

STATE v LEONE VAKARUSAQOLI and 2 Ors (HAC0023 of 2004S)

HIGH COURT — CRIMINAL JURISDICTION

5 WINTER J

14, 15 October 2004

10 **Criminal law — bail — application for bail — whether Applicants' conditions of confinement inhumane and degrading — whether Applicants' conditions of confinement breached non-derogable rights under the Constitution — Constitution of the Republic of Fiji ss 25, 27.**

15 The Applicants, Vakarusaqolim (A1), Cakacaka (A2) and Dreu (A3), were jointly charged of two counts of robbery with violence, one count each of attempted robbery, unlawful use of a motor vehicle, and larceny. The Applicants had previous convictions. In August 2004, A3 applied for bail but was refused as A3 earlier failed to attend court. Both A3 and A1 renewed their bail applications orally and in writing. They claimed that they were subjected to physical, mental, emotional, inhumane and degrading treatment at the remand facility to which they were detained in contravention of s 25 of the Constitution
20 of the Republic of Fiji. They further complained that their rights as a detained person to be treated with dignity and respect for their humanity were being totally ignored contrary to s 27 of the Constitution.

On 15 October 2004, the court requested the Human Rights Commission to accept appointment as amicus curiae and prepare a report which the commissioner accepted. A scene visit to inspect the prison and view look at the Applicants' conditions of confinement
25 was scheduled by the court.

The commissioner found that the conditions of confinement of the Applicants did not comply with the minimum standard rules for the treatment of prisoners and that there was breach of the Applicants' rights as detained persons to be treated with dignity and respect for their inherent humanity.

30 **Held** — (1) The conditions and confinement of the Applicants failed to comply with the minimum standard rules for the treatment of prisoners and was therefore in breach of their rights as detained persons to be treated with dignity and respect as human beings. After the prison visit by the court, it was established that the remand conditions are grossly degrading and the prison failed on almost every standard. A distinction should be made
35 between two classes of prisoners, the ones convicted and sentenced and the remand prisoners. Thus, in agreement with internationally recognised standards, remand prisoners should be treated apart from sentenced prisoners separated not only physically but by the very prison policies prevailing in the institution as they are untried, unconvicted and innocent until proven otherwise.

40 Application granted.

Cases referred to

State v Eugene T. M. C. Ladpeter [2005] FJHC 25, applied.

Rhodes v Chapman [1981] 452 US 337; [1981] USSC 144; *State v Pickering* [2003] NZAR 293, cited.

45 *Reyes v R* [2002] 2 AC 235; [2002] UKPC 11, considered.

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B. Solanki for the State

Accused all in person

5 *D. Herman* for the Human Rights Commission

K. Keteca for the Attorney-General

Winter J.

Background

10 The Applicants are jointly charged with one other. They are alleged to have committed robbery with violence on two counts, attempted robbery on one count, unlawful use of a motor vehicle on one count and larceny on one count. Four of the five counts relate to events on 30 April 2004.

The allegations are serious. Each of the Applicants has previous convictions.
15 Mr Dreu made an application for bail before Shameem J in August of this year and it was refused. The court was minded to grant bail because of the delay there would be between arrest and trial. However, her Honour refused the application as the Accused earlier failed to attend court.

20 Both Mr Dreu and Mr Vakarausaqoli renewed their bail applications before me in writing and orally. They claimed that the conditions of imprisonment at the remand facility in Korovou Prison, Suva were so poor that their physical and mental health would be affected by a further remand in custody.

They claimed that the remand facility conditions continued to breach their non derogable entitlements under the Constitution especially ss 25 and 27.

25 The conditions were such, they claimed, that they there were subjected to physical, mental, emotional, inhumane and degrading treatment: s 25. They further complained that their rights as a detained person (s 27) to be treated with dignity and respect for their humanity were being totally ignored.

30 The allegations are of great concern to me. It was not the first time I had heard complaint about conditions in this gaol. Indeed I have at least three constitutional redress applications before me seeking to challenge the inhumane conditions of incarceration at Korovou.

For that reason on 15 October I requested the Human Rights Commission
35 accept appointment as *amicus curiae* to prepare a report. The proceedings commissioner graciously accepted the appointment and I am grateful to him for that. I ordered that the Attorney-General be served with the proceedings and be given an opportunity to comment. I also directed that on Tuesday 5 October 2004 I would conduct my own scene visit to inspect the prison and view the particular
40 prisoner's conditions of incarceration. My registry made these arrangements.

Introduction

It is trite to say that how a community treats prisoners, one of the most vulnerable groups in the community, reveals a great deal about the community's moral sensibility and to its claim to be humane, enlightened and committed to the
45 rule of law. In a decision of the United State Supreme Court (*Rhodes v Chapman* [1981] 452 US 337 at 346; [1981] USSC 144 per Powell J) the court observes that the treatment of prisoners and the continued application of the law to regulate their conditions of confinement is indicative of a community's maturity.

50 There have been prisons for a long time. John the Baptist was locked up for treason: MATT 14:3. In England both lay and ecclesiastical authorities had prisons. Indeed the great University of Oxford was the sight of one such

horrendous jail. John Howard [1777] exposed the evils of these medieval prisons thereby lending his name to the International Prison Reform League. In the century that followed central government increasingly took the initiative to build sanitary convict prisons, appoint inspectors, approve rules and set building standards. The Victorians spent a lot of money in providing prisons with single cells of reasonable proportions often with sanitation. They believed in the silent system and designed cells that could house one inmate with a minimum of communication and contamination.

A fine example of such a building is still to be found in our capital city. Korovou Prison was a gift of the colonial government. It was built in 1912. It was designed in a different era. The building was condemned to demolition by the Public Works Department in 1971. It was ordered to be replaced in 1980. Concrete compression tests conducted in March 1986 found the building to be structurally unsound and confirmed earlier reports that the buildings be replaced no later than 1993. There followed three detailed engineering reports in 1992 urging replacement. The buildings were re-condemned by the senior engineer of Structures in October 2000. In September of this year a further inspection by the National Occupational Health and Safety Service confirms demolition as the only option. The structures are no longer suitable for the secure and humane containment of those committed to custody.

This application

The report prepared by the Proceedings Commissioner for Human Rights carries with it a succinct and clear message. I adopt the report in its entirety.

The commissioner finds that the conditions and confinement of these Applicants do not comply with the minimum standard rules for the treatment of prisoners. It therefore breaches the Applicants rights as detained persons to be treated with dignity and respect for their inherent humanity.

This view was sharply fortified by my scene visit to the prison.

In respect of Mr Kelemedi Dreu's cell I found him to be locked up with two other prisoners in a very congested inside room not much bigger than the size of the average household bathroom. There was certainly not enough space in the room for the three occupants of the cell. I have been advised and accept that they are only let out for a shower and meals for a matter of minutes every day. Mr Dreu showed me pustule-like rashes on his skin that had the appearance of impetigo. It is a reasonable assumption to make that this condition was caused by his close confinement in this filthy cell. There was one window situated high up on a wall. The cell was damp. I was advised when it rains the cell gets wet. There was one light bulb. The light is turned off at 8 pm every day. The cell even during the afternoon when I visited was very dark. There was one metal bucket in the corner of the cell that the three prisoners had to use as a toilet. There was no privacy. The bucket gave out a very bad odour. Each prisoner had been given a very rudimentary mattress, bed sheet and blanket. These items were of poor and generally unsanitary condition. The three men had been together in the cell for over a month. The daily routine saw them locked down for the better part of 23 out of 24 hours in every day.

My inspection of Leone Vakarusaqoli's cell revealed the same thing. He was fortunate in that he was contained in the cell by himself. He had been there for the last 3 months. The cell itself was of extremely poor condition. It had cracks in the wall and ceiling. I am advised that when it rains water comes in through the window. I am advised that the cell leaks through the concrete block cracks.

I detected that pieces of the concrete ceiling were rotting and falling into the cell. He had a metal toilet bucket. He too suffered a regime of lengthy lockdowns.

Generally I found the prison to be overcrowded. It frequently exceeds its muster. There is little or no separation between remand prisoners and convicted inmates; that is completely unacceptable.

I note in passing that the party accompanying my visit to the prison were all astounded at the degrading and inhumane conditions. There was nothing counsel for the DPP or the Attorney-General could in any way gain say on the opinion of the Human Rights Proceedings Commissioner. Their own observation confirmed the paucity of prisoner conditions.

The opposition to bail

Mr Keteca on behalf of the Attorney-General relies on an affidavit provided by the Commissioner of the Fiji Prison Service dated 13 October. In that affidavit the commissioner gives certain assurances about the future care of remand prisoners saying that they will be accommodated in a separate building with a separate ablation block but on the same site as sentenced prisoners. However, counsel concedes that the commissioner cannot address the significant issues raised in the various structural reports and the occupational health and safety issues of the prison. Counsel also quite properly concedes that the commissioner is bound by political will and the allocation of scarce resources. While as a matter of convenience he has provided an affidavit to partly answer the present crisis created by these applications the commissioner can give no final assurance that the care of these prisoners will be dramatically improved. I find there is a risk that these Applicants will be returned to similar miserable conditions while they await trial.

The Director of Public Prosecutions, Mr Solanki opposes bail but completely respects the report provided by the proceedings commissioner. Counsel responsibly and professionally acknowledges that the conditions inside Suva prison for remand inmates are not in accordance with international law standards. He advises that the Applicants have been held in these appalling conditions for 5 months. However, he rightly has absolutely no confidence in any of these Applicants being successfully brought to trial if they are released on bail. Their previous history and failure to appear when required demonstrate a clear bail risk.

Decision

I have had the benefit of reading my learned sister Shameem J bail decision in *State v Eugene T. M. C. Ladpeter* [2005] FJHC 25 (*Ladpeter*). Her Honour was in that decision dealing with a serious offender remanded in Korovou but in a low risk bail category. Bail was granted on strict terms. These Applicants present a high bail risk.

I respectfully adopt her Honour's two stage test approach.

In terms of s 19 of the Bail Act these Applicants would not normally be entitled to bail. Their previous criminal history and ignorance of previous court orders can leave me with absolutely no confidence in their ability to answer bail when called upon. However, as citizens they have every expectation and entitlement to the constitutional protections guaranteed to us all. Sections 25 and 27 of the Constitution read:

25. (1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.

(2) Every person has the right to freedom from scientific or medical treatment or procedures without his or her informed consent or, if he or she is incapable of giving informed consent, without the informed consent of the lawful guardian.

27. (1) Every person who is arrested or detained has the right:

- 5 (a) to be informed promptly in a language that he or she understands of the reason for his or her arrest or detention and of the nature of any charge that may be brought;
- (b) to be promptly released if not charged;
- 10 (c) to consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice require legal representation to be available, to be given the services of a legal practitioner under a scheme for legal aid;
- (d) to be given the opportunity to communicate with, and to be visited by:
- 15 (i) his or her spouse, partner or next-of-kin; and
- (ii) a religious counsellor or social worker;
- (e) to challenge the lawfulness of his or her detention before a court of law and to be released if the detention is unlawful; and
- (f) to be treated with humanity and with respect for his or her inherent dignity.

20 (2) The authorities holding a person who has been arrested or detained must promptly take all reasonable steps to inform his or her spouse, partner or next-of-kin of his or her arrest or detention.

(3) Every person who is arrested for a suspected offence has the right:

- 25 (a) to be informed promptly in a language that he or she understands that he or she has the right to refrain from making a statement;
- (b) to be brought before a court no later than 48 hours after the time of arrest or, if that is not reasonably possible, as soon as possible thereafter; and
- (c) to be released from detention on reasonable terms and conditions pending trial, unless the interests of justice otherwise require.

(4) A person who is ordered to be detained pending trial is, so far as practicable, to be kept apart from convicted persons.

30 (5) A detained child is, so far as practicable, to be kept apart from adults, unless that is not in the child's best interests.

The rights described in these sections are non-derogable and unqualified: *State v Pickering* [2003] NZAR 293.

35 In a decision of the judicial committee of the privy council contained in *Reyes v R* [2002] 2 AC 235; [2002] UKPC 11 about the constitutionality of the mandatory death penalty in *Belize*, the counsellors allowed the appeal, quashed the sentence of death and remitted the case back to the Supreme Court for appropriate sentencing. It was held that:

40 a generous and purposive interpretation is to be given to constitutional provisions protecting human rights. In this process, the court should not take into account its own moral pre-delections or public opinions instead it must consider the substance of the fundamental right at issue and ensure contemporary protection of it in the light of evolving standards of decency that mark the progress of a maturing society.

45 A contemporary marker in the evolving standards of decency and progress of a maturing society caring for remand prisoners is contained in the United Nations Standard Minimum Rule for the Treatment of Prisoners developed in 1957. Those rules have been referred to me by the Human Rights Commission. They are fully detailed in *Ladpeter*.

50 There is a distinction to be made between two classes of prisoners. The sentence of a term of imprisonment might properly denude a convicted citizen of rights he previously enjoyed to the extent necessary to operate a correctional

institution. He rightly suffers the disgrace of conviction, must endure his punishment and be given the prospect of rehabilitation. However, remand prisoners must remain able to clutch firmly to the presumption of innocence and only have their non-derogable rights limited in the least invasive way. They are
5 untried, have no shame to bare and cannot be affected by mainstream convicted prisoner policies.

In accordance with internationally recognized standards remand prisoners should be treated apart from sentenced prisoners separated not only physically but by the very prison policies prevailing in the institution. Remand prisoners are
10 untried, unconvicted, innocent but contained citizens. Unless they request it they should ideally be kept one to a cell; given plenty of fresh air and exercise; be provided with adequate ablution facilities; wear their own clothes; have regular outside contact and be free to vigorously pursue their defence.

The vulnerability of remand prisoners to prison policies which do not respect their interests as right-bearing individuals is of grave concern. The law by articulation and prescription of its trial procedures and norms must ensure that any decision made which affects the rights or liberties of remand inmates must be constitutionally valid. If correctional administrators are unable to apply
15 correct procedures and operate prisons in a manner that respects a remand inmate's constitutional rights to function in an autonomous self-directed manner, totally apart from sentenced prisoners, then remand inmates must be released on bail.

In my view a generous and purposive interpretation of s 25 requires that I not
25 only address this bail application in its present sense but also must; if I find there has been a breach of the section; provide a purposive remedy to right the wrong that has been done to the Applicants.

The remand conditions at Korovou are so grossly degrading that they speak for themselves. I do not need to redefine those constitutional terms in ss 25 and 27
30 beyond their natural and ordinary meaning.

The prison fails on almost every standard. The buildings are clearly unsound and leaky. They are condemned. Prisoners are often kept three to a cell and locked down in miserable conditions. There does not appear to be any distinction
35 made between convicted and untried remand prisons. The latter are contained on the same site in similar or worse conditions. Remand prisoners wear the same prison rig, suffer the same deprivations and endure a similar denuding of their rights. I find that the remand facilities are inhumane and degrading to such an extent as to constitute a constitutional breach of the applicant's rights.

It is unlikely that the applicant's trial will be reached for several months. The authorities now say to me that they have mended their ways and made alternative dormitory style arrangements for the containment of these remand prisoners. That assurance I am afraid is too little too late. The commissioner's affidavit does not really address the history of the Applicants complaint nor the proper penal
40 policy for the separate containment of remand inmates.

I find that that these breaches have existed for over 5 months. I find there is a risk that the breaches will continue. Successive administrations have failed since 1971 to address even the most basic building and structural requirements and defects of this jail. I have absolutely no confidence that in the time before trial
50 these remand issues will be addressed to enable the correctional facilities to operate within acceptable guidelines.

Yes, there is a risk of reoffending. Yes, there is a risk that these Applicants might not answer their bail conditions. Yes, the trial may never proceed, but I must balance those risks against the shocking attack upon the Applicant's non-derogable rights and the deprivations they have already suffered. These Applicants may well have allegations of serious criminal activity against them but a responsible community acting with maturity and humanity can never insist that remand prisoners be subject to such a severe denuding of their basic rights and expectations of fair humane treatment.

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10 Society has created this problem, so society will have to live with the outcome. Accordingly, the prisoners are released on strict bail conditions. The terms are attached at Apps A and B.

Application granted.

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