NAUSHAD ALI v STATE

HIGH COURT — APPELLATE JURISDICTION

PRAKASH J

1 November 2001, 21 March 2002

[2001] FJHC 169

Criminal law — appeals — appeal against conviction and sentence — corporal punishment unconstitutional — Constitution ss 2, 3, 19(2)(e), 21(3), 25(1), 27(1), 28(1), 29(3), 41(3), 43(2), 195(3) — Criminal Procedure Code ss 206, 308(1), 309(1), 320 — Education Act (Cap 262) — Penal Code ss 34, 34(2), 34(4), 175, 183 — Prisons Act s 84 — UN Convention of the Rights of the Child ss 2, 19, 28(2).

Statutes — interpretation — Penal Code and Criminal Procedure Code inconsistent with Constitution s 25(1) — corporal punishment unconstitutional

Appellant sought an appeal against conviction and sentence concerning an unnatural offence against her own daughter. He was convicted and sentenced to 5 years' imprisonment and further sentenced to six strokes of corporal punishment. Appellant alleged the constitutionality of the corporal punishment meted on him.

Held — The court cannot condone the corporal punishment upon the Appellant in view of its obligations under the Constitution and considering that the Appellant was a first time offender. Corporal punishment under the Penal Code, Criminal Procedure Code and any administrative guidelines or otherwise enforced in schools was unconstitutional since it runs conflict with the Constitution's policy regarding degrading and inhuman punishment.

Appeal against conviction dismissed. Appeal against sentence dismissed partially.

Cases referred to

A v United Kingdom Case No 100/1997/884/1096; *A Juvenile v State* [1989] LRC (Const) 774; *Dakai v State* [1998] FJHC 104; *Ex Parte Attorney-General of Namibia, In re Corporal Punishment by Organs of State* [1992] LRC (Const) 515; *Kuruka Bogiwalu and Ifereimi Nakauta v State* Crim App No AAU 0006/1996S; *Maleli Qiladrau v State* Crim App No 48/2000; *Mohammed Munaf v State* Crim App No HAA 0001/1998; *Mul Prasad v State* Crim App No 37 of 1997; *Ncube and Ors v State* [1998] LRC (Const) 442; *Sailasa Naba and 4 Ors v State* HAC 00012/2000L; *Stephen John Peter Jones* [1991] 92 Cr App R 288; *Suren Singh and 4 Ors v State* Crim App No 079/2000S; *Taj Deo v State* Crim App No 47/1998; *Tevita Bulumakau v State* Crim App No HAA 0109J/1998B; *Umesh Kumar v State* Criminal Appeal No AAU 9 of 1997S, considered.

DPP v Gaj Raj Singh [1978] 24 FLR 43; *Eri Mateni v State* Crim App No AAU 0021/985; *Minister of Home Affairs and Anor v Fisher and Anor* [1980] AC 319; *Muhozya v The Attorney-General* Civil Case No 206/1993; *R v Peter Charles Willis* (1974) 60 Cr App Rep 146; *State v Audie Pickering* Misc Action No HAM 0007/2001S; *Tyrer v United Kingdom* (1978) 2 EHRR 1; [1978] ECHR 2; *Van Eck No and Van Rensburg No v Etna Stores* 1947 (2) SA 984, cited.

Vilikesa Balecala v State Crim App No HAA 0062/96, followed.

G. P. Shankar for the Appellant

D. Prasad for the State

S. Shameem, *Ratuvili* and *D. Sudhakar* for the Proceedings Commissioner, Fiji Human Rights Commission (amicus curiae)

Judgment

Prakash J.

Introduction

The Appellant appeared before the Ba Magistrates Court on 16 August 2001. He was charged with one count of Unnatural Offence — contrary to s 175 of the Penal Code. The particulars alleged that: "Naushad Ali s/o Mohammed Ali from January, 2000 to the 14th day of August 2001 at Korovuto, Ba in the Western Division had carnal knowledge of Banu Farnaz Bano d/o Naushad Ali against the order of nature". He pleaded guilty. The facts were read out and also tendered in writing. The medical report on the victim was tendered. The Appellant's caution interview, in Hindi, and translation were also tendered.

The Appellant admitted the facts. The learned magistrate convicted the Appellant. The appellant was a first offender. The Appellant spoke briefly in mitigation. The learned magistrate sentenced him to 5 years' imprisonment. He further ordered six strokes of corporal punishment subject to confirmation by the High Court. The officer-in-charge of the Ba Magistrates Court, via memo dated 20/08/01, sent the relevant criminal file together with two certified copies of the record for confirmation of corporal punishment.

The matter was first called before this court on 31/08/0Mr J Sharma, the Legal Aid Commission counsel at Lautoka, appeared for the accused. Mr J Waqaivolavola appeared for the State. The court requested the parties to consider s 34 of the Penal Code. The court sought clarification as to the purpose of confirmation by the High Court its powers etc. These matters subsequently became academic. In the absence of submissions the court did not fully address these issues. The court was informed that the accused wished to appeal. When the matter was called on 14/09/01 the Ba Magistrates Court informed the High Court that an appeal had been filed. A petition of appeal was filed in the Ba Magistrates Court on 12/09/01. Mr K Qoro appeared for the accused to inform that GP Shankar & Associates would represent the Appellant. Mr Shankar himself appeared on 28/09/01. He stated he was ready for a hearing. By consent between the State counsel and Mr Shankar the Fiji Human Rights Commission was requested to intervene as amicus curiae, in relation to the issue of corporal punishment. The matter was then adjourned for hearing on 11/11/01.

The notice of appeal (mistakenly headed, in the Fiji Court of Appeal at Lautoka) was only filed on 29 October 2001 at the Lautoka High Court Registry. The following grounds were listed:

> *(1) That the Appellant be allowed to argue appeal against conviction notwithstanding the provisions of s 308(1) of the Criminal Procedure Code and to adduce evidence [provisionally by affidavit] under s 320 of the Criminal Procedure Code, because the purported plea of guilty was not a real and genuine plea of guilty but was entered by unlawful conduct on the part of the Police and the whole proceedings were miscarried because of unlawful conduct on the part of the Police.*
>
> *(2) That the Appellant be at liberty to in the alternative to argue against the sentence on the grounds that the sentence is excessive, wrong in principle, and in any event corporal punishment ought not to have been imposed.*

(3) That the Appellant be referred to examination by Psychiatrist for examination and a report on him be submitted to the Court and made available to all parties to this appeal.

Interestingly, two Affidavits were filed on behalf of the Appellant on 26/10/01 — 3 days before the notice of appeal. It is not clear on what basis these affidavits were filed. The notice of appeal (para 1) purports to suggest the adducing of evidence (provisionally by affidavit) under "Section 320 of the Criminal Procedure Code". Section 320 of the Criminal Procedure Code allows the High Court to take additional evidence itself or direct such evidence to be taken by a Magistrates Court. There is no provision for affidavit evidence to be adduced. No objections were taken by the State. Learned State counsel stated that the Magistrates' Court record speaks for itself. There was no need for further affidavits in response. No leave was sought to allow the Appellant nor his mother, who deposed in the two affidavits filed, to give oral evidence. In view of the procedure adopted in *Prem Singh v State* [1994] 40 FLR 219 the court perused the affidavit evidence filed.

Appeal against conviction

Under s 309(1) of the Criminal Procedure Code: "No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such plea by a Magistrates' Court, except as to the extent of legality of the sentence". The basis on which the Appellant counsel wishes to question the plea is "– because the purported plea of guilty was not a real and genuine plea of guilty but was entered by unlawful conduct on the part of the Police and the whole proceedings were miscarried because of unlawful conduct on the part of the Police".

It is clear from the authorities in Fiji and other common law jurisdictions that an appellate court will not inquire into the guilty plea unless it was unequivocal. The Fiji Court of Appeal succinctly summarised the position in *Kuruka Bogiwalu and Ifereimi Nakauta v State* (Crim App No AAU0006 of 1996S):

If it can be demonstrated that an unrepresented accused has pleaded guilty in a manner that is in any way equivocal or uncertain, or that the accused entered the plea when he did not have a full understanding of the effect of the plea, namely that he was admitting that he committed the offence with which he has been charged, an appeal against conviction may be entertained despite the guilty plea. In that event, s 309(1) will not apply, because there has not been an effective and binding plea of guilty.

Whether a plea of guilty is effective and binding will be a question of fact to be determined by the appellate court ascertaining, from the record and from any other evidence tendered, what occurred at the time the plea was entered. The onus will be on the Appellant to establish the facts on which the validity of the plea is challenged.

Appellant counsel also raised the issue of an examination of the Appellant by a psychiatrist. In submissions it was not clear what was the purpose of any psychiatric examination of the Appellant counsel. It was merely stated that the Affidavit material was sufficient basis to raise this issue. The submissions appear to suggest that the Appellant did not understand the proceedings, that he was not mentally fit to plead. The mother Shah Bang, for example, deposes in her affidavit (para 4):

That Naushad Ali right from his childhood has been very timid, always behaved cowardly, gets frightened very quickly and as I as his mother say that he has been of very low mentality, and lacks sufficient intelligence. He spent about four years in primary school but is nevertheless equal to an illiterate and fool person.

The court does not need to consider in detail the affidavit materials. Suffice it to mention that the matters deposed to by the Appellant do not suggest him to be a completely foolish or dumb person. He signed his caution interview in English. He is a cane cutter which is not a job for a "fool person". The legal aid counsel who first appeared for him and had consultations with the Appellant did not indicate that the Appellant did not understand the proceedings he was facing before the High Court. The Appellant did indicate he wished to appeal and that his relatives had seen a lawyer. All in all the court does not have any basis to doubt the Appellant's mental capacity to plead and to understand the charges and proceedings he was facing. Appellant counsel's submission that "He is poor, virtually illiterate, low mentality" is not borne out by any evidence.

While the court did not have any opportunity to hear the Appellant the court did note that he was a frail, lightly built person. As such the court finds his allegations regarding the nature of police brutality incredible. He deposes in para 5:

> *That in the Police Station I was brutally beaten up and given inhuman treatment. I was punched on my stomach several times, on my ribs and I was made to lie down on cement floor, the police officer was jumping on my stomach. I suffered very severe and grave pain that I could not tolerate any more ill-treatment. Because of that I put my signature to whatever the police recorded. I had no sleep. I was made to lie down on the floor.*

In the court's view if the brutality described above took place, especially the jumping on his stomach, the Appellant would have been in no position to be presented to court in a physical state that the learned magistrate would not have noticed some physical strain, injury etc. It is noted that the Appellant was in police custody for the caution interview from 10.30am on 16/08/01. He was formally charged from 12.20 hour to 12.45. He was presented in court at 2.30pm. Given such a short period of police custody and production in court the level of assault alleged would have been clearly noticed in his demeanour and appearance in court.

The allegation is of unlawful conduct of the police. No materials have been submitted to question the record of the Magistrates Court. In this court's view the records of the Magistrates Court at Ba suggests the adoption of proper procedures by the learned magistrate. After the charge was read and explained the Appellant was recorded to have stated "Guilty". The record states:

> *I plead guilty of my own free will. The police did not force me to plead guilty.*

This, from my experience, indicates the learned magistrate clarifying from the Appellant the equivocality of his plea. The Appellant was in the sanctity of the court when the plea was taken. The learned magistrate further sought the accused's caution interview. This was subsequently translated and tendered. It was after the learned magistrate perused the caution interview that it is recorded that "facts are admitted". The conviction is then entered. The learned magistrate correctly followed the guidelines provided by Townsley J in *Vilikesa Balecala v State* (Crim App No HAA 0062/96). There is no evidence of improper pressure on the Appellant (*Brenner* (1941) 28 Cr App R 41).

In his written submission (para 2.3) Appellant counsel raised the issue of carnal knowledge. He submits that "– there must be some penetration in the vagina". This is incorrect. Carnal knowledge is defined in s 183 of the Penal Code. Under s 175 there is no requirement of penetration of the vagina. The carnal knowledge is against the order of nature.

There is also no requirement to put an accused person whether he admits the voluntariness of the caution statement or if he pleads guilty. A guilty plea and the admission of facts assume an accused admits the offence. The caution interview, medical reports or government analyst report are there to assist the court to ascertain whether the elements of the offence are made out and the plea is unequivocal. In this court's view the learned magistrate complied with the provisions on s 206 of the Criminal Procedure Code.

Appellant counsel in oral submissions raised the issue of legal representation. He stated that the Appellant was denied the opportunity for legal representation. In *Suren Singh and 4 Ors v State* (Crim App No 079 of 2000S) Shameem J had fully considered the right to counsel under ss 27(1) and 28(1) of the Constitution. As Her Honour stated:

> *Taking a purposive approach, therefore, to the right to counsel under the Constitution, the suspect must be told of that right by the Police on arrest. In many cases arrest and charge occur simultaneously under the Judges Rules so that the purpose of the provision would be satisfied if the right were explained once.*

The Appellant's caution interview was before the court. In it the Appellant was asked whether he wished to consult his solicitor. He said "No". The learned magistrate did not inform the Appellant of the right to defend himself or to be represented by a legal practitioner. However, given the procedure adopted by the learned magistrate, this was not fatal to the case before him.

This court cannot find any basis to disturb the guilty plea entered. No evidence has been submitted to question the Appellant's mental capacity to plead. There are no grounds to refer the Appellant for psychiatric examination. In the court's view the Appellant's plea before the Ba Magistrates Court was unequivocal. The appeal against conviction is dismissed.

Appeal against sentence

Appellant's submission against sentence was rather sparse. Only oral submissions were made. Appellant counsel submitted that Appellant was a first offender, and pleaded guilty. He further submitted that there was no mental torture or permanent injury to the victim. He submitted that the sentence be reduced and suspended. The Appellant is not a menace to society. A suspended sentence hanging over his head would be sufficient punishment.

The court is mindful that the Appellant is a first offender. However, the victim was his 6-year-old daughter. One cannot concur with Appellant counsel's submissions that there was no mental torture or permanent injury to the victim. These have not been assessed nor placed before the court. The facts suggest that the unnatural offence commenced sometime in January 2000. The Appellant was charged for one offence only. The medical report indicated signs of penetration.

In *Maleli Qiladrau v State* (Crim App No 48 of 2000) Pathik J briefly reviewed the authorities concerning unnatural offences against children. In that case a 35-year-old man had sodomised a 6-year-old boy. They both lived in a close knit village community. In that case a sentence of 5 years was upheld. In *Mohammed Munaf v State* (Crim App No HAA0001 of 1998) Townsley J also upheld a 5-year sentence in a case of sodomy. This case involved a teacher priest betraying the trust of a young student. It is quite clear that courts are quite sensitive to the psychological effects of such offences on young children: *R v Peter Charles Willis* 60 Cr App Rep 146 (CA)). The relationship of trust where neighbours, relatives and others in close proximity to children are involved is also an important factor in sentencing.

In the UK *Attorney-General's Reference (No 17 of 1990) Stephen John Peter Jones* [1991] 92 Cr App R 288, the Court of Appeal set out five aspects which a sentencing judge has to take into consideration in determining the correct sentence for such offences:

> *First of all the overall gravity of the offence; secondly, the necessity for punishment of the offender, something which is sometimes overlooked; thirdly, the necessity to protect the public from the activities of someone is prepared to sniff solvent and then, having his sexual inclinations aroused, goes and commits this type of offence; fourthly, the public concern at sexual offences on young children; and fifthly what one hopes may be the deterrent effect, the effect which a severe sentence may have upon other people who might be minded to act in this way.*

In *Maleli Qiladrau* Pathik J also considered the UN Convention on the Rights of the Child (CRC). This convention was ratified by Fiji in 1993. Articles 16 and 19 of the convention are relevant. The convention requires governments to take legislative and other measures to protect children from physical or mental violence including sexual abuse. As with all victims of crimes the rights of children have particular poignancy. Children are the most vulnerable members of any community. It is the duty of the courts to protect their interests, especially where parents are wanting. In this case the victim was a young child of 6 years. She was the daughter of the appellant.

In considering the above guidelines and the cases of *Maleli Qiladrau* and *Mohammed Munaf* this court does not find any basis to disturb the 5-year sentence of imprisonment imposed.

Corporal punishment

As the court has indicated earlier this matter first came before the Lautoka High Court for the confirmation of the corporal punishment imposed. The confirmation is a requirement under s 34(2) of the Penal Code. The court queried the parties as to the purpose of confirmation. Could the High Court refuse confirmation? If so on what basis? In the case of *Taj Deo v State* (Crim App No 47 of 1998) the High Court at Suva refused confirmation of corporal punishment on the grounds that s 34(4) of the Penal Code was not complied with. As it stated: "The age of the appellant was not properly given although he said he was 28 years old. His birth certificate should have been produced. The prosecution also does not support the corporal punishment because of the appellant's health". It is not clear what was the health conditions alluded to. The High Court could have ascertained the Appellant's age if it wished. It appears that neither the court nor the prosecution wanted to confirm the corporal punishment.

A perusal of the available files in the Lautoka High Court since 1976 indicates a summary procedure for the confirmation of corporal punishment. In the absence of an appeal a judge usually confirmed the corporal punishment in chambers. In certain cases on appeal the issue of confirmation was not specifically addressed.

In this case the parties have made submissions on the validity of corporal punishment in view of s 25(1) of the Constitution. Counsel for the Appellant submitted that: "Corporal punishment (also called whipping) was abolished in England by Criminal Justice Act 1967". He further submitted that "Whipping or as it is called corporal punishment is outdated, and contravenes the constitution because in effect it is a 'torture' as well as 'cruel', 'inhuman' and 'degrading or disproportionately severe punishment'".

Appellant counsel further stated that he supported the written submissions on corporal punishment made by the Human Rights Commission.

The State did not make any substantive submissions on the issue of corporal punishment. Learned State counsel stated that the State's view was in line with the case of *Umesh Kumar v State* (Crim App No AAU0009 of 1997S), He further suggested that if corporal punishment is not confirmed, the High Court could enhance the sentence of imprisonment as it did in *Dakai v State* ([1998] FJHC 104). Appellant counsel responded that if the High Court rules that corporal punishment is unconstitutional then it should not substitute it for any other sentence. It is not clear from a consideration of the case of *Dakai* that Pathik J substituted a sentence in lieu of corporal punishment. The Appellant Dakai was sentenced to 5 years' imprisonment "with a recommendation that he be given 5 strokes of the birch". The final order of Pathik J states: "I set aside the sentence and the recommendation for corporal punishment and substitute it with one of five and half years (5 ½) imprisonment". It appears that the whole sentence was substituted to one of 5–and-a-half years. The High Court cannot substitute a sentence greater than that permitted to the Magistrates Court (see *DPP v Gaj Raj Singh* [1978] 24 FLR 43; *Eri Mateni v State* FCA Crim App AAU 21/985. It is clear that Pathik J did not specifically deal with the issue of confirmation of corporal punishment. It is also not clear whether he substituted the 6-month additional sentence in lieu of corporal punishment.

In *Umesh Kumar* the Fiji Court of Appeal only expressed its "doubt about the constitutionality of any corporal punishment having regard to s 25(1) of Fiji's 1997 Constitution". It also recognised that a similar provision existed, in the 1990 Constitution. It was noted in that case that the State counsel agreed that since more than 6 months had already elapsed, corporal punishment cannot be carried out. As such the Fiji Court of Appeal did not have an opportunity to consider the constitutionality of corporal punishment under s 25(1) of the Constitution.

In the case of *Tevita Bulumakau v State* (Crim App No HAA0109J of 1998B) the Appellant was sentenced to 5 years' imprisonment and five strokes of corporal punishment. Madraiwiwi J dismissed the appeal and further stated that "– the court will set aside the five strokes of corporal punishment proposed by the learned magistrate on the basis that it is both unconstitutional and contrary to this country's … international treaty obligations under the International Covenant of Civil and Political Rights". It is clear that neither the Fiji Court of Appeal nor the High Court fully considered the constitutionality of corporal punishment. Given the submissions placed before it this court is bound to consider the constitutionality of corporal punishment. In its submissions the Fiji Human Rights Commission has urged the court to consider corporal punishment under the Penal Code and as administered in schools. It has argued that all corporal punishment per se is against s 25(1) of our Constitution and international human rights law. In Fiji corporal punishment, as far as this court is aware, is provided for as a punishment in the Penal Code and the Criminal Procedure Code. It is not provided for under any prison disciplinary procedures except under s 84 of the Prisons Act. Under s 84 corporal punishment may be imposed for certain prison offences. However, the charges have to be dealt by the Magistrates Courts and provisions of s 34 of the Penal Code complied with. It is also provided for understanding administrative guidelines issued by the Ministry of Education to schools.

Section 25(1) of the Constitution

Section 25(1) of our Constitution states:

> *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.*

In the case of *Sailasa Naba and 4 Ors v State* (HAC 0012 of 2000L) this court had considered ss 25(1) and 29(3) of the Constitution in relation to detainees awaiting trial for murder. In that case the court had stated at 3:

> *In interpreting these (Bill of Rights) provisions it is evident that they need to be considered within the evolving human rights jurisprudence both in Fiji and internationally. Section 3 and Chapter 4 of the Constitution mandates us to promote democratic values based on freedom and equality. In our interpretation of human rights we are obliged by the Constitution to consider social and cultural developments, and developments in the understanding, promotion, and content of particular human rights.*

It is quite clear from a consideration of the case law from around the Commonwealth that in interpreting the fundamental rights provision of a constitution the courts have taken a purposive approach in giving full effect to those fundamental rights and freedoms (*Minister of Home Affairs and Anor v Fisher and Anor*, Appeal from the Court of Appeal of Bermuda, [1980] AC 319). The interpretation of a constitution must reflect changes in society. *It is a living instrument which must be construed in the light of present day conditions*. (*Muhozya v The Attorney-General* judgment of the High Court of Tanzania (DSM), Civil Case No 206 of 1993, p 3 unreported). Punishment and treatment of persons by state institutions that may have been condoned in the past may be offensive for the present. In relation to the particular issue before this court the Supreme Court of Zimbabwe in 1989 made a pertinent observation. It had before it the issue of corporal punishment. It observed: "– a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman and degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances" (*A Juvenile v State* [1989] LRC (Const) 774). One can see the living spirit of our Constitution and the impact of international human rights jurisprudence on our Penal Code in the introduction of the Bill in Fiji's Parliament to amend ss 50 and 51 of the Penal Code. The Bill sought to abolish the death penalty for treason and substitute it with life imprisonment. The explanatory note to the Penal Code (Amendment) Bill 2001, inter alia, states:

> *– Amnesty International opposes the death penalty in all cases because it is the ultimate cruel, inhuman or degrading punishment and violates the right to life. Human Rights Organisations are also supportive of the abolition of death penalty. The Second and Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of death penalty which was adopted and proclaimed by the UN General Assembly in 1989 provided that no one in the jurisdiction of the State Party should be executed and the State Party should take all necessary measures to abolish death penalty within its jurisdiction.* (Bill No 6 of 2002)

The philosophy adopted in our Constitution and the Bill of Rights chapter are very much in the tradition embedded in the case law on human rights in the Commonwealth countries, the European Union and USA. As the Constitution itself mandates, in the interpretation of a provision of the Constitution we need to take "– into account the spirit of this Constitution as a whole–". It further mandates us to regard – the context in which this Constitution was drafted and

to the intention that constitutional interpretation take into account social and cultural developments". More specifically in relation to human rights it mandates us to regard especially "developments in the understanding of the content of particular human rights; and developments in the promotion of human rights" (s 3). As far as the Bill of Rights (Ch 4) is concerned:

> *– The courts must promote values that underline a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.* (s 43(2)).

The above specific mandates need to be situated in the wider context of the Preamble to the Constitution which, among other things, acknowledges:

> *Reaffirming our recognition of the human rights and fundamental freedoms of all individuals and groups safeguarded by adherence to the rule of law, and our respect for human dignity–.*

Further, in the compact (Ch 2) of our Constitution:

> *The people of the Fiji Islands recognise that, within the framework of this Constitution and the other laws of the State, the conduct of government is based on the following principles:*
>
> *(a) The rights of all individuals, communities and groups are fully respected;*
> *…*

While the Preamble and the Compact are non-justiciable they do reflect the spirit and purpose of the Constitution. As s 7(2), on the application of Compact, states:

> *In the interpretation of this Constitution, or a law made under this Constitution, consideration must be given to those principles, when relevant.*

For the judiciary in Fiji, the Constitution sets high standards and high expectations in the promotion and progressive development of human rights and fundamental freedoms. It may be sometimes overlooked that the Bill of Rights (Ch 4) also binds the judiciary.

Section 21 states:

> *(1) This chapter binds:*
> *(a) The legislative, executive and judicial branches of government at all levels –*
> *(3) Laws made, and* **administrative** *and* **judicial actions taken** *after the commencement of this Constitution are subject to the provisions of this Chapter.* (Emphasis added).

The Fiji Human Rights Commission submissions succinctly summarise the relevant international instruments that impinge on the issue of corporal punishment. Article 5 of the Universal Declaration of Human Rights to which all UN members are bound states:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

The above is reiterated in Art 7 of the International Covenant on Civil and Political Rights. The UN Human Rights Committee was established under this covenant. This committee has interpreted Art 7 as follows:

> *The prohibition in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the* **prohibition must extend to corporal punishment including excessive chastisement ordered as punishment for a crime or an educative or disciplinary measure**. *It is appropriate to emphasise in this regard that Article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.*

The wording of s 25(1) of our Constitution is almost identical to Art 5 of the Universal Declaration and Art 7 of the International Covenant on Civil and Political Rights. As such we are bound to interpret s 25(1) in consonance, with international human rights laws. In fact s 43(2) of the Constitution makes it incumbent on the courts to do so. Section 43(2) states:

> *In interpreting the provisions of this Chapter, the Courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.*

The other provisions of the Constitution which are specifically relevant to the consideration of the issues before the court are:

Section 2:

> *(1) This Constitution is the supreme law of the State.*
>
> *(2) Any law inconsistent with this Constitution is invalid to the extent of the inconsistency.*

Section 3:

> *In the interpretation of a provision of this Constitution:*
>
> *(a) A construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object; and*
>
> *(b) Regard must be had to the context in which this Constitution was drafted and to the intention that constitutional interpretation take into account social and cultural developments, especially:*
>
> *(i) Developments in the understanding of the content of the particular human rights; and*
>
> *(ii) Developments in the promotion of particular human rights.*

Section 19(2)(e):

> *All written laws in force in the State (other than the laws referred to in subs (1)) continue in force as if enacted or made or pursuant to this Constitution and all other law in the State continues in operation.*

Section 195(3):

> *… Subject to s 2, written laws referred to in para (2)(e) or (f) are to be construed, on and from the commencement of this Constitution, with such modifications and qualifications as are necessary to bring them into conformity with this Constitution.*

It is quite clear from the provisions of the Constitution cited above that all laws passed prior to the promulgation of the 1997 Constitution must be scrutinised for compliance with the Constitution (see *State v Audie Pickering* Misc Action No HAM0007 of 2001S). All laws passed subsequently will also need to be tested against the provisions of the Constitution since the Constitution is the supreme law.

While the doctrine of parliamentary supremacy is deeply rooted in the common law the duty on the courts in dealing with the Constitution is also very onerous. The Constitution binds the legislature, executive and judicial branches of government. The duty of the courts is to uphold the Constitution. As a past Chief Justice of the USA has stated:

> *We are oath-bound to defend the Constitution. This obligation requires that congressional enactment be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual*

rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorise and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication.

The efficacy of corporal punishment

The Penal Code provides for the imposition of corporal punishment for certain offences. One cannot discern any particular pattern in the nature of offences that attract corporal punishment. All felonies do not attract corporal punishment. For example, rape, defilement and certain other offences against morality attract corporal punishment. Some robberies and extortion do. Manslaughter which attracts a sentence of life imprisonment does not have provisions for corporal punishment. However, disabling in order to commit a felony or misdemeanour attracts life imprisonment with or without corporal punishment. For no offence is corporal punishment mandatory. The Magistrates Court is entitled by law to impose corporal punishment not exceeding 12 strokes.

No data or information has been presented to the court on the history of corporal punishment, the pattern of crimes attracting corporal punishment and the efficacy of corporal punishment in Fiji. From a perusal of the files some shop breaking entering and larceny offences have attracted corporal punishment. Not all rape cases have attracted corporal punishment. It appears to be based on the individual discretion of magistrates. It is not clear what sentencing objectives have been targeted. No reasons are given as to why corporal punishment is imposed for the same offence in different situations. Not all heinous and violent rapes attract corporal punishment. It is discretionary, based on subjective value judgments. On traditional sentencing principles and objectives it remains unsatisfactory. The situation in Fiji now is no different from what the Report of the Departmental Committee on Corporal Punishment discovered in the UK as long ago as 1938. Among other matters the committee stated at 92:

There is the same difficulty in finding any common principle underlying the various offences for which corporal punishment may be imposed under the existing Jaw. These offences have been selected, not by the application of any principle or logic, but merely by historical accident, and in consequence the existing law is full of anomalies.

The committee further stated: "In our view corporal punishment must be justified by the deterrent, not the retributive principle — we have found no evidence to suggest that — long sentences of imprisonment or penal servitude are so ineffective as deterrents that it is essential to add some further penalty for the protection of society". It is clear from most studies that corporal punishment has neither deterrence nor reformative effects. The European Court of Human Rights has stated that retribution has no place in the scheme of civilised jurisprudence (*Tyrer v United Kingdom* (1978) 2 EHRR 1; [1978] ECHR 2).

It is interesting that as early as 1843 the commissioners on the Criminal Law, in recommendations for a comprehensive codification of the criminal law, did not favour the retention of whipping as a general penalty for adult offenders. As they stated: "It is a punishment which is uncertain in point of severity, which inflicts an ignominious and indelible disgrace on the offender, and tends, we believe, to render him callous, and greatly to obstruct his return to any honest course of life" (quoted in p 2 of the Report on Corporal Punishment). It is quite clear that the inhumanity of the punishment was recognised from very early times.

The offence of whipping or corporal punishment was abolished in the UK in 1967. It has been abolished in Canada (since 1972), Australia and New Zealand and most other Commonwealth jurisdictions. It has been in our Penal Code since colonial times. Since independence nor proper consideration has been given to its usefulness or penal purpose, nor compliance with the 1970 Constitution and others that followed. The 1970 Constitution s 7 stated:

> *No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.*

The 1990 and 1997 Constitutions refined the language reflecting developments in international human rights raw and practice.

Case law on corporal punishment

The two most relevant cases that the court wishes to consider are from fellow Commonwealth countries of Namibia and Zimbabwe. The Namibian case: *Ex parte Attorney-General of Namibia, In re Corporal Punishment by Organs of State* [1992] LRC (Const) 515 was decided in April 1991. The Zimbabwean case *Ncube and Ors v State* [1998] LRC (Const) 442 was decided in December 1987. Both cases considered the case law on similar constitutional provisions to s25(1) of our Constitution. The provisions were similar to that in our 1970 Constitution (Namibia: "No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment". Zimbabwe: "No persons shall be subjected to torture or to inhuman or degrading punishment or other such treatment".). While there are slight variations in language it is clear that the interpretations of the provisions confirm to a clear pronouncements to the banning of corporal punishment, whether judicial or quasi-judicial and administrative, including corporal punishment in schools.

In the Namibian case the Supreme Court of Namibia was requested to determine whether the imposition and infliction of corporal punishment by or on the authority of any organ of State contemplated in legislation is:

(i) per se; or
(ii) in respect of certain categories of persons, or
(iii) in respect of certain crimes or offences or misbehaviours, or
(iv) in respect of the procedure employed during infliction thereof in conflict with the provisions of the Constitution.

The Namibian case was quite comprehensive in its analysis. The court (Mahommed AJA) analysed the constitutional provision stating that the proviso seeks to protect citizens from seven different conditions:

(a) torture
(b) cruel treatment
(c) cruel punishment
(d) inhuman treatment
(e) inhuman punishment
(f) degrading treatment

(g) degrading punishment

The court stated that "– even if the moderation counselled or contemplated in some of the impugned legislation or practice succeeds in avoiding 'torture' or 'cruel' treatment or punishment it would still be unlawful if what it authorises is 'inhuman treatment or punishment' or 'degrading treatment' or punishment" (p527). Adopting the *Oxford English Dictionary* meaning of "inhuman" and "degrading" the court had no difficulty in concluding that corporal punishment was inhuman and degrading. According to the *Oxford Dictionary* inhuman means: "destitute of natural kindness or pity, brutal, unfeeling, cruel, savage, barbarous". To degrade means "to lower in estimation, to bring into dishonour or contempt, and to lower in character or quality, to debase". Following *Ncube and Ors* the Namibian Supreme Court agreed that the question whether a particular form of punishment authorised by the State could properly be said to be inhuman or degrading involved value judgments. As it states at 528:

> *It is, however, a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.*

The court concluded:

> *In the interpretation of such articles there is strong support for the view that the impositions of corporal punishment on adults by organs of the State is indeed degrading or inhuman and inconsistent with civilised values pertaining to the administration of justice and the punishment of offenders. This view is based substantially on the following considerations:*
>
> 1. *Every human being has an inviolable dignity. A physical assault on him sanctified by the power and the authority of the State violates that dignity. His status as a human being is invaded.*
> 2. *The manner in which the corporal punishment is administered, is attended by, and intended to be attended by, acute pain and physical suffering "which strips a recipient of all dignity and self-respect'. It 'is contrary to the traditional humanity practiced by almost the whole of the civilized world, being incompatible with the evolving standards of decency" (State v Ncube (supra) at 722).*
> 3. *The fact that these assaults on a human being are systematically planned, prescribed and executed by an organized society makes it inherently objectionable. It reduces organized society to the level of the offender. It demeans the society which permits it as much as the citizen who receives it.*
> 4. *It is partly at least premised on irrationality, retribution and insensitivity. It makes no appeals to the emotional sensitivity and the rational capacity of the person sought to be punished.*
> 5. *It is inherently arbitrary and capable of abuse leaving as it does the intensity and quality of the punishment substantially subject to the temperament, the personality and the idiosyncrasies of the particular executioner of that punishment.*
> 6. *It is alien and humiliating when it is inflicted as it usually is by a person who is a relative stranger to the person punished and who has no emotional bonds with them.*

Similar conclusions were made by the Supreme Court of Zimbabwe in *Ncube* (see at p 466).

Corporal punishment in schools

In its submissions the Fiji Human Rights Commission urged the court to consider the issue of corporal punishment under the Penal Code and in schools. It has submitted that all corporal punishment is in breach of s 25(1) of the Constitution. The court will … [missing words]

As in Namibia in 1991 corporal punishment in schools in Fiji is not imposed by any specific legislative provision. In Namibia it was issued as an administrative code by the Ministry of Education, Culture and Sport.

In Fiji the Education Act (Cap 262) does not make any specific provisions for the imposition of corporal punishment in schools. However, since 1976 the Permanent Secretary has issued guidelines dealing with corporal punishment. These are published in the education gazettes. It is telling to note the contents of Circular No 10 of 1986 on corporal punishment:

> *It is all too common in schools to see children being subjected by teachers to petty assaults such as striking on the head or hands with a ruler or a pointer, boxing of ears, hitting over the head with the hand and similar forms of cruelty. Habits such as these are the hallmarks of the inefficient teacher.*
>
> *Many teachers seem to regard their pupils as inferior beings who have no rights save those allowed them by the teacher. Children are individual personalities as much as anyone else, even if they are still undeveloped, and should be treated with the same consideration and courtesy as adults.*

It is interesting that the circular accepted that the various forms of assaults by teachers on students were seen as forms of cruelty. Despite the very enlightened views on the rights of students, their individual personalities, treatment as adults etc. The circular accepted that corporal punishment "is sometimes necessary". It then outlined the rules of administering corporal punishment:

> *(i) Only Headteachers/Principals have the right to inflict corporal punishment, and he/she should satisfy himself/herself that it is really warranted before he/she administers it. No other teacher whether registered or recognised, may inflict corporal punishment.*
>
> *(ii) Headteachers/Principals may inflict moderate corporal punishment for gross misbehaviour such as bullying, stealing, lying and cheating. However, they are forbidden to punish children so severely that bodily harm is done. They are reminded that they are liable to be summoned before a magistrate and fined for inflicting unreasonably severe punishment on a pupil.*
>
> *(iii) Corporal punishment should not be given for any form of academic failure.*
>
> *(iv) When giving corporal punishment only a leather strap should be used. The use of sticks, rods, rulers, etc is prohibited. Slapping, punching, kicking or other forms of direct physical contact are also forbidden.*
>
> *(v) Punishment for offences committed outside the school grounds should be given only in exceptional cases, e.g. bullying children of their own or another school, throwing stones at buses, houses and other properties, using abusive language, violence and any form of offensive behaviour.*
>
> *In such cases the Headteacher/Principal may find it useful to discuss the matter with the child's parent before inflicting punishment.*
>
> *(vi) A brief account of any corporal punishment. Which has been administered must be entered in the School Log Book. The date pupil's name, nature of the offence and the punishment given should be clearly stated.*

It is quite clear from media reports and anecdotal evidence that the guidelines are not adhered to. Teachers have been charged for various offences of assault on students. The Ministry of Education repeated the above general guidelines in

several Education Gazette's subsequently. The report of the Fiji Islands Education Commission/Panel discussed the issue of discipline and punishment in the wider context of Fiji society:

> *Disciplinary matters present a challenge to teachers and principals. There is a high level of tolerance of child violence in society at large. Beating is sometimes justified as an indication of love for one's children. Teachers have tended to use corporal punishment, citing reasons such as "It's the only language they understand".*
>
> *There are Ministry of Education regulations on corporal punishment, which urge teachers to be sensitive and humane in disciplinary matters, but these are widely recognised as not being heeded. An increasing number of cases of corporal punishment, excessive in the eyes of parents, have been reported in the press in recent times and police have become involved in several cases. As well as very obvious corporal punishment, it is evident that practices such as tweaking ears and smacking with blackboard dusters are common, and are sometimes used on* **children who have failed to achieve rather than for disciplinary matters.**

(*Learning Together: Directions for Education in the Fiji Islands* — Report of the Fiji Island's Education Commission/Panel, Ministry of Education, November 2000, p105, emphasis added.)

The Education Commission/Panel further quotes from other reports which need repeating. UNICEF research has found that:

> *Classroom violence is common. This reflects the generally-held view in Fiji that parents and teachers can inflict physical punishment and the reluctance of some teachers and parents to respect the views of children. Abuse takes many forms from actual physical assault, verbal assault and humiliation.*
>
> *These punishments develop low self-esteem in children and this is known as poor achievement. There is concern that corporal punishment and psychological abuse is particularly rife in Fijian homes and schools and is a factor in the lower achievement of Fijian students. The situation is difficult to change, given the community acceptance of violence.* (Emphasis added.)

A Save the Children Fund report noted that:

> *Classroom violence is effectively condoned in that few parents complain about it. They themselves believe that this is a correct form of punishment, or they hold the teachers in too much respect to question their methods, or fear that by complaining they could make the situation worse for their child. Many children are too frightened of both the teachers and parents to report the abuse in the first place.* (Emphasis added.)

In concluding the section on discipline and punishment the author of the Education Commission/Panel report concludes:

> *Schools should be promoting self-control and self-discipline and acceptable forms of behaviour. Students and teachers can be guided in conflict resolution so that they can confront and control their emotion and anger. Schools need to develop non-violent means of disciplining students, as violence only breeds more of the same, giving the impression that violence itself can solve problems. There is a range of non-violent disciplinary actions that may be employed by teachers and principals. These include physical work such as weeding, detention, suspension and exclusion from school, with expulsion as a last resort. Shaming is commonly resorted to, but it can be seen as a form of abuse, especially when it involves public humiliation.*

It is clear that corporal punishment is a violent means of resolving conflict/tension. There is need for alternative means to deal with discipline and conflict. The Fiji Women's Crisis Centre has also recommended the abolishment of corporal punishment in schools as a result of its research and wider experiences with domestic violence and sexual assaults. It has stated:

Corporal punishment is a means by which the concept of violence is used as a form of punishment or a means by which conflict resolution is reached through punishment of the offender. Although its use has been limited to head teachers and principals in schools, numerous media reports highlighting cases where in the name of "corporal punishment" students suffered severe physical abuse by teachers. As such it must be totally abolished and more constructive forms of discipline or behaviour management should be implemented.

(*Incidence and Prevalence of Domestic Violence and Sexual Assault*: A Research Project of the Fiji Women's Crisis Centre, 2001) (Emphasis added.)

The Education Commission/Panel also recommends that: "The Ministry of Education actively encourages schools to have expedient disciplinary policies. It should continue with its policy of not allowing corporal punishment and should actively foster alternative forms of discipline" (p115). The court is not aware that the Ministry of Education does not allow corporal punishment since the guidelines quoted from the Education Gazettes suggest it is allowed by principals and headteachers. There is no indication that the guidelines have been withdrawn.

The court is also aware that the Children's Co-ordinating Committee in 1999 recommended the abolishing of corporal punishment in school. This was in view of s 25(1) of the Constitution and Fiji's obligations under the UN Convention of the Rights of the Child (CRC). Section 28(2) of the CRC states:

State parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with child's human dignity and in conformity with the present Convention.

Section 19 of CRC further states:

(1) State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

(2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and as appropriate, for judicial involvement.

The High Court has previously expressed opinions about corporal punishment in schools especially when teachers have come before the court on charges of assault. Pathik J in considering an appeal from the Magistrate Court stated:

It is a matter of comment that if the approach of the learned Magistrate is correct then Headteachers run the risk of being prosecuted as in the case when they inflict corporal punishment, for injury of some sort is bound to be caused. Lest this should happen again in future, **I suggest to the Ministry of Education to reconsider the provisions relating to "corporal punishment"**. *By having such a provision in the Gazette, and in case the law takes no note of that, as in this case, the Ministry is a vehicle which could be seen as facilitating the dismissal of a Head Teacher from service and this would ruin the teacher's career altogether.* (*Mul Prasad v State* Crim App No 37 of 1997, emphasis added)

According to information available to this court the last Ministry of Education circular on Corporal Punishment was contained in Education Gazette (Term II, 1997). It is clear that the case law from other jurisdiction support the abolition of

corporal punishments in schools. The Education Commission/Panel, the Children's Co-ordinating Committee and the Women's Crisis Centre also support its abolishment.

As with corporal punishment under the Penal Code there is no consistent and coherent principles as to the basis of corporal punishment in schools. It appears that since the beginning of schools in Fiji corporal punishment was seen as a valid form of discipline. Since parents used to beat their children at home it was acceptable that teachers, who have traditionally been held in high regard in the wider community in Fiji, could do the same. However, in recent years such values have changed with many parents, especially educated ones, not happy with their children being hit by teachers or other close relatives. The common law right of parents to discipline children as they wished is also being tempered with by enlightened educational policies. In Australia and other Commonwealth jurisdictions the law is beginning to fetter the discretion of parents to use force to discipline children or what are reasonable and lawful punishments.

The European Court of Human Rights has considered the issue in relation to a 9-year-old child who was beaten by his stepfather. The court stated that Art 3 of the European Convention of Human Rights "– required states to take measures designed to ensure that individuals within their jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment, including such ill treatment administered by private individuals — Children and other vulnerable individuals, in particular, were entitled to state protection in the form of effective deterrence against such serious breaches of personal integrity" *(A v United Kingdom*, Case No 100/1997/884/1096. Reported in the Times Law Reports — European Court of Human Rights, October 1, 1998).

Whether it is corporal punishment by judicial authorities or administered by schools under authority of a minister the courts have stated that similar principles apply. In the *Juvenile's* case the Chef Justice of Zimbabwe stated at 789:

> *In a system which has formal rules on corporal punishment drawn by a competent authority, the same considerations governing judicial corporal punishment must apply.*

The Namibian Supreme Court in *Ex parte Attorney-General* referred stated at 5333:

> *The differences between adults and juveniles which appear from the relevant statutes and regulations with respect to the manner in which corporal punishments is administered are — insufficient to convert punishment which is degrading or inhuman for adults into punishment which is not degrading and inhuman in case of juveniles. Such punishment remains an invasion on human dignity, and unacceptable practice of inflicting deliberate pain and suffering "degrading to both the punished alike". Even in the case of juveniles it remains wide open to abuse and arbitrariness; it is heavily loaded with retribution with scant appeal to the sensitivity and rational responses of the juvenile.*

It is quite clear that the common law rights of parents to discipline their children cannot be compared to disciplining of children by teachers. Teachers have no such rights. It is questionable whether parents can delegate such rights. In any case the authority in Fiji is derived from an administrative circular issued by the Ministry of Education. Even if the motive for corporal punishment in schools is to achieve some laudable objectives the punishment cannot be authorised by law: "Means otherwise unauthorised by the law do not become authorised simply because they seek to achieve a permissible and perhaps even a laudable

objective". *Van Eck No and Van Rensburg No v Etna Stores* 1977 (2) SA 984 at 996, and 998, quoted in *Ex parte Attorney-General (Namibia)* at 532).

Children have rights no wit inferior to the rights of adults. Fiji has ratified the Convention on the Rights of the Child. Our Constitution also guarantees fundamental rights to every person. Government is required to adhere to principles respecting the rights of all individuals, communities and groups. By their status as children, children need special protection. Our educational institutions should be sanctuaries of peace and creative enrichment, not places for fear, ill-treatment and tampering with the human dignity of students. It is clear that the Ministry of Education is aware of progressive education policies. It admits:

> *Excessive use of punishment is a general sign of teacher incompetence. If pupils are inattentive, noisy, and frequently late or absent from the school, the teacher should try to establish the causes. The fault need not always be that of the pupils, it could be the teacher's as well. The remedy is not to beat the pupils but to make school life and work attractive and interesting to ensure that pupils are happy and busily engaged all the time.*
>
> *Child counselling and parental involvement should be resorted to first in order to improve pupils' conduct.* (Education Gazette Vol LXVI No 2 Term II, 1995).

It also recognised the rights of children as far back as 1986. It had stated:

> *Many teachers seem to regard their pupils as inferior beings who have no rights save those allowed them by the teacher.* **Children are individual personalities as much as anyone and courtesy as adults.** (Circular No 10/86, Education Gazette 1986, emphasis added).

It is not clear why with such enlightened views the Ministry of Education has not taken a more pro-active role in completely banning corporal punishment in schools. The Education Commission/Panel has also called for enlightened policies on school discipline. So have other relevant institutions such as the Women's Crisis Centre and the Children's Co-ordinating Committee. This court, in view of its obligations under the Constitution, cannot condone such punishment.

The Fiji Court of Appeal in *Umesh Kumar* had expressed its doubts about the constitutionality of "any corporal punishment". Under s 21(3) of the Constitution laws made, and administrative and judicial actions taken after the commencement of this Constitution are subject to Ch 4 (Bill of Rights). Under s 195(3) written laws are to be construed with such modifications and qualifications as are necessary to bring them into conformity with the Constitution. In exercise of its powers under ss 41(3) and 195(3) of the Constitution the court rules that corporal punishment under the and the Criminal Procedure Code, and under any administrative guidelines or otherwise enforced in schools is unconstitutional.

Conclusions and orders

As far as the substantive matters of the appeal are concerned the court will make the following orders:

(1) The appeal against conviction is dismissed.

(2) The appeal against sentence is dismissed partially. The 5-year sentence of imprisonment is upheld.

(3) The sentence of six strokes of corporal punishment is quashed. The court further rules that the provisions on corporal punishment under the Penal Code and the Criminal Procedure Code breach s 25(1) of the Constitution and are, therefore, unlawful.

It is further declared that the infliction of corporal punishment in schools in pursuance of the Ministry of Education guidelines or otherwise is unconstitutional and unlawful and in conflict with s 25(1) of the Constitution.

Appeal against conviction dismissed. Appeal against sentence dismissed partially.