IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action HBJ 5 of 2019

IN THE MATTER OF AN APPLICATION BY SALEN BRIJ DEO PRESENTLY DETAINED AT THE MEDIUM CORRECTIONS CENTER [HEREINAFTER "CALLED THE APPLICANT"] FOR A JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION BY THE FIJI CORRECTIONS SERVICE TRIBUNAL DATED 1ST FEBRUARY 2017, [HEREAFTER "CALLED THE RESPONDENT"]

BETWEEN : SALEN BRIJ DEO

APPLICANT

AND : IN THE MATTER OF THE DECISION OF THE FIJI CORRECTIONS SERVICE TRIBUNAL

RESPONDENT

BEFORE : Justice M. Javed Mansoor

COUNSEL : Applicant appears in person

: Ms Chand S & Mr Sharma B for the Defendants

Date of Hearing : 4 June 2019
Date of Judgment : 14 June 2019

JUDGMENT

JUDICIAL REVIEW – Certiorari –Fiji Corrections Service Tribunal – excess of jurisdiction – loss of remission of sentence of imprisonment – prison offence – criminal offence – common assault – duty to prosecute in a court when action can also be taken for a prison offence – delay –natural Justice – alternate remedy – fairness – arguable case at threshold – applicant's conduct

References:

Legislation:

1. Constitution 28 (1) (k)
2. Interpretation Act, Section 59
3. Rules of the High Court, Order 53
4. Corrections Service Act 2006, Sections 18, 37, 39 & 54
5. Corrections Service Regulations 2011, Regulations 13, 15, 16 & 17
6. Crimes Act 2009

Cases:

1. Wednesbury Corporation v Ministry of Housing and Local Government [1966] 2 QB 275
2. Cagica v Public Service Commission [1998] FJCA 59
3. Lesili Tuiwawa v Pio Tikoduadua and others [2008] Vol. 1 FJHC 353
4. Matalulu and another V DPP [2003] FJSC 2
5. The State v Registrar of Trade Unions [1991] 37 FLR 55

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1. The Applicant sought leave to apply for Judicial Review challenging the decision dated 1 February 2-17 of the Fiji Corrections Service Tribunal at the Minimum Corrections Center. The Applicant's complaint is that he was found guilty of the charge of common assault while serving his term of imprisonment and was sentenced to a month's loss of remission.

2. The Applicant was originally sentenced to imprisonment for a period of five (5) years and eight (8) months, and he was due for release on 16 June 2019. While serving time, the Applicant assaulted another inmate. Thereupon, the Fiji Corrections Service Tribunal sentenced the Applicant to a month's loss of remission of his sentence, whereby he is now due to be released on 16 July 2019.

3. It is this decision of the Fiji Corrections Service Tribunal that is being assailed by this application. In particular, it is the Fiji Corrections Service Tribunal's jurisdiction to charge the Applicant for assault, convict and sentence the Applicant to a month's loss of remission that is under attack.

4. There is no dispute that an assault of a fellow inmate occurred at the hands of the Applicant, and that injuries of a fairly serious nature were caused to the victim inmate necessitating medical attention. The Applicant is not shy to admit that he did cause such an assault, or of the seriousness of the resulting injuries. The material facts, therefore, are not substantially at variance as between the parties.

5. What is at issue in this application is a question of law; primarily, whether the Fiji Corrections Service Tribunal acted in excess of its jurisdiction, and thereby rendered its decision to charge, convict and cause a month's loss of remission in the Applicant's sentence, a nullity.

6. The Applicant sought a writ of certiorari, a declaration that the Fiji Corrections Service Tribunal at Minimum Corrections Center acted unfairly and abused its discretion under the constitution and other laws, and sought damages. The Applicant prayed for reinstatement of the loss of a month's remission and for release on 16 June 2019, instead of 16 July 2019, as decided by the Fiji Corrections Service Tribunal. His reliefs were predicated on the following grounds:

   a. The Fiji Corrections Service Tribunal at Minimum Corrections Center has exceeded its jurisdiction by finding the Applicant guilty, convicting and sentencing him to a month's loss of remission for the offence of common assault.

   b. That the Fiji Corrections Service Tribunal at Minimum Correction Center has breached the rules of natural justice in not giving the Applicant the opportunity to be heard before the decision was made.

   c. That the Fiji Corrections Service Tribunal at Minimum Correction Center has abused its discretion under the constitution and laws such as the Criminal Procedure Act and the Crimes Act.

   These positions were taken by the Applicant in his Application for Leave dated 8 April 2019 seeking Judicial Review under Order 53 Rule 3(2) of the High Court Rules.

7. The Applicant's position is that the offence of common assault is a summarily tribal offence in the Magistrate Court and not by the Fiji Corrections Tribunal, and that the offence of Common Assault is a criminal offence under the Crimes

Act 2009 and such offence should have been the subject of a police investigation; this had denied him the right to a fair trial in the Magistrate Court; the Tribunal had denied him his constitutional rights to give evidence on oath and call witnesses; the Fiji Corrections Tribunal did not have the jurisdiction to convict and sentence the Applicant for a criminal offence under the Crimes Act, and that, therefore, the Tribunal committed a jurisdictional error; the Fiji Correction Service has jurisdiction to convene disciplinary proceedings against prisoners who commit prisoner offences but do not have the jurisdiction to have proceedings against prisoners who commit offences under the Crimes Act 2009; the injury sustained by the victim amounted to a criminal offence and that ought to have been determined by a Criminal Court of Law and thereby the Tribunal proceedings should have been a nullity; the Tribunal had exceeded its jurisdiction to investigate a criminal offence under the Crimes Act of 2009, which was the duty of the Police. He also complained in his Affidavit that the proceedings of the Tribunal did not show that he was informed of his right to legal representation and thereby he was denied the rights to natural justice.

8. By notice of opposition dated 20 May 2019, the Respondent opposed the Application for Leave to Apply for Judicial Review on the following grounds:

(a) The Application is filed out of time and with undue delay.

(b) The Applicant does not show an arguable case.

(c) Pursuant to section 39 (1)(c) of the Corrections Service Act 2006, powers to hear and determine proceedings against prisoners in relation to prison offences may be vested by regulations in a Tribunal established and empowered by regulations.

(d) Pursuant to regulation 13(2)(b) of the Corrections Service Regulations 2011, a prisoner commits a prison offence if he or she commits any assault or act of violence to any prisoner, correction officer, visitor to a person or any other prisoner within a prison.

(e) The Applicant was charged with the offence of assault on a fellow prisoner on 31 January 2017 to which the Applicant pleaded guilty before the Fiji Corrections Tribunal. The Tribunal subsequently decided that the Applicant will lose a month's remission from his sentence.

(f) Given that the Applicant pleaded guilty to the charge, the Applicant cannot seek Judicial Review of the Tribunal's decision.

9. The Respondent contended *inter alia*:

a. that the Applicant appeared before a lawfully constituted Tribunal and pleaded guilty after admitting the offence of assault of another prisoner. Thereafter, on 1 February 2017, the Tribunal proceeded to impose a sentence of a month's loss of remission for assaulting and causing grievous bodily harm after the Applicant pleaded guilty.

b. the victim prisoner had sustained injuries requiring 10 stiches to the mouth and a cut to the head as a result of the assault by the Applicant; the Police was not involved in investigating the matter, which was dealt with internally in accordance with the Correction Act of 2006. The guilty plea is contained in TS1 of the Respondent's Affidavit filed on 20 May 2019.

These facts are not in contest.

c. the loss of remission of sentence was fair and consistent with the Corrections Act 2006 and the Corrections Service Regulations of 2011, and that the Fiji Corrections Service has the jurisdiction to convene disciplinary proceedings against prisoners who commit prison offences.

d. had the Applicant not pleaded guilty before the Tribunal, the Applicant would have been given the opportunity to call witnesses and give evidence.

10. Judicial Review concerns the decision making process in proceedings before a body and not about the merits of a decision. The Court's concern would be whether there was illegality, irrationality or unfairness in how the Corrections Service Tribunal conducted proceedings; whether there were improper motives or unreasonableness in the Wednesbury[1] sense; the question at this threshold stage is whether the Applicant has an arguable case with a reasonable prospect of success. The Applicant contended that he has an arguable case and has sufficient interest because he was affected by the loss of a month's remission of sentence.

[1] Wednesbury Corporation v Ministry of Housing and Local Government [1966] 2 QB 275

11. There is no doubt that the legislature has thought it fit to create a species of offences commonly described as "prison offences", which may or may not be caught up within the definition of offences created by the Crimes Act. An act of assault within the confines of the prisons, for instance, as in this case, could be dealt with under both; the Corrections Act and the Crimes Act. One cannot, however, ordinarily charge, convict and sentence a man for the same act that would correspond to the same offence though constituted under different legal regimes, unless expressly permitted by law.

12. Section 59 of the Interpretation Act states:

> "Where an act or omission constitutes an offence under two or more written laws, the offender shall, unless a contrary intention appears, be liable to be prosecuted and punished under any of such laws, but shall not be liable to be punished twice for the same offence".

13. Section 28(1)(k) of the Constitution also gives expression to the principles similar to Section 59 of the Interpretation Act. Section 28(1)(k) states that every person charged with an offence has the right not to be tried again for an offence of which he or she has previously been convicted or acquitted

14. The Corrections Service Act 2006 and the related Corrections Service Regulations 2011, however, do not prohibit prison offences to be tried under the ordinary laws of the land.

15. The objects of the Corrections Service Act include vesting prison officers with the necessary powers to deal with unlawful acts that are committed in prisons; hence, an assault in prison against another prisoner could be the basis of a charge of a prison offence.

16. In terms of the statutory powers vested in it, the Corrections Service Tribunal has charged, convicted and sentenced the Applicant by reducing the remission of his sentence by a month; in doing so, the Corrections Service Tribunal acted within its jurisdiction.

17. As adverted to, the Applicant's main complaint is that the assault on another prison inmate – which is not in dispute – should have been investigated by the Police and prosecuted under the Crimes Act in the Magistrate's Court, and not be the subject of proceedings before the Corrections Service Tribunal.

18. However, Section 37 (2) of the Corrections Service Act 2006 provides that, when a prisoner is charged with and punished for a prison offence, nothing shall prevent criminal proceedings being taken against the prisoner arising from the same circumstances.

19. Hence, criminal proceedings could have been instituted against the Applicant even after he was found guilty by the Corrections Service Tribunal. However, upon a plain reading of Section 37 (2), it is evident that no mandatory duty has been cast upon the Fiji Corrections Service under that section to initiate criminal proceedings against the Applicant. In the absence of such a statutory duty, the Applicant cannot claim that he had a right to be prosecuted under the Crimes Act also in the Magistrate Court. Moreover, proceedings in the Corrections Service Tribunal have been kept separate from criminal proceedings in the ordinary courts. It cannot be presupposed that the fate of the proceedings in one forum will influence the proceedings in another institution.

20. In this case, having admitted the assault and the causing of bodily injury to another prisoner, the Applicant does not explain what manner of clemency he would have received or how he was prejudiced by the failure to have him prosecuted in the Magistrate Court under the Crimes Act, in addition to the proceedings instituted against him in the Corrections Service Tribunal; it must also be borne in mind that the sentence remission is only for a month, and there is no evidence to suggest that the Magistrate Court would have imposed a more lenient punishment on the Applicant.

21. The Applicant had no legitimate right to call upon the Corrections Service Tribunal to refrain from proceeding against him in respect of the prison offence. In the circumstances, the Applicant cannot call in question the decision to prosecute him before Corrections Service Tribunal. In any event, there is no evidence that the Applicant objected to the proceedings before the Tribunal. He has by his conduct accepted the jurisdiction of the Tribunal.

22. The Applicant's Application for Leave for Judicial Review dated 8 April 2019 was made well over two years after the decision affecting his release was made by the Corrections Service Tribunal on 1 February 2017.

23. Order 53 Rule 4(1) of the High Court Rules 1988 states:

> "Subject to the provisions of this Rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which

paragraph (2) applies, the application for leave under Rule 3 is made after the relevant period has expired, the Court may refuse to grant-

(a) Leave for the making of the application; or
(b) any relief sought on the application,

If, in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

Order 53 Rule 4(2) of the High Court Rules 1988 states:

"In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding".

24. Submitting that there was a delay of approximately 766 days in applying for judicial review and that the Applicant had failed to set out exceptional circumstances in his Affidavit in Support of Judicial Review, especially considering that there was a long delay to make such application, the Respondent relied on the judgment in Cagica v Public Service Commission[2]. In that case, the Court of Appeal stated:

"It is a cardinal principle of judicial review that it should be sought without delay and then heard and determined expeditiously. That is because public law remedies are by their nature likely to impinge on the interests of other members of the public, or of a particular class of the public, and on public administration. Such remedies must be sought and, if justified, given without undue delay or the interests of those on whom the remedies impinge will be unreasonably affected and sound administration stultified. Unfortunately, for various reasons, applications for judicial review have not always been heard and determined expeditiously. But that does not mean that this Court should countenance undue delay in seeking judicial review."

25. The Court agrees with the submissions made on behalf of the Respondent that there has been undue delay by the Applicant in failing to make an application for Judicial Review within the relevant period of three (3) months prescribed by law. The Applicant has also not satisfactorily explained the delay in making an application. As to what constitutes undue delay is a matter for the Court to decide at its discretion in the context of the circumstances. In the absence of a satisfactory explanation by the Applicant to explain his delay of more than two

[2] [1998] FJCA 59

years in applying for Judicial Review, it must be presumed that the Applicant has no justifiable explanation, and, therefore, there is undue delay on his part.

26. The question at this leave stage – with its low threshold - is for Court to decide whether the Applicant has an arguable case, and not embark on a full review of the facts[3]. The Applicant was obliged to have raised an arguable case involving an error of or in law; a serious error in fact; a violation of natural justice or procedural fairness; or an excess of jurisdiction by the decision maker.

27. The factors to be considered by the Supreme Court were laid down in Matalulu and another V DPP[4]. These factors include: whether the application is frivolous or vexatious or an abuse of the process of the Court; whether the application discloses arguable grounds for review; whether the application would serve any useful purpose; and, whether there is an obvious alternative remedy which has not been exhausted.

28. The long title of the Corrections Service Act 2006 states that it is an Act to repeal the Prisons Act and to make comprehensive provision for the administration of prisons with appropriate emphasis on providing corrective services and applying all human rights obligations and standards, and for related matters. Section 54 (1) of the Corrections Service Act empowers the Minister to make regulations to give effect to the provisions of the Act. In terms of Section 54 (1) (d), the Minister may prescribe offences against discipline applying to officers and prisoners.

29. Section 37 of the Corrections Service Act deals with prison offences. The section states:

> (1) "Prison offences shall be prescribed by regulations and in Commissioners Orders, and shall be prominently displayed at all prisons at a place or places where prisoners have access, and shall be in the English, iTaukei and Hindustani languages".
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> (2) "When a prisoner is charged with and punished for a prison offence, nothing shall prevent criminal proceedings being taken against the prisoner arising from the same circumstances, but a court shall take into account any

[3] Lesili Tuiwawa v Pio Tikoduadua and others [2008] Vol. 1 FJHC 353 and R v Legal Aid Board; Ex parte Hughes [1992] 24 HLR 698.
[4] [2003] FJSC 2

penalty imposed under this Act, when sentencing a prisoner for the criminal offence".

30. The Respondent submitted that the conduct of the Applicant constituted a Prison Offence under regulation 13(2)(b) of the Corrections Service Regulations 2011 which states:

"Without limiting the generality of sub-regulation (1), a prisoner commits a prison offence if he or she…..

(c) Commits any assault or act of violence to any prisoner, corrections officer, visitor to a prison or any other person within a prison….."

Regulation 13 (2) sets out various circumstances in paragraphs (a) to (x) that constitute offences, and these mainly relate to the administration of prisons and the maintenance of discipline among prisoners.

31. Regulation 16(1) of the Corrections Service Regulations 2011 provides:

"The Commissioner shall have the power in any proceedings to impose any of the following punishments, or any combination of them –

(a) forfeiture of remission of sentence not exceeding 3 months;"

32. Section 39 of the Corrections Service Act 2006 deals with proceedings related to prison offences. The section provides:

(1) Powers to hear and determine proceedings against prisoners in relation to prison offences may be vested by regulations in—

(a) Divisional Supervisors or senior officers;
(b) a Magistrate; or
(c) a tribunal established and empowered by regulations.

(2) The punishments which may be imposed for breaches of prison offences shall be as prescribed by regulations, with the following limitations applying to the exercise of such powers by Divisional Supervisors, senior officers and officers in charge—

(a) forfeiture of remission of sentence for a period not exceeding 90 days;
(b) deprivation of earnings, or part thereof, for a period not exceeding 60 days;
(c) forfeiture of privileges in accordance with this Act for a period not exceeding 60 days; or
(d) separation for a period not exceeding 14 days.

(3) All proceedings shall be conducted in a manner which apply the principles of natural justice, and where necessary interpreters shall be provided.

(4) Where any proceeding is heard and punishment is imposed by a Divisional Supervisor or officer in charge, the Commissioner may review the matter and overturn the decision or impose an alternative punishment, not exceeding those prescribed in subsection (2).

(5) No procedure may permit or require a prisoner to impose punishment on any other prisoner, but this restriction shall not prevent appropriate arrangements being made for prisoners to be designated to play leadership or mentoring roles in relation to other prisoners.

33. Section 39 (2) of the Corrections Service Act 2006 provides for the limitation of punishments to be imposed by divisional supervisors, senior officers, and officers in charge, in this manner:

"The punishments which may be imposed for breaches of prison offences shall be as prescribed by regulations, with the following limitation applying to the exercise of such powers by divisional supervisors, senior officers, and officers in charge -

(a) forfeiture of remission of sentence for a period not exceeding 90 days……"

34. The Respondents submitted that the Applicant had an adequate alternative remedy under the law and such remedy should have been exhausted before applying for Judicial Review. Regulation 17 of the Corrections Service Regulations 2011 provides that the Commissioner of Corrections Service has the power to review all proceedings heard by any supervisor or senior officer. The Commissioner has the power to quash a finding; alter a finding and find the prisoner guilty of another offence; reduce or increase the punishment; or remit the proceedings back to the supervisor or senior officer who heard the proceedings, or to another supervisor, for hearing. The Commissioner cannot increase the punishment during such a review, unless the prisoner has had an opportunity to be heard.

35. There is no evidence that the Applicant made use of the review mechanism provided by regulation 17 to canvass the decision made against him. At the hearing the Applicant submitted that he wrote a letter to the Commissioner of the Fiji Corrections Service in March 2018, but could not produce a copy, and submitted that a copy was not provided to him despite his request. Although the Commissioner has the power to review a decision in terms of Regulation 17,

the review process does not necessarily rule out the route through Judicial Review, and the Applicant's failure to challenge the decision made on 1 February 2017 by way of review is indicative of his disinclination to contest the decision of the Corrections Service Tribunal. He chose not to do so in a timely manner at his own peril. He chose to do so very much later, and this appears to have been an after-thought on the part of the Applicant. The Applicant's explanation that an application for review was not made as he was awaiting the Commissioner's endorsement is not acceptable.

36. The burden of establishing these claims are upon the Applicant and his failure to apply to the Commissioner or make a timely application for Judicial Review have not been satisfactorily explained. If the prison officers were uncooperative and hindered the Applicant in making the relevant applications for relief, he could have complained to the visiting Magistrates, which is provided by the Corrections Service Act[5]. A Visiting Justice is required to conduct an inspection of each prison within the Division for which he or she is responsible, at least once every month. The Applicant's failure to discharge this burden reflects unfavourably on him, and weakens his claim for discretionary relief from this Court.

37. A further complaint by the Applicant was that his rights to natural justice were violated by the Corrections Service Tribunal in that he was not permitted to give evidence or summon witnesses. The Respondent contended that the Applicant had pleaded guilty and, therefore, there was no necessity to lead evidence or summon witnesses on the Applicant's behalf. The Respondent relied on the decision of The State v Registrar Of Trade Unions[6]; in that case, Byrne J stated at page 62:

> *"In my judgment the case law establishes that the right to a fair hearing can be limited and that its extent depends on what Tucker LJ. called "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the special matter that is being dealt with ……"Russell v. Duke of Norfolk [1949] 1 All E.R. 109 at p.118. In Ridge v. Baldwin [1964] A.C 40 at pp. 64-65 Lord Reid said that the test is what a reasonable man would regard as fair procedure in particular circumstances. In the much later case of Lloyd v. MacMahon [1987] 1 All E.R 1118 at p.1161 Lord Bridge said:*
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> *"My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirement of fairness demand when any body, domestic, administrative or judicial, has to make a*

[5] Section 18
[6] [1991] 37 FLR 55

decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates."

"In other words, His Lordship was saying that the rules of natural justice are flexible and must depend on the circumstances of particular cases and the functions and responsibilities of the decision-maker."

38. These words of Byrne J are instructive; and the rules of natural justice are not cast on stone. I would add that, apart from the particular circumstances of this case, the functions and responsibilities of the Fiji Corrections Service and the Corrections Service Tribunal, the conduct of the Applicant, too, is relevant in assessing the fairness of a decision; in considering whether there has been a breach of the rules of natural justice.

39. The Corrections Service Tribunal has acted within its jurisdiction. There is no evidence of the breach of any laws or the rules relating to natural justice. In these circumstances, this Court of the view that the Applicant does not have an arguable case with a reasonable prospect of success at a full hearing. Therefore, the Court is not inclined to grant leave to apply for Judicial Review.

ORDERS

1. Leave to Apply for Judicial Review is refused

2. There is no order for costs

Delivered at Suva this 14th day of June**, 2019.**

HIGH COURT OF FIJI SUVA

Justice M. Javed Mansoor
Judge of the High Court