disabilities** [CRPD] and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters.
24. Fiji ratified the convention on the 7th of June 2017.
25. Disability is not specifically defined in article 2 of the convention. However, a wide interpretation could mean any physical or mental challenge or a combination of both which inhibits the enjoyment or exercise by the person of human rights on an equal footing with others [**Concise Oxford English Dictionary**, 12th edition at page 407].
26. Article 14 of the convention requires state parties to ensure that persons with disabilities enjoy the right to liberty and security and are not to be unlawfully and arbitrarily deprived of these rights but if done, it is to be in conformity with the law. In addition, that a person should not be discriminated solely on having such disability.
27. The **Mental Health Act 2010** is in force and it repeals the **Mental Treatment Act Cap 113**.
28. There are several objectives of the Act and one of them is to provide for the care, treatment, management, rehabilitation and protection of people with mental illness and mental disorders [section 5 (a)].
29. The police, the court, health care professionals are some of the bodies or persons who have responsibilities under the Act and amongst other things should as far as is practicable and subject to available resources, ensure that persons with a mental disorder or mental illness receive the best available care, support and, if required, treatment and protection, even work towards lessening the adverse effects of mental disorder on persons with a mental disorder, their families and their communities [section 6 (1) (a) and (d)].
30. I have not found any precedence locally that addresses the same or similar issues as raised in the case of the Respondent Mr Jitendra Kumar.
31. One example of the objectives and responsibilities being observed or applied was in the case of **Kaur v Nand** [2017] FJHC 594; HBC104.2011 (31 July 2017) a civil case in the High Court. The parties consented to have the Plaintiff son's appointed as the next of friend or guardian ad litem and the son was appointed to manage the affairs of the Plaintiff. The appointment was done pursuant to Order 80 rule 1 of the High Court rules and section 108 of the **Mental Health Act 2010** which relates to the management of the estate and affairs of persons with mental disorders.
32. Generally under the **Mental Health Act 2010**, there are two ways in which a person can be treated or assessed or committed.

33. It can be done voluntarily or involuntarily.
34. Although not expressly outlined in the application but having heard from the parties and the concerns raised, the case before me seeks that the Respondent be involuntarily committed.
35. A person can be detained for assessment in a mental health facility for example, on a recommendation given by a medical practitioner, on the order of a Magistrate or Judge or on the action of a police officer [section 23 of the **Mental Health Act 2010**] .
36. There are qualifiers obviously before any of the persons or entities mentioned above can detain a person.
37. For police, section 25 of the Act lays out the circumstances under which they can unilaterally detain a person with the objective of having that person taken for examination to a mental health facility. There are provisions for an officer to arrest without a warrant if for example, the officer reasonably suspects that the person is a danger to himself or herself or to any other person or will suffer some physical or sexual harm if not taken to a mental health facility and that the person refuses to accompany the officer to the mental health facility.
38. Further on, section 27 of the Act stipulates that a person may be taken to and detained in a mental health facility in accordance with an order made by a court on the recommendation of a medical practitioner under the **Criminal Procedure Act 2009** and **Crimes Act 2009**.
39. The **Criminal Procedure Act** and **Crimes Act** has provisions for the detention of a person for an assessment and or treatment when there is a complaint or criminal charge filed or criminal charge pending determination by the Court. There can be a committal even after determination of the charge if for instance the defendant is found not guilty by reason of insanity. See for example section 56, 104 to 109 of the **Criminal Procedure Act 2009** and section 25 of the **Crimes Act 2009**. The key to utilising the provisions under the **Criminal Procedure Act** or **Crimes Act** is that a criminal complaint or charge must be filed or pending determination.
40. The case of **Kaisau v State** [2015] FJHC 712; HAM071.2014S and 101.2015S (2 October 2015) is one such case where a complaint was laid and the defendant was tried and found not guilty by reason of insanity to two murder counts. He was committed by the trial judge to the St. Giles Hospital indefinitely. He was treated and cared for under the **Mental Treatment Act Cap 113** and then later under the **Mental Health Act 2010** when the latter came into force.

41. There is no provision under the **Criminal Procedure Act** or the **Crimes Act** for when there is no complaint or criminal charge pending or filed which is the situation here in the case of the Respondent Mr. Jitendra Kumar.
42. As stated already, the Respondent Mr Jitendra Kumar has not been charged with any offence relating to the recent allegation of violence towards his father.
43. If there is an involuntary detention at a mental health facility, it is mandatory that an assessment must be commenced within 24 hours unless the person is released. Also, there must be a decision made within 72 hours or within 3 days from the time the person is detained at the mental health facility about whether the person should be released, should undergo involuntary inpatient treatment, community treatment or if the person consents to voluntary treatment [section 31 of the **Mental Health Act 2010**].
44. There is a criteria for the involuntary assessment of a person either at a mental health facility or at the person's place of residence or at some other suitable place.

The criteria involves:

- a. The person appears to have a mental disorder;
- b. The person appears unwilling or unable to be assessed on a voluntary basis; and
- c. The person appears to require care, support and treatment –
 - i. For the protection of the safety, health and welfare of the person; or
 - ii. To protect another person or persons.

[section 32 of the Act]

45. All of a. to c. above must be present with the option of c. i. or c. ii.
46. Section 32 of the Act and the immediate subsequent sections are useful for the health care professional and it is not necessarily for the party such as the police or a family member(s) that brings the person in for an involuntary assessment.

FINDINGS

47. Having considered the evidence and facts and some of the applicable law, I find and express the following as it is incidental to and directly related to the application:
- a. This court does not have jurisdiction to detain the Respondent with the aim of having him committed to a mental health facility;
 - b. This court will have jurisdiction if for instance, a complaint or criminal charge is filed and that the complaint is pending determination by the court and the defendant appears to be of unsound mind or suffering from some mental impairment which would allow the Court to exercise its powers under the **Criminal Procedure Act** or **Crimes Act** in combination with the **Mental Health Act**;
 - c. That police have powers to arrest a person without a warrant and detain the person with the aim of having that person committed to a mental health facility and this is pursuant to section 23 and 25 of the **Mental Health Act 2010**;
 - d. I find with the information and evidence before me in this application, that the police were and are entitled to arrest without a warrant and detain the Respondent with the aim of committing him to a mental health facility as there is reasonable suspicion that he is a danger to himself and to others;
 - e. That the Respondent wishes to go home and I find that he does not consent to a voluntary assessment;
 - f. That police do not need a court order to commit the Respondent. That police can directly make the application for committal to the relevant mental health facility which in this case is most likely the St. Giles Hospital.
 - g. It is advised that police in making the application for committal to the relevant mental health facility, police are to use Form 1 in Schedule 2 of the **Mental Health Act Forms Order 2012** with the amendments to the form where necessary;
 - h. The arrest and detention of the Respondent and the legal provisions mentioned is not inconsistent with our obligations under international convention and the Constitution;
 - i. That I recognise why the police has not resorted to charging the defendant with any criminal complaint for the recent allegation of violence against his father, considering the history of the defendant and that treatment appears to be the primary objective rather than criminal prosecution;

- j. That there is no time or duration specified by law within which the Respondent must be committed to a mental health facility if police seek an involuntary assessment. In theory, the Respondent could be detained by police forever.
- k. Despite there being no timeline provided, police are advised to have the Respondent committed as soon as practicable and the health care professional in charge of such mental health facility, to examine the application and the Respondent, in line with the professional's obligations under the **Mental Health Act 2010** namely section 31 and 32.
- l. If it is deemed that the Respondent fits the criteria outlined in section 32, then the health care professional can take the Respondent under his or her care and the health care professional can then undertake his or her obligations under the **Mental Health Act 2010** to treat Respondent.
- i. The Respondent is not prevented from revisiting or challenging his detention whether he is detained by police or at a mental health facility by a health care professional. He can do any of the following or initiate any other lawful alternative:

The Respondent can convince the health care professional that he should be released or released with conditions such as with a community treatment order.

The Respondent or a family member or some other suitable person can apply for a writ of *habeas corpus* to a Magistrates' Court and that challenge can be dealt with pursuant to section 16 (1) (f) of the **Magistrates' Court Act 1944**.

The Respondent or a family member or some other suitable person can apply for a remedy or constitutional redress pursuant to section 44 of the **2013 Constitution** which will be determined by the High Court.



LISIATE T.V FOTOFILI
Resident Magistrate

At Tavua this 31st day of May, 2019.