WILLIAM ROSA JUNIOR v STATE

HIGH COURT — MISCELLANEOUS JURISDICTION

GATES J

24 April, 11 July 2003

[2003] FJHC 196

Criminal law — sentencing — appeal against sentence — Larceny of dwelling house — totality principle — 6 months' imprisonment consecutive to all terms appropriate — total term to be served 5 years 4 months — Criminal Procedure Code s 310(1).

Limitation of actions — application for extension — application for enlargement of time heard in absence of parties — Constitution ss 41(1), 41(2), 41(3), 41(8), 41(9) — High Court (Constitutional Redress) Rules 1998 rr 2, 3.

Applicant, a serving prisoner, was convicted of a single count of Larceny of a dwelling house. He elected to remain silent and did not call any witnesses at his trial. He was convicted and was sentenced. He alleged the harshness of his sentence, which left him with a total term to serve of 6 years 10 months. The magistrate took into account Applicant's long history of convictions in sentencing him to 2 years' imprisonment consecutive to his serving terms. Applicant then sought an appeal against sentence.

Held — (1) The 6 months' imprisonment consecutive to all terms that he was serving was the appropriate sentence for the offence of larceny of a dwelling house considering the totality of Applicant's sentences. The sentence was below the tariff for such an offence, but the overall total term to be served would still amount to a term of 5 years 4 months.

(2) Applicant had not launched a collateral attack upon the sentence he seeks to impugn. He says he was never allowed to seek lawful remedies by way of appeal. The appeal was never heard. The relief of constitutional redress was proper. The application was treated as the hearing of his appeal.

Appeal allowed.

Cases referred to

Director of Public Prosecutions v Jack Heritage [1976] 22 FLR 80; *Chokolingo v Attorney-General of Trinidad and Tobago* [1981] 1 All ER 244; *Wong Kam Hong v State* (unreported, Court of Appeal Fiji, Crim App No AAU 10 of 2002S, 30 May 2003), cited.

Metuisela Railumu v Commander, Republic of Fiji Military Forces (Suva High Court, Misc App No HBM 81J of 2002S, 24 December 2002, unreported); *R v Bradley* [1979] 2 NZLR 262, considered.

The Applicant appeared in person.

N. Lajendra for the Respondent.

Gates J.

Introduction

[1] The applicant, a serving prisoner, seeks constitutional redress. His papers, are somewhat informal though voluminous and his sentencing circumstances were complex. It has been difficult therefore to ascertain where his true complaint lies.

[2] Because the applicant is not represented I have perused his recent files for errors. I have also heard his oral submissions and read his written submissions.

[3] His most recent sentences of imprisonment were as follows:

1.	2271/97	9 months Lautoka MC 14.7.99
2.	2995/98	12 months consec Suva MC 23.7.99
3.	2985/98	6 months consec Suva MC 23.7.99
4.	2272/97	18 months consec Suva MC 23.7.99
5.	208/99	12 months consec Sigatoka MC 27.1.00
6.	341/99	1 month consec Nausori MC 29.11.99
7.	740/99	2 years consec Suva MC 5.4.00
		Total sentence: 6 years 10 months consec
8.	343/98	4 months consec Nausori MC 9.5.00
		Total sentence: 7 years 2 months consec

[4] In his final oral submission the Applicant said his sentence in Suva Crim Case No 740/99 of 2 years' imprisonment consecutive to his then total term was too harsh. It left him with a total term to serve of 6 years 10 months. This was really the nub of his complaint.

[5] I note that the sentences passed by the Nausori Magistrates' Court on 29 November 1999 and 9 May 2000 of 1 month and 4 months' imprisonment respectively, consecutive to his then present term, both took into account the totality principle.

[6] On 5 April 2000 the Applicant was tried before a resident magistrate at Suva. He was convicted of a single count of larceny from a dwelling house. The facts were that he had managed to inveigle himself into the complainant's house by saying he was from the FEA and was there to check power points and appliances. He obtained the confidence of the complainant and his wife.

[7] The magistrate in her judgment said: "The Accused got the complainant and his wife to be in other rooms while he was in the master bedroom alone for about 5 minutes". In that time he found and took $800 cash which was in a drawer. This money was being kept to pay wages for the complainant's employees.

[8] The Accused in his trial elected to remain silent and did not call any witnesses. He was convicted. He said in mitigation he was 32 years old, single and said he had learnt from past mistakes. He admitted a long list of convictions. The $800 was not recovered.

[9] In sentencing him to 2 years' imprisonment consecutive to his serving terms the magistrate said:

> … However, he has a long history of conviction(s) — 3 pages long dating back to 1992 with numerous offences similar to the present count. He has not reformed nor likely to reform in the near future. The Court can only respond by giving another deterrent sentence in the hope that he learns that such crimes do not pay. There is also no way that the Court can grant the Accused request of a concurrent sentence given his past and tendency of re-offending.

His appeal

[10] The Applicant addressed a letter to the officer in charge at Naboro Minimum Prison on 7 April 2000 for an appeal against sentence. The officer in charge in a subsequent letter to the senior court officer of the Suva Magistrates

Court stated that the applicant's intention to appeal and request for case record had been forwarded to the court on 11 April 2000, that is well within the 28 days appeal period [s 310(1) of the CPC].

[11] The appeal record was certified by the trial magistrate on 2 June 2000 and forwarded to the prison on 9 June 2000. However the magistrate who dealt with the application for enlargement of time, dated 10 July 2000, considered the application on 4 August 2000. This application appears to have been heard in the absence of the Applicant, (and the State), and the magistrate concluded that no good reason had been shown as to why time for appeal should be enlarged.

[12] From his reasons, it appears the magistrate did not realise that an informal petition had been sent on 11 April 2000 from the Prisons Department with the request for a record of proceedings. The appeal was therefore lodged within time and no question of enlargement arose. The Applicant has been denied his appeal.

[13] If there was any doubt about this, it is obvious the preparation of the court record would seem to indicate a request had been made, at least for a record. If the record were only available to the Applicant some days after 9 June 2000, the late delivery of the record outside of the appeal period was a factor that should have been considered a "good cause" for allowing the application [s 310(2)(d) of the CPC]. The record was never mentioned in the magistrate's reasons for refusing to enlarge time, nor when declining a subsequent renewal of the application on 22 October 2002.

[14] Applications for enlargement of time should not be approached as administrative decisions. They are judicial decisions, and form part of the trial process. The Constitution grants rights of appeal to every person charged and subsequently found guilty [s 28(1)(l)]. Rights of appeal are not to be lightly denied especially to persons of the Applicant's category, that is, unrepresented persons who have to mount their appeals with the handicap of being incarcerated in prison. Similarly no part of the trial process, which includes the appeal stage, is to take place in the absence of the person being tried [s 28(1)h)], and he or she has a right to a copy of the record of proceedings of the court and of the decision of the court within a reasonable time [s 28(1)(g)]. Such a right may be subject to the payment of a reasonable fee prescribed by law, but I believe all such fees are waived in the case of prisoners. Though Grant CJ in *Director of Public Prosecutions v Jack Heritage* [1976] 22 FLR 80 at 82 considered it sufficient for a magistrate to exercise his discretion judicially, perhaps as visiting justice at the prison without the prosecution, the above Constitutional safeguards of the 1997 Constitution would mean a court is obliged to accord a fair trial to both sides, and not to determine the issue in the absence of one or both. On the need not to let mere technicalities stand in the way of justice and on the issue of informality of proceedings and materials I fully concur with Grant CJ.

[15] Both parties to the litigation have a right then to be present on the enlargement application. After all, the prosecution may wish to object to the application and to file an affidavit in opposition, and the convicted person has a constitutional right to defend himself on the application [s 28(1)(d)], as part of the right to a fair trial before a court of law [s 29(1)]. If it has been the practice in the past to deal with enlargement applications without the presence of the relevant parties, that practice should cease. The parties should be heard, and the proceedings should be heard in open court, unless the public are to be properly

excluded under one of the categories of exclusion set out in the Constitution [s 29(5)]. Open justice is often trumpeted. It would be better if it were simply applied.

[16] The Applicant could have applied to the High Court against the refusal of the magistrate to transmit the court record to the High Court for the hearing of the Petition of Appeal and sought orders of mandamus, or alternatively he could have appealed the refusal to enlarge time. But such steps would not have been obvious to this unrepresented Applicant, and it is perhaps of little moment which course suitably might have been followed.

High Court Redress Rules

[17] As it was, the Applicant brought the applications pursuant to s 41 of the Constitution. Subsections (1), (2) and (3) of s 41 provide:

> 41.(1) If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.
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> (2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.
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> (3) The High Court has original jurisdiction:
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> (a) to hear and determine applications under subsection (1); and
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> (b) to determine questions that are referred to it under subsection (5);
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> and may make such orders and give such directions as it considers appropriate.

[18] This jurisdiction is an original jurisdiction [s 41(3) of the Constitution] which is exercisable by a single judge [r 2 of the High Court (Constitutional Redress) Rules 1998]. The papers prepared did not strictly comply with the requirements of r 3. I overlook that inadequacy. The State was called in to respond to the application and to assist the court; Mr Lajendra from the Director of Public Prosecutions office appeared and since the director is a party to the appeal, it would seem notice under s 41(8) is not required to be given to the Attorney-General for him to consider intervening in the proceedings [s 41(9)].

[19] In exercising a jurisdiction under this part of the Constitution the court is proceeding in a civil jurisdiction. Rule 7 specifically states that the jurisdiction and powers "are to be exercised in accordance with the practice and procedure (including any Rules of court) for the time being in force in relation to civil proceedings in the High Court, with any variations the circumstances (may) require".

[20] This application was not brought within 30 days of the magistrate's decisions either in 2000 or in 2002, in contravention of the 30–day time limit set by r 3(2). In *Metuisela Railumu and 7 Ors v Commander, RFMF and 2 Ors* (unreported, Suva High Court, Misc Application No HBM0081J.2002S, 24 December 2002), Jitoko J said (at 3):

> The rights of the individual as protected under the Constitution's Bill of Rights, including such rights as protected under s 29(2) cannot be whittled down or compromised by the imposition of conditions that may be deemed unreasonable or unjustifiable in a free and democratic society.

[21] Further on at 4 his Lordship concluded:

> In the Court's view, the time limitation of 30 days within which to bring an application that is intended to assert any of the basic rights of an individual as recognised by the

> Bill of Rights in Chapter 4 of the Constitution, is neither reasonable nor justifiable. In its effect, it interposes itself between the individual's rights guaranteed by the Constitution and one's ability to exercise it, and in so doing jeopardises the essence of all the rights protected under Chapter 4. As the Amicus Curiae aptly puts it; "*It fetters an applicant's right of redress*." The Court finds that the 30-day limitation under Rule 3(2) of the High Court (Constitutional Redress) Rules 1998, unconstitutional and therefore invalid.

[22] I respectfully concur with that opinion. The circumstances of the Applicant, that he was unrepresented, incarcerated, and without access to a lawyer are sufficient for me to consider it reasonable that this application be brought so late. That he was denied a valid appeal which was on foot is repugnant and requires redress.

[23] In this case the Applicant's right to a fair trial has been infringed since his appeal has not been heard. He has been denied an appeal path, which if proceeded with to its logical conclusion, would have effectively extinguished any parallel rights he might have enjoyed under the Constitutional Redress Provisions [s 41]. *Chokolingo v Attorney-General of Trinidad and Tobago* [1981] 1 All ER 244.

[24] Lord Diplock delivering the advice of the Privy Council said at 248:

> Acceptance of the appellant's argument would have the consequence that in every criminal case in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under s 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under s 6(1) is stated to be "without prejudice to any other action with respect to the same matter which is lawfully available". The convicted person having exercised unsuccessfully his right of appeal to a higher Court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) on a judgment that the Court of Appeal had upheld, by making an application for redress under s 6(1) to a Court of co-ordinate jurisdiction, the High Court. To give to Chapter 1 of the Constitution an interpretation which would lead to this result would, in their Lordship's view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine.

[25] The jurisdiction then would be to do justice within the Bill of Rights and the law, and it is the judicial role to avoid the absurdities of unwarranted duplications.

[26] In the instant case an Applicant has not launched a collateral attack upon the sentence he seeks to impugn. He says he was never allowed to seek lawful remedies by way of appeal. The appeal was never heard. In the circumstances, I allow him the relief of constitutional redress and treat his application as the hearing of his appeal.

[27] The sentence of 2 years' imprisonment consecutive to the term he was then serving, prior to that imposed on 5.4.2000, amounting in all to 6 years 10 months, offends the totality rule. The magistrate correctly decided the Applicant was a nuisance, preying on members of the public with so many instances of obtaining money by false pretences, larceny, forgery and personation. It was correct also that this separate piece of offending should attract a sentence of imprisonment, and one which must needs be consecutive to his other terms now serving. But I

conclude that the Applicant, though he has been a nuisance for which he must pay, is not a danger to the public for which more severe punishment would be required.

[28] In *R v Bradley* [1979] 2 NZLR 262 the Court of Appeal of New Zealand said:

> Undoubtedly it is crucial in arriving at a sentence for several offences, after considering them individually, to stand back and look in a broad way at the totality of the criminal behaviour.

This was cited with approval in *Wong Kam Hong v State* (unreported, Court of Appeal Fiji, Criminal Appeal No AAU0010.2002S, 30 May 2003).

[29] In looking at the totality of the applicant's sentences I consider a term of 6 months' imprisonment consecutive to all the terms that he was then serving on 5 April 2000 is the appropriate sentence for the offence of larceny from a dwelling house [Suva MC Crim Case No 740.99]. This sentence is below the tariff for such an offence, but the overall total term to be served on that date would still amount to a term of 5 years 4 months, which I consider sufficient in all the circumstances.

[30] Accordingly his sentence of 2 years is quashed, and in its place is substituted a sentence of 6 months imprisonment consecutive to his other terms of imprisonment then serving on 5 April 2000.

Appeal allowed.