

IN THE HIGH COURT OF FIJI (AT SUVA)

CIVIL ACTION NO.HBC0017 OF 1993

BETWEEN:

DHAMENDRA PRASAD

(f/n Bhagwat Prasad)

Plaintiff

- and -

THE ATTORNEY-GENERAL &

MINISTER FOR JUSTICE

1st Defendant

- and -

COMMISSIONER OF PRISONS

2nd Defendant

V. Maharaj for the Plaintiff

D. Singh for the Defendants

J U D G M E N T

The following undisputed facts are revealed by the amended pleadings, a pre-trial conference held on 25 August 1995, the Plaintiffs List of Documents filed on 19 September 1995 and a statement of Agreed Relevant Facts drafted by the Court and signed by Counsel on 8 December 1995.

On 17 April 1990 the Plaintiff was sentenced by the Suva Magistrates' Court to 6 months imprisonment suspended for 2 years.

On 5 July 1991 during the operational period of the suspended sentence the Plaintiff was charged with 4 offences of dishonesty. He pleaded guilty in the Suva Magistrates' Court (T. Karunaretam Esq.), following which sentencing was deferred to 18 July.

On 18 July the Plaintiff reappeared before the same Magistrate. By mistake, instead of being sentenced in respect of the Charge to which he had pleaded guilty on 18 July he was sentenced in respect of an earlier and superseded charge which contained in addition to the 4 Counts to which the Plaintiff had pleaded guilty 5 additional Counts which had earlier been withdrawn. He was sentenced to 12 months imprisonment, the sentences on all 9 Counts being concurrent (Warrant 2800).

A little later on the same day the Prosecutor told the Magistrate what had occurred. It was explained that the Plaintiff had been sentenced in respect of the wrong charge and also that the breach of the suspended sentence had been

overlooked. The Magistrate directed that the Plaintiff who had already been sent to prison should be brought back before him on 22 July.

On 22 July the Magistrate ordered that the sentence imposed in respect of Counts 5, 6, 7, 8 and 9 of the second charge be "struck out" and the warrant "amended accordingly". He ordered the "office" (presumably the Magistrates' Court Registry) to issue a fresh warrant for Counts 1, 2, 3 & 4 and also ordered warrant 2800 to be "recalled". Finally he activated the suspended sentence and ordered it to be served consecutively to the fresh warrant.

To summarise, a sentence of 12 months imprisonment (warrant 2800) was to be replaced by a sentence of 18 months imprisonment (warrants 2843 and 2844). Unfortunately, apparently as a result of a clerical oversight, warrant 2800 was never amended or cancelled and accordingly the Plaintiff returned to prison subject to all 3 warrants which, applying section 28 (4) of the Penal Code (Cap.17) provided for a total sentence of 2 1/2 years imprisonment instead of the 18 months intended by the Magistrate.



According to the calculations of the Prisons Department based on a term of 2 1/2 years imprisonment the Plaintiff was not due to be released until 17 March 1993 whereas the correct release date based on a sentence of 18 months imprisonment would have been 17 July 1992.

On 18 January 1993, it having come to light that the Plaintiff was still imprisoned, application was made to the Chief Magistrate who immediately ordered his release. This is an action for damages for 6 months wrongful imprisonment during the period 17 July 1992 to 18 January 1993.

The prayer of the amended of Statement of Claim seeks inter alia:-

" (a) a declaration that the Plaintiff's freedom of movement and liberty guaranteed under the Constitution of Fiji has been contravened and the 1st Defendant is thereby liable to compensate the Plaintiff in public law of the State pursuant to section 19 (1) of the Constitution;

(b) an order for exemplary and punitive damages."



The Defence advances section 65 of the Magistrates' Court Act (Cap.14) together with section 25 of the Prisons Act (Cap.86) "as a complete defence to the claim". It also relies on section 15 (3) (c) of the Constitution.

Both Counsel filed helpful and careful written submission for which I am grateful. Mr. Maharaj's argument was quite straightforward. Citing Attorney-General v. Prasad (ABU36/94 - FCA Reps. 95/209 - The Decision of the Fiji Court of Appeal in this action which resulted in its being remitted to this Court for rehearing), Mr. Maharaj submitted that section 19(1) afforded a new remedy to which neither the State Proceedings Act (Cap.24) nor the Prisons Act could provide a shield and that the Magistrate himself not being a party to the action section 65 of the Magistrates' Court Act was irrelevant. As has been seen the basis of the prayer in the Statement of Claim was section 19 of the Constitution and Mr. Maharaj was content to found his claim on that section.

In answer, Mr. Singh began by referring to the proviso to section 19 (2) of the Constitution which reads as follows:-

"Provided that the High Court may decline to exercise its powers under this sub-section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law".

Mr. Singh suggested that since an ex-gratia payment was available to the Plaintiff both under common law and under the Finance Act (Cap.69) the Court should decline to act under section 19. I am afraid I did not find this preliminary point particularly attractive. In the first place Mr. Singh's written submission concludes by asserting that in all circumstances of this case the error which led to the Plaintiff's unlawful 6 month period of incarceration was not "a deprivation of due process of law and therefore the State is not liable and no compensation is payable". In the second place as appears from pages 14 to 20 of the Plaintiff's list of documents Plaintiff's Solicitors have been endeavouring, with a total lack of success, for the past 2 years to obtain some form of ex-gratia payment for their client. Thirdly, as pointed out by Mr. Singh, the making of an ex-gratia payment is entirely discretionary and in the absence of fraud or bias a refusal is not subject to Review. In these circumstances



the Plaintiff can hardly be blamed for having little confidence in an ex-gratia payment being forthcoming or for pursuing his claim under section 19. I find no good reason for this Court not to entertain it.

The second part of Mr. Singh's argument was a little curious since it appeared to amount to the submission that what had occurred could found no action because the Orders made and warrants issued by the Magistrate were lawful and because the failure to cancel the warrant could not give rise to liability. Accordingly the Attorney-General and the State were not liable either. The problem however about that line of argument is that if sound then it falls foul of the decision in Attorney-General v. Prasad already referred to whereas if unsound it removes a means of redress alternative to section 19(1). In my view the liability or otherwise of the Magistrate, the Court or the Prisons Department under the relevant Acts is not germane to this action.

Mr. Singh did however refer to 3 sections of the Constitution which he argued afforded protection to the State. The first was section 6 (1)(a), the second was section 6(6) and the third was section 15 (3)(c).

Section 6 (1)(a) reads as follows:-

"No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say (a) in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a Court whether in Fiji or elsewhere in respect of a criminal offence of which he has been convicted;"

Section 6 (6) reads as follows:-

"Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person, or from any other person or authority on whose behalf that other person was acting."

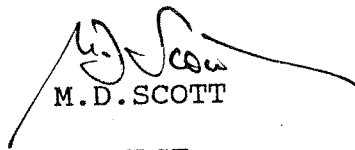
Section 15 (3) (c) reads as follows:-

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent

that the law in question makes provision ....  
(c) for imposing restrictions, by Order of a  
Court .....".

In each of these sections the protection afforded whether the right to personal liberty or the right to freedom of movement may be lifted by a lawful order of the Court. In the present case Mr. Singh argued that the Court's Orders and warrants were lawfully made by the Magistrate and lawfully issued by the Court office and therefore the protective sections had not been breached. I must disagree. As has been seen from the agreed facts the Magistrate set aside the first sentences imposed by him and ordered that the first warrant be cancelled. It is unarguable that had this Order and cancellation been brought to the attention of the Second Defendant then the Plaintiff would immediately have been released because that was the effect of the Orders in fact made by the Magistrate. In short, the reason the Plaintiff was detained after 17 July 1992 was a failure to carry out the Magistrate's Orders and was not the result of an Order that the Magistrate had made. For this reason I hold that these sections of the Constitution afford no assistance to the Defendants.

In my respectful opinion the position is really quite straight forward. It begins with the maxim *ubi jus ibi remedium* - "where there is a right there is a remedy". In this case there is a right to personal liberty enshrined in section 6 of the supreme law of the land namely the Constitution. The cumulative effect of the Magistrate's Orders was to imprison the Plaintiff for 18 months. Instead of being released on the due date the Plaintiff was detained. His detention was not authorised by law since the sentence which was treated as subsisting had in fact been set aside. Therefore the Plaintiff was unlawfully detained and acquired a cause of action and right to compensation under section 6 (6) of the Constitution. The machinery for invoking the jurisdiction of the High Court to determine a claim brought under section 6 (6) is section 19(1) and under the provisions of section 12 (2) of the State Proceedings Act the Attorney-General is the proper Defendant. The Plaintiff has acted with procedural correctness. There is no need to invoke any other legislation apart from the Constitution. There will be Judgment for the Plaintiff with damages to be assessed in default of agreement.

  
M.D. SCOTT  
JUDGE

27 DECEMBER, 1995