

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 29 of 2018

BETWEEN : DESHWAR KISHORE DUTT

APPLICANT

AND : STATE

RESPONDENT

Appearances : Applicant in Person
Mr. Chauhan for the Respondent

Date of Hearing : 15 April 2019

Date of Ruling : 29 April 2019

RULING

INTRODUCTION

1. Before me is a Notice of Motion filed by Deshwar Kishore Dutt (“Dutt”) dated 28 August 2018. The Motion is filed pursuant to section 15 (1) (2) and 26 (3) (a) of the Constitution of Fiji 2013. The Motion seeks an order that:

“...the mechanical restraint applied to the Applicant in the busy corridors of the High Court premises in Lautoka be removed while conveying the Applicant from the escorting vehicle to the Court Room and inside the Court Room in Criminal Case No: 13 of 2018”

2. Section 15(1) and (2) of the Constitution provide as follows:

- 1) Every person charged with an offence has the right to a fair trial before a court of law.
- (2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.

3. Section 26(3)(a) provides:

“A person must not be unfairly discriminated against, directly or indirectly on the grounds of his or her—

(a) actual or supposed personal characteristics or circumstances, including race, culture, ethnic or social origin, colour, place of origin, sex, gender, sexual orientation, gender identity and expression, birth, primary language, economic or social or health status, disability, age, religion, conscience, marital status or pregnancy.”

4. Dutt is a convicted criminal. He is currently serving a sentence. He also has several pending criminal matters in various courts in Fiji. It is on account of these pending matters that Dutt is occasionally transported to and from court. From Dutt’s affidavit, it is clear that he is aggrieved about the treatment that he gets in having to be put on leg-cuffs, as well as handcuffs whenever:

- (i) he is transported to Court and
- (ii) whenever he has to appear before a Judge or Magistrate in Court:

5. His two main concerns are:

- (i) that putting him on shackles is degrading and causes him great embarrassment to have to be taken through the court premises on hand and leg cuffs in full view of the public.

- (ii) that if he were to appear in court on cuffs, it may prejudice his right to a fair trial.
- 6. Apparently, Dutt is classified as “high risk” by the prison authorities. This is the reason why the prison authorities transport him to and from court, and present him in court, in hand cuffs and leg cuffs. His classification as “high risk” is based on the fact that he did escape from the Nadi Court premises in December 2017.
- 7. Generally, in terms of a prisoner’s security classification, whether a prisoner is to be classified as “high risk” or otherwise, is best left as a matter of policy for the prison authorities.

COMMENTS

- 8. I accept the respondent’s classification of Dutt as “high risk” and I do not believe that such business should be open to judicial scrutiny. However, the form and manner of restraint applied to manage a high-risk prisoner when:
 - (i) he is being transported to attend Court, may be “cruel, inhumane, degrading or disproportionately severe” in terms of section 11 of Fiji’s 2013 Constitution.
 - (ii) he is presented in Court before a Judge or Magistrate, may prejudice his right to a fair trial.
- 9. Section 13(1) (j) of the Fiji Constitution 2013 imposes an obligation on the State to respect and protect the human dignity of persons who are detained or arrested.

Rights of arrested and detained persons

13.—(1) Every person who is arrested or detained has the right—
(j) 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;

10. Sections 11(1) of the Fiji Constitution 2013 provides:

Freedom from cruel and degrading treatment

11.—(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.

11. The principles espoused in the above provisions are the foundation upon which the relevant provisions of the Fiji Corrections Act 2006, which prohibit and limit the use and the manner in which instruments of restraint may be applied to a prisoner, are based.

12. Section 42(1) of the Fiji Corrections Act 2006 forbids the use of chains and irons to restrain prisoners in any circumstances¹. Section 42(2) forbids the use of any instrument of restraint as punishment², while section 42(3) stipulates that handcuffs may be used as a precaution against escape during the transfer of a prisoner, or upon the order of the officer in charge if other means of controlling a prisoner have failed³. Section 42(5) provides:

¹ Section 42(1) provides:

42. (1) The use of chains and irons to restrain prisoners is not permissible in any circumstances.

² Section 42(2) provides:

42(2) No instrument of restraint may be used as a punishment.

³ Section 42(3) provides:

(3) Handcuffs may only be used as a precaution against escape during the transfer of a prisoner, or upon the order of the officer in charge if other means of controlling a prisoner have failed.

(5)The use of any other instrument of restraint must be authorised by Regulations, and where instruments are used under the authority of this Act, the following requirements shall apply to their use:

(a) they must not be applied in such a way as to cause unnecessary pain to the prisoner;

(b) they must be applied in a manner which preserves the dignity of the prisoner as far as is practicable; and

13. The wording of section 42(3) of the Fiji Corrections Act 2006 gives the prison authorities a discretion to use a handcuff as a precaution against escape during transfer. The use of a chain or iron is not within that discretion given their outright prohibition in section 42(1). Clearly then, the discretion is to be framed as follows - whether or not to use a handcuff when transporting a prisoner?

14. The guideline for the exercise of that discretion is to be found in the Commissioner's Local Orders Local Order No. 10 which was gazetted on Monday 16 May 2011. CLO No. 10 prescribes as follows at paragraph 3 (d):

3) Procedures for transfer and transportation of prisoners. The Escorting Officer(s) shall –

(d) Identify the prisoner's security classification in order to apply appropriate restraints and escort as follows:-

- i. High Security – handcuffs and two officers
- ii. Medium Security – handcuffs and one officer
- iii. Low Security – no handcuffs and one officer
- iv. Two or more prisoners of any security rating will be accompanied by at least two Escorting Officers. Two prisoners may be handcuffed together with one pair of handcuffs if appropriate to security rating.

15. Apart from the above, Commissioners Local Order No. 13 at Orders 4.6, 4.7, 4.10 and 4.11 provide that all prisoners should be handcuffed when attending court cases, however the extent of restraint applied in each case should depend on the factors in paragraph 4.7. Notably, the proviso in CLO No. 13 which is at paragraph 4.10 is that the escorting officer must remove the handcuffs when a prisoner is presented in Court unless the court otherwise directs.

4.6 All prisoners shall be handcuffed when—

- (a) attending court cases;

4.7 Consideration should be given to the following when determining restraint—

- (a) security rating;
- (b) health of prisoner;
- (c) age of prisoner;
- (d) area to be visited eg; court, hospital, funerals, home visits, police stations.

4.10 The escorting officer must remove the handcuffs when a prisoner is presented in court unless otherwise directed by the Judge or Magistrate.

4.11 The escorting officer may make representation to the court regarding the security of the prisoner if it is considered that there is risk of an escape.

16. Rule No. 47(1) of the Nelson Mandela Rules makes that general prohibition⁴ against the use of chains and irons and other instruments of restraint which are degrading or painful. However, Rule 47(2) (a) allows the use of “other instruments of restraint” when authorised by law either as a precaution against escape during a transfer, provided that the

⁴ Rule 47(1) provides of United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) prohibits the use of chains, irons or other instruments of restraint which are inherently degrading or painful.

instrument of restraint be removed when a prisoner appears before a judicial officer⁵.

17. Mr. Chovan submitted in Court that the Fiji Corrections Act does not define shackles or handcuffs. He submits that leg cuffs must come within the definition of handcuff.
18. The Act does not define "handcuff" either. However, it would be absurd to treat and interpret the word "handcuff" to include "shackles" or "leg cuffs" because the words are clearly not the same in terms of common usage. I would think that a shackle or cuffs applied to restrain the legs would fit within the meaning of "chains and irons" which are outright prohibited under section 42(1) of the Act (see above).
19. Having said that, the policy reason why CLO. No. 13 and Rule No. 47(1) of the Nelson Mandela Rules prohibit outright the use of any form of restraint on a prisoner appearing in Court, is founded on concerns on the right to fair trial, which, in Fiji, is guaranteed under section 15(1) and (2) of the Constitution (see above).
20. The US case of Lemons v Skidmore 985 F.2d 354 (7th Cir. 02/09/1993) illustrates quite clearly how putting an accused person on an instrument of restraint before a Court might prejudice his or her case. Although this was a civil claim, the policy concerns expressed therein apply especially to criminal cases.
21. In Lemons, a state prisoner filed a civil complaint that he was attacked and severely beaten by prison guards. The defendants were prison guards.

⁵ This Rule provides as follows:

1. Other instruments of restraint shall only be used when authorized by law and in the following circumstances:
 - a. As a precaution against escape during a transfer, provided that they are removed when the prisoner appears before a judicial or administrative authority.

When the case went to trial, the court at first instance went along with the defendants' (prison guards') request that Lemons be handcuffed and manacled in front of the jury during the trial. The jury entered a verdict in favour of the defendants. Lemons appealed to the US Court of Appeals for the Seventh Circuit ("Appeal Court").

22. In the court below, Lemons' attorney noted at the outset of trial that the defendants were all in Court in full prison-guard uniform. He also observed that the court room was full of court officers and marshals. Sensing an immediate prejudice to his client, the attorney requested the court that Lemons not be required to appear in court in handcuffs and leg irons. The Court at first instance however took the view that, since Lemons was in custody, the Department of Corrections sets the rules of how a prisoner is to be restrained, if at all. The Department argued it was their policy to keep the restraints in place. The Court allowed the Department to keep Lemons in handcuffs and leg irons when he attended court to testify.
23. In due course, the jury directed a verdict against one of the defendants only. Lemons appealed. His main ground was that the jury was prejudiced by viewing him in handcuffs and leg irons.
24. The Appeal Court said the case "presents a question of what is required for a fair trial and due process". The Court noted that the shackling of defendants in criminal cases is a practice which has been found to violate the constitutional right to a fair trial. Except in cases of great or extreme need, shackling is not to be encouraged as it is a violation of that right.
25. The court said that:

Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself

something of an affront to the very dignity and decorum of judicial proceedings that the Judge is seeking to uphold.

26. After reviewing some US cases, the court went on to say:

The courts found that the appearance of the defendant in shackles would prejudice the jury, causing them to believe that the person was dangerous. In Harrell, 672 F.2d at 635, the court stated that "courts must guard against practices which unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion."

And:

In a criminal case, the appearance of the defendant in shackles may prejudice a jury by weakening the presumption of innocence which the defendant is entitled to.

CONCLUSION

27. I am of the view that, even accepting that Dutt is "high risk", it seems rather excessive to have to put him on leg cuffs as well as hand cuffs and a heavy leather belt around him when transporting him to Court. All that is necessary to manage Dutt during transfer is to handcuff him and provide two officers to escort him as provided under CLO No. 10 paragraph 3 (d). When Dutt is presented in Court, Commissioners Local Order No. 13 Rule 4.10 requires the escorting officer to remove the handcuffs. If the escorting officer feels that Dutt is at risk of escaping, the officer may make representations in court regarding to that effect under Rule 4.11, in which case, the Court may then exercise its discretion under Rule 4.10.

ORDERS

- (i) The Prison Officers are to desist from transporting Dutt to and from Prison in leg cuffs or shackles. As a "high risk" prisoner, Dutt is to be handcuffed and escorted by two officers in accordance with Commissioner's Local Orders No. 10 paragraph 3 (d)iv.

- (ii) When presented to Court, the escorting officer must remove Dutt's handcuffs. If the escorting officer feels that Dutt should remain in handcuff in court, then an appropriate application should be made to the Court.



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Anare Tuilevuka
JUDGE
Lautoka

