

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 262 OF 2019

BETWEEN : **PASIFIKA ENTERPRISE** of Nasau, Nadi.

PLAINTIFF

AND : **LAND TRANSPORT AUTHORITY** a body corporate established
under the Land Transport Act.

DEFENDANT

Appearances : Mr R. Singh for the plaintiff
Mr N. Kumar for the defendant
Date of Hearing : 28 February 2020
Date of Judgment : 06 July 2020

J U D G M E N T

Introduction

[01] The plaintiff brings this action by way of originating summons seeking the following orders

- 1.1 *A declaration the Traffic Infringement Notice No. 3589118 issued on 5 March 2019, is in breach of Section 14(2) and Section 15 of the Constitution of the Republic of Fiji and therefore null and void.*
- 1.2 *That the Traffic Infringement Notice No. 3589118 be declared null and void.*
- 1.3 *Costs on client solicitor indemnity basis.*

Background

[02] Pasifica Enterprise, the plaintiff is the owner of the truck registration number IY 967.

[03] On 5 March 2019, the Land Transport Authority, the defendant (“LTA”) issued with a traffic infringement notice No. 3589118 (“TIN”) for the alleged offence of permitting another person to drive the truck registration No IY 967 on the road with non-confirming mass plus load, i.e. had permitted the driver of the said truck in that allowing to carry over the permitted load restriction as regulated. The plaintiff was fined \$13,000.00 as being the fixed penalty. The TIN (No. 3589118) states, so far as relevant, as follows:

“ ...

“If you wish to contest this Notice for any other reason, you may elect to dispute this Notice in court.

If you fail to pay the Fixed Penalty, provide a Statutory Declaration or dispute this Notice in Court within 90 days from the date of issue of this Notice, you –

- (a) will be liable to a late payment fee equivalent to 50% of the fixed penalty, in addition to the Fixed Penalty;*
- (b) will be issued a departure prohibition order preventing you from leaving Fiji; and*
- (c) will not be able to renew your licence or vehicle registration.*

You may pay your Fixed Penalty and late payment fee in a single payment or in instalments.

The departure prohibition order and your ineligibility for licence or vehicle registration renewal will continue until you pay your Fixed Penalty and late payment fee in full or provide a Statutory Declaration or elect to dispute this Notice in court.

If you do not pay your Fixed Penalty and late payment fee in full or provide a Statutory Declaration or elect to dispute this Notice in court within 12 months from the date this Notice is issued to you, this Notice will take effect as a conviction and the Land Transport Authority may suspend your licence and seek the maximum penalty and demerit points applicable from the court”

[04] The solicitor for the plaintiff by his letter dated 17 May 2019, challenged the TIN on the grounds that:

- a) That the charging officer did not give any notice and did not request the driver to off load the excess weight before charging and issuing the TIN.
- b) That the procedure used or the way the scale was used by the defendant to weigh the truck was incorrect.
- c) That the plaintiff did load the truck to the limit it usually loads.
- d) That no certificate or printed reading was issued by the defendant from the scale used to ascertain the alleged overloading.
- e) That the TIN issued to the plaintiff is illegal and an abuse of process and thus it should be withdrawn and any money paid under the said TIN be refunded and any conviction noted against our client to be removed from the system.

[05] In these proceedings, the plaintiff challenges the TIN issued against it on the basis that it is void and illegal as it contravenes sections 14 and 15 of the Constitution.

The defendant's position

[06] The LTA's position is that:

- 7.1 The TIN is issued pursuant to the procedures set out in the Land Transport Act 1998 and the Land Transport (Traffic Infringement Notice) Regulations 2017, therefore is valid.

- 7.2 There is no breach of Section 14 and 15 of the Constitution of the Republic of Fiji (The Constitution).
- 7.3 The procedures are set out in the TIN and are proper.
- 7.4 The right to be presumed innocent is limited by law.

The evidence

[07] The plaintiff relies on its affidavit in support filed on 15 October 2019 and its affidavit in reply filed on 12 February while the defendant on its affidavit in response/opposition.

Legal framework

[08] Regulation 6 of the Land Transport (Traffic Infringement Notice) Regulations 2017 (*“the regulation 2017”*) provides:

“Fixed penalty

6 A person to whom a Traffic Infringement Notice is issued, is liable to a fixed penalty and must, within 90 days from the date the Traffic Infringement Notice is issued, undertake one of the following actions –

- (a) pay the fixed penalty in a single payment or by instalments;*
- (b) make a Statutory Declaration to the Authority in accordance with section 85(3) or 85A (2) of the Act; or*
- (c) elect to dispute the fixed penalty in court.”*

[09] The 2013 Constitution of the Republic of Fiji (*“the Constitution”*), section 2, states (so far as relevant) that:

“Supremacy of the Constitution

2.- (1) This Constitution is the supreme law of the State.

(2) Subject to the provisions of this Constitution, any law inconsistent with this Constitution is invalid to the extent of the inconsistency.”

(3)...

(4) This Constitution shall be enforced through the courts, to ensure that –

- (a) laws and conduct are consistent with this Constitution;
- (b) rights and freedoms are protected; and
- (c) duties under this Constitution are performed.”

...” (Emphasis added)

[10] Section 14 (2) (a) of the Constitution states that:

“Rights of accused persons

(2) Every person charged with an offence has the right-

(a) to be presumed innocent until proven guilty according to law;

...”

[11] The reg. R 9 states:

“9 If a person to whom a Traffic Infringement Notice is issued does not undertake any of the actions provided in regulation 7 within 12 months from the date the Traffic Infringement Notice is issued, **the Traffic Infringement Notice takes effect as a conviction** and the Authority may –

(a) suspend the person’s licence; and

(b) seek from the court a sentence providing for the issuance of demerit points and maximum penalties for the offence.”

The issues

[12] The issues to be determined by the court include:

- 12.1 What are the true and very extent of the legislation and regulation and how does it relate to the actual TIN issued?
- 12.2 Does the Act or Regulation intend for a TIN of the nature issued?
- 12.3 Is entry of a conviction without a public trial before a court of law in breach of section 14 and 15 of the Constitution of the Republic of Fiji?
- 12.4 Whether the fine is in accordance with the relevant regulation?

The submission

- [13] Mr Singh, on behalf of the plaintiff, submits that: section 9 does not provide the power to LTA to act as a court of law or to enter a conviction. The Constitution is the supreme law of the country. Any law which is inconsistent with the supreme law of the country is invalid and the right enshrined in the Constitution should be protected. The Bill of Rights in the Constitution provides for rights which are internationally protected. The right to be presumed innocent is clear and unwavering.
- [14] It is argued that how does one elect to dispute the TIN. The matter does not go before a court of law. There are no processes in place for a dispute to be filed either before a court of law or anywhere else. Does it mean that the plaintiff disputes the TIN and the defendant will issue a charge from the court? The reality in the ground is that there is a lacuna in the law as to how the dispute will be handled and how the dispute brought to court. He submits that the regulation effectively asks the plaintiff to go to court to prove his innocence. This is directly against the general right to be presumed innocent until proven guilty.
- [15] It is further contended that R 6 of the regulation reverses the onus in a criminal setting and clearly is unconstitutional in this respect and, therefore, void so far as the inconsistency.
- [16] Mr Kumar, on the other hand, for the defendant contends that: the Constitutional right under sections 6 and 7 can only be limited as prescribed or provided or authorized or permitted by law or any actions taken under the authority of a law, and such limitation is outlined in the Act and the regulation when an accused person must exercise their right within a statutory timeframe, and a person who did not take any action within the stipulated timeframe is statutory barred and statutory conviction, this conviction is not decided or adjudicated by the defendant but by law. The authority may only seek from the court a sentence providing for the issuance of demerits points and the maximum penalties for the offences, and such decision is only discretionary on the Authority.

[17] It is further argued on behalf of the defendant that the defendant as a regulator is duty bound to comply and apply the law and the regulation and it never fell short of this obligation, and the Act and the subsidiary legislations are all consistent with the Constitution.

Discussion

[18] In these proceedings, the plaintiff is seeking a declaration that the Traffic Infringement Notice No. 3589118 issued on 5 March 2019, (“TIN”) is in breach of section 14 (2) and section 15 of the Constitution and therefore null and void.

[19] The TIN was issued against the plaintiff for permitting another person to drive a motor vehicle with excess permissible gross weight load contrary to regulation 80 (9) (d) and 122 of the Land Transport (Vehicle Registration and Construction) Regulation 2000. The particulars of the offence were:

“Pasifika Enterprise on the 5th day of March 2019 at Denarau back road Nadi, in the Western Division being the owner of truck IY 967, permitted Mr Faiyaz Ali to drive and carry load of river sand with the total aggravated gross weight load of 34.7 ton when the legal permissible total gross weight load approved by the authority is 21.4 ton. The total excess gross weight is 13.3 ton.”

[20] It will be noted that particulars of the offence do not state the vehicle number involved in the commission of the offence.

[21] The defendant’s power under the Land Transport Act (“the Act”) read with the regulations made thereunder to issue TINs for violations of the Act and its regulations was not in dispute.

Principal issue

[22] The principal issue is whether the TIN issued against the plaintiff violates the plaintiff’s bill of rights guaranteed under sections 14 (2) and 15 of the Constitution.

[23] Section 14 (2) of the Constitution guarantees that every person charged with an offence has the right to be presumed innocent until proven guilty according to law while section 15 the right to a fair trial before a court of law.

- [24] It is declared under section 6 (6) of the Constitution that subject to the provision of the Constitution this Chapter (Bill of Rights Chapter) applies to all laws in force at the commencement of this Constitution.
- [25] The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.
- [26] The regulation in question has reverse onus provisions. It shifts the burden of proof to the accused or applies a presumption of fact or it operates against the accused.
- [27] The right to the presumption of innocence is one of the guarantees in relation to legal proceedings contained in section 14 of the Constitution, the Supreme law of the country. The other guarantees are the right to a fair trial before a court of law (s.15 (1), and minimum guarantees in criminal proceedings, such as the right to counsel (s.14 (d)) and not to be compelled to self-incriminate (s. 14 (j)).
- [28] Dealing with the right to the presumption of innocence, Fiji Court of Appeal in *Rahul Ritesh Chand v The State (Criminal Appeal Number AAU 158 of 2014)* said:

“[26] In the United States Supreme Court decision in Re Winship [1970] USSC77;[1970] 397 US 358, the court held that the reasonable doubt rule has constitutional force under the due process provisions of the United States Constitution. The same could be said in regard to Article 15(1) of the Constitution of Fiji which states that “every person charged with an offence has the right to a fair trial before a court of law “and under Article 14(2) (a) “Every person charged with an offence has the right to be presumed innocent until proven guilty according to law”. Brennan J said in re Winship: “Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

[27] The Supreme Court of India said in B. N. Mutto & Another – v- Dr T. K. Nandi [1979] 1 SCC 361: “It stems out of the fundamental principle of our criminal jurisprudence that the

accused is entitled to the benefit of any reasonable doubt. If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of a reasonable doubt. But fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him."

[28] In the South African case of S -v- T [2005] 2 SACR 318 €: "The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law

[29] In the Zimbabwe case of S-v-Makanyanga [1996] (2) ZLR 231 the court observed: "A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of the criminal complainant, but the fact that such credence is given to the testimony does not mean that conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that the complainant be believed. It demands that a defence succeeds wherever it appears reasonably possible that it might be true."

[29] Some laws, through their onus provisions, shift the burden of proof to the accused or apply a presumption of fact or law operating against the accused.

Under international human rights law, a reverse provision will not necessarily violate the presumption of innocence provided that the law is not unreasonable in the circumstances and maintains the right of the accused. The purpose of the reverse onus provision would be important in determining its justification. Such a provision may be justified if the nature of the offence makes it very difficult, or if it is made mere practical for the accused to prove a fact then for the prosecution to disprove it.

- [30] On the issue of presumption of innocence, European Court of Human Rights (“ECHR”) in *Kemal Coskun v Turkey* [2017] ECHR 281 (28 March 2017) said [at paragraph 42] that:

“42. ... The presumption of innocence, considered in the light of the general obligation of a fair criminal trial under Article 6 ss 1, excludes a finding of guilt outside the criminal proceedings before the competent trial court, irrespective of the procedural safeguards in such parallel proceedings and notwithstanding general considerations of expediency (see Bohmer v. Germany, no. 37568/97, ss 67, 3 October 2002). In this connection, the Court considers that the duty to refrain from procedural or premature comments regarding a person’s guilt applies a fortiori to courts other than the one determining the criminal charge. The Court emphasises that the purpose of the right to be presumed innocent until proven guilty is not only guarantee the fairness of the criminal trial from undue influences but also to protect a person’s reputation from unjustified brandings of guilt (see El Kaada v. Germany, no. Ss 42. 12 November 2015, and mutatis mutandis, Allen, cited above, ss 94).”

- [31] Dealing with a similar situation, Alfred J (as he was then) in *Raviravi Investment Timber & Hardware Ltd v Fiji Revenue and Customs Service* [2019] FJHC 341; HBT01.2019 (15 April 2019) observed [at paragraphs 14 to18]:

“14. I now turn to section 15(1) of the Constitution of Fiji, the supreme law of the land, which states “Every person charged with an offence has the right to a fair trial before a court of law.

15. It is as plain as a pikestaff that the CEO, Revenue is not a judge nor a court nor a member of the Judicial Branch of Government. He is clearly a member of the Executive Branch. My decision today will put the issue at rest in consonance with the constitutional arrangement for the separation of powers.

16. *Before I pronounce my judgment, I shall first have to attend to the startling wording in the ultimate paragraph of the Infringement Notice. This reads “If you do not pay your fixed penalty and late payment fee in full or elect to dispute this Infringement Notice in court within 3 months from the date this Infringement Notice is issued to you, this Infringement Notice will take effect as a conviction from the court and the Fiji Revenue and Customs may seek the maximum penalty from the court”.*
17. *I shall state quite categorically that this part of the Notice has no such effect nor can it ipso facto convert itself to something tantamount to a conviction by the court. A conviction of the court, I reiterate, can only emanate from the court and from nowhere else.*
18. *In my considered opinion, sub-regulation (4) will require a taxpayer who is alleged to have committed an offence against sub-regulation (3) to first be charged in a court of law, then convicted, and then only fined. Here these elements are clearly absent. In their absence, Revenue had no right to impose a \$50,000 fine even if that is erroneously described as a penalty.”*

[32] Returning to the matter at hand, the R6 of the Land Transport (Traffic Infringement Notice) Regulation 2017 (“Regulation 2017”) states that:

“Fixed penalty

6 A person to whom a Traffic Infringement Notice is issued, is liable to a fixed penalty and must, within 90 days from the date the Traffic Infringement Notice is issued, undertake one of the following actions –

- (a) pay the fixed penalty in a single payment or by instalments;*
- (b) make a Statutory Declaration to the authority in accordance with section 85(3) or 85A (2) of the Act; or*
- (c) elect to dispute the fixed penalty in court.” (Emphasis added)*

- [33] R6 (c) that elect to dispute the fixed penalty in court clearly has, in my opinion, has the effect of reverse onus meaning the person issued with a TIN must prove his innocence while the Constitution guarantees the presumption of innocence as a fundamental human right.
- [34] The proof of over loading can be easily proved in court. It is not very difficult to do so. The defendant did not submit about the purpose as to why such reverse onus was introduced in R6 (c) of the regulation 2017. The crux of the defendant's submission was that it was not the defendant that convicts the plaintiff or the person issued with a TIN under the regulation but the law/the regulation does.
- [35] In the absence of the legitimate aim to meet by the reverse onus, it would be very hard for the court to decide that it (reverse onus) was proportionate means of a legitimate aim. In the circumstances, I would hold that R6 (c) of the regulation 2017 violates the right of presumption of innocence guaranteed under section 14 (2) (a) of the Constitution. Section 2 (2) of the Constitution declares that any law which is inconsistent with the Constitution is invalid to the extent of the inconsistency. Therefore, R 6 (c) is inconsistent with the Constitution, accordingly must be read subject to the Constitution. This translates that rule (R 6 (c)) must be read as "*will be prosecuted in court*".
- [36] Further, the Land Transport Authority (Traffic Infringement Notice) Regulations 2017 the Traffic Infringement Notice issued by the defendant states that in the event that the same is not disputed within 12 months from the date of issuance of the TIN, the Notice will take effect as conviction.
- [37] A conviction can only be entered by the court but not otherwise. The TIN that informs the plaintiff: that in the event that the same is not disputed within 12 months from the date of its issuance, the Notice will take effect as conviction.
- [38] The deeming conviction notice not only violates the right to a fair trial before a court of law (section 15 (1) of the Constitution) but also the right of presumption of innocence guaranteed under section 14 (2) (a) of the Constitution. Therefore, the notice is invalid as it is consistent with the Constitution.

Conclusion

[39] For all these reasons, I conclude that the plaintiff is entitled to relief it seeks. I accordingly declare that the Traffic Infringement Notice No.3589118 issued on 5 March 2019 is in breach of sections 14 (2) and 15 of the Constitution and therefore *null and void*. The plaintiff is also entitled to summarily assessed costs of \$1,000.00.

Result:

1. There shall be a declaration that the Traffic Infringement Notice No.3589118 issued on 5 March 2019 is in breach of sections 14 (2) and 15 of the Constitution and therefore *null and void*.
2. The defendant shall pay summarily assessed costs of \$1,000.00 to the plaintiff.

M.H. Mohamed Ajmeer
6/7/20

.....
M.H. Mohamed Ajmeer

JUDGE



**At Lautoka
06 July 2020**

Solicitors:

Patel and Sharma, Barristers & Solicitors for the plaintiff

Krishna & Co, Solicitors for the defendant