IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 249 of 2017

BETWEEN

THE PROCEEDINGS COMMISSIONER on behalf of **NETE KALAUCAVA** of Buresova Dtreet, Nausori, Fiji.

FIRST APPLICANT

AND

THE PROCEEDINGS COMMISSIONER on behalf the **HUMAN RIGHTS COMMISSION AND ANTI-DISCREMINITATION COMMISSION** of Naibati House, Goodenough Street, Suva, Fiji,

SECOND APPLICANT

AND

THE ATTORNEY GENERAL OF FIJI of Level 7 – Suvavou House, Victoria Parade, Suva, Fiji.

FIRST RESPONDENT

AND

THE COMMISSIONER OF FIJI POLICE FORCE of Vinod Patel Building,

Ratu Dovi Road, Suva, Fiji.

SECOND RESPONDENT

Counsel	:	Mr. R. Vananalagi for the Applicants. Ms. M. Lee with Ms. G. Lagilevu for the Respondents
Date of Hearing	:	26th September, 2018
Date of Ruling	:	26th October, 2018

JUDGMENT

[1] The applicants made this application for constitutional redress seeking the following orders:

1. That the Honourable High Court make a declaration that the arrest and detainment of the 1st Applicant by the 2nd Respondent on the 29th June 2017 was unconstitutional as it breached section 11(1) of the Constitution of the Republic of Fiji when the 2nd Respondent physically assaulted the 1st Applicant in police custody at the Nausori Police Station.
2. That the Honourable High Court make a declaration that the arrest and detainment of the 1st Applicant by the 2nd Respondent on the 29th of June 2017 was unconstitutional as it breached section 11(2) of the Constitution of the Republic of Fiji when the 2nd Respondent physically assaulted the 1st Applicant in police custody at the Nausori Police Station.
3. That the Honourable High Court make a declaration that the arrest and detainment of the 1st Application by the 2nd Respondent on the 29th of June 2017

was unconstitutional as it breached section 13(1)(d) of the Constitution of the Republic of Fiji when the 2nd Respondent tried to compel the 1st Applicant to confess to a crime that he did not commit by physically assaulting the 1st Applicant in police custody at the Nausori Police Station.

4. That the Honourable High Court make a declaration that the arrest and detainment of the 1st Applicant by the 2nd Respondent on the 29th of June 2017 was unconstitutional as it breached section 13(1)(j) of the Constitution of the Republic of Fiji when the 2nd Respondent physically assaulted the 1st Applicant in police custody at the Nausori Police Station and a such not upholding the 1st Applicant's human dignity.
5. That the Honourable High Court make a declaration that the arrest and detainment of the 1st Applicant by the 2nd Respondent on the 29th of June 2017 was unconstitutional as it breached section 41(1)(d) of the Constitution of the Republic of Fiji when the 2nd Respondent physically assaulted the 1st Applicant in the police custody at the Nausori Police Station and not upholding the 1st Applicant's right to be protected from abuse and any form of violence.
6. That the Honourable High Court make declaration that the unlawful arrest and detainment of the 1st Applicant by the 2nd Respondent on the 29th of June 2017 was unconstitutional as it breached section 41(1)(e) of the Constitution of the Republic of Fiji when the 2nd Respondent detained the 1st Applicant in police custody at the Nausori Police Station without any lawful cause.
7. That as a result of the human rights violations and breaches committed by the 2nd Respondent in unlawfully arresting and detaining the 1st Applicant on the 29th of June 2017, at the Nausori Police Station the Honourable High Court award damages and compensation to the 1st Applicant.
8. That the Honourable High Court award damages to the 1st Applicant for the humiliation, injury to the feelings and the inhumane treatment as a result of the 2nd Respondent's actions in unlawfully arresting and detaining the 2nd Applicant on the 29th of June 2017 at the Nausori Police Station.
9. That the costs of this matter to be borne by the Respondents.

[2] Nete Kaloucava, a 10 year old child, was arrested by Mr. Suliano Manabua (Badge No. 4112) at around 9.00 pm while he was having dinner on 29th June, 2017 without a warrant. The arresting officer did not allow the mother of the child to accompany him

to the Police Station despite her request. Whilst at Nausori Police Station the child was physically assaulted by the arresting officer.

[3] In paragraph 3 of the affidavit of Superintendent Rajesh Krishna, Acting Director Legal of the Police Head Quarters it is averred that on 29th June, 2017 Nete Laloucava was taken from home for questioning by SC 4112 Suliano Manabua and that there were allegations of assault were raised against him.

[4] The child was submitted for medical examination on 30th June, 2017 and the medical report is annexed to the affidavit in support. The findings of the doctor are as follows:

> Tender on anterior abdominal wall. Skin redness noted. No bruises, abrasion or laceration. Tender on right anterior thigh.

[5] This child was taken from home at about 09.00 pm on 29th June, 2017 and he was examined by the doctor at 2.10 am within few hours of the alleged assault. It is to be noted that the child was referred to the hospital by the Police and not by his mother. If the child did not sustain any injuries there was no reason for the Police to refer him for medical examination. There is nothing on record say that the child had injuries when he was brought to the Police Station. The court does not need any further evidence to arrive at the conclusion that that the child sustained injuries while in the custody of the Police.

[6] The respondents relied mainly on Section 41(4) of the Constitution which is a proviso to section 41(1).

[7] Section 41(4) provides as follows:

> 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.

[8] It was the submission of the learned counsel for the respondents that in view of the above provisions if the applicant has an alternative remedy available to him, he is not entitled to come before the court by way of constitutional redress.

[9] In support of this argument the learned counsel cited various authorities which I will consider the applicability of the principles enunciated in those decisions, to the matter before this court.

[10] In **Harrikisson v A.G. of Trinidad and Tobago** [1979] 3 WLR 62 the House of Lords made the following observations:

> The right to apply to the High Court... 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 actions. ... The mere allegation that a human right or fundamental freedom of the applicant has been or likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court. ...if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court.

[11] In that case the appellant teacher alleged that he had been transferred from one school to another as a punishment without proper notice. The appellant instead of following a laid out procedure which would have eventually led to a decision by the Teaching Service Commission, sued under the Constitution of Trinidad and Tobago for a declaration of breach of his human rights.

[12] The facts of Harrikissoon's case referred to above cannot be compared with the facts of this case. An application for constitutional redress of a child of 10 years who was assaulted by the Police is considered abuse of the process there is no purpose of having Bill of Rights in the Constitution.

[13] The respondents also relied on the decision in **Natakaru v Attorney General of Fiji** {2017] FJHC 461; HBM26.2016 (29 June 2017). That case the court has relied on the provisions of Section 44(4) of the Constitution, the decision of the Court of appeal in **Abhay Kumar Singh v D.P.P and the Attorney General** AU0037/2003 and the decision in **Aiyaz Ali v Attorney General [2005] FJHC, HBM 0079 of 2004**.

[14] 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 in these circumstances as an abuse of process and as being subversive of the Rule of Law which the constitution is designed to uphold and protect."

The facts of that case are briefly as follows:

> In 2003, the appellant was asked by one Khan to represent him in a prosecution which he was charged of corruption. Before the trial the appellant met the complainant (the witness) who was to be a state witness in the corruption case and asked the witness to alter part of the evidence against Khan or to leave the country when the corruption case ended. The witness reported this to the police. The matter came before the Director of Public prosecutions where the witness was asked to have another conversation with the appellant and record the same in a small tape recorder without the appellant's knowledge which he did as advised. The appellant was charged of attempting to prevent the cause of justice.

[15] In **Aiyaz Ali v Attorney General** (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 procedures 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 Aladdin's cave which contains all the remedies for all the ills."

[16] Section 44(4) of the Constitution must always be read with section 44(2) in deciding in whose favour the court should exercise its discretionary power. Section 44(2) of the Constitution 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.

[17] It is therefore, clear that the mere fact that there is an alternative remedy available it will preclude any person whose rights guaranteed by the Constitution has been

violated in bringing the matter before the court by way of an application for constitutional redress.

[18] The question whether an application for constitutional redress should be refused on the ground that the party seeking redress has an adequate alternative remedy depends on the facts of each case. The discretion conferred upon the court by section 44(4) of the Constitution must be exercised cautiously and the court must always consider whether the alternative remedy available to the applicant is adequate before refusing an application for constitutional redress. There are no set guidelines to follow in deciding whether a particular alternative remedy available to a party is adequate.

[19] As I said earlier in this judgment, the victim in this case is a 10 year old child who was taken to the police station at 9.00 pm without a parent or guardian and was assaulted. This is a country where the government is very much concerned about child rights. The person who arrested the child and assaulted him was an officer appointed to safeguard the rights and security of the people of this country. If the court ignores severity of a matter of this nature and refused the application on the ground that the applicant has an adequate alternative remedy it will open floodgates to people, especially the law enforcement officers to harass helpless citizens. For these reasons I am of the view that this is not a matter which the court can refuse on the ground of availability of an adequate alternative remedy.

[20] It is important to note that the 2nd applicant has made a complaint to the 2nd respondent and on 24th July, 2017 and since there was no response from the 2nd respondent and the 2nd applicant sent follow-up letter requesting a response but until the application for constitutional redress was filed there had been no response form the 2nd respondent. The court must also bear in mind that an application for constitutional redress must be made within six months from the allege act of violation.

[21] Sections 11(1) and 11(2) of the Constitution provides as follows:

> (1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.

(2) Every person has the right to security of the person, which includes the right to be free from any form of violence from any source, at home, school, work or in any other place.

[22] There is a clear violation of the above rights of the child by the officer who arrested and assaulted him.

[23] It is alleged that arresting and assaulting the child Nete Kaloucava is in violation of his rights guaranteed under sections13(1)(d) and 13(1)(J) of the Constitution. Section 13(1)(d) provides that every person who is arrested or detained has the right not to be compelled to make any confession or admission that could be used in evidence against that person, and section 13(1)(j) provides that every person who is arrested or detained has the right to conditions of detention that are consistent with human dignity, including at least the opportunity to exercise regularly and the provision, at State expense, of adequate accommodation, nutrition, and medical treatment.

[24] There is no evidence on record as the condition in which the child was detained at the police station nor is there any evidence that a confession was recorded from him.

[25] It is also alleged that the arrest and detention is in violation of his rights guaranteed by sections 41(1)(d) and 41(1)(e) of the Constitution.

Sections 41(1)(d) and 41(1)(e) of the Constitution provide:

> Every child has the right—
>
> (d) to be protected from abuse, neglect, harmful cultural practices, any form of violence, inhumane treatment and punishment, and hazardous or exploitative labour; and
>
> (e) not to be detained, except as a measure of last resort, and when detained, to be held—
>
> (i). only for such period of time as is necessary; and
>
> (ii). separate from adults, and in conditions that take account of the child's sex and age.

[26] Assaulting a child of 10 years, especially the way he has been assaulted, is no doubt an inhuman treatment, however, the detention cannot be considered as a violation of

section 41(1)(e) for the reason that the detention was only for few hours and he was then taken for medical examination by another officer. Therefore, it cannot be said that the detention was in violation of sections 41(1)(d) and 41(1)(e) of the constitutions.

[27] The court taking into consideration the facts and circumstances of this case I decide to award $25,000.00 as compensation to 1st applicant.

[28] For the reasons aforementioned the court makes the following orders:

1. The court declares that the 2nd respondent has violated the rights of the 1st applicant guaranteed by sections 11(1), 11(2) and 13(1)(d) of the Constitution.
2. The respondents are ordered to pay the 1st applicant (Nete Kalaucava) $25,000.00 as compensation.
3. The respondents are also ordered to pay $2000.00 as costs of this application.

Lyone Seneviratne

JUDGE

26th October, 2018