Rarasea v The State [2000] FJHC 146; HAA0027.2000 (12 May 2000)

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA0027.2000

Between:

TAITO RARASEA
Appellant

And:

THE STATE
Respondent

Counsel: Appellant in Person
A. Saiyad Khaiyum for Respondent

Date of Hearing: 5 May 2000
Date of Judgment: 12 May 2000

JUDGMENT

Taito Rarasea the appellant appeals against a sentence of six months imprisonment imposed on 20 April 1999 by the learned Chief Magistrate for the offence of escaping from lawful custody contrary to section 138 of the Penal Code Cap. 17 as well as the sanctions imposed by the Commissioner of Prisons pursuant to sections 83(1)A(i) and (vi) of the Prisons Act Cap. 86 (the "Act") as the appellant had also breached paragraph 123(3) of the Prisons Regulations, (the "Regulations"). This consisted of reducing his eight month remission entitlement for the original sentence of two years by one month and seven days and giving him reduced rations for two weeks. In addition the sixty-six (66) days he was at large were added to his sentence under paragraph 114 of the Regulations.

In relation to the six month consecutive sentence imposed, escaping from lawful custody is a serious offence and carries a maximum two year term. The courts appear to treat the matter with some gravity because the offender seeks to evade the consequences of his/her conduct. The sentence imposed was appropriate bearing in mind that the appellant has committed this offence before. He had little choice but to plead guilty. This aspect of the sentence will not be disturbed.

The only ground of appeal which has merit is the one in which the appellant alleges he has been punished twice for the same offence (i.e. double jeopardy). In the course of the hearing, the appellant conceded that the approach taken by the Commissioner of Prisons (the "Commissioner") in relation to this issue was correct. That position is set out elsewhere in this decision. However, the court will disregard the appellant's concession because he is not in a position, for good reason, to appreciate the constitutional issues which involve sections 25 and 28 of the constitution. These matters require some attention in the interests of justice.

As regards section 83(1) A(vi) of the Act, the court has to consider whether it is consistent with section 25(1) of the Constitution which provides:

"(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."

It is now settled law that a constitution is an instrument sui generis requiring special rules of interpretation Minister of Home Affairs v Fisher [1989] AC 319. These rules require a broad and purposive approach as was recognised by Mudholker J in Sakal Papers (P) Ltd v Union of India & Ors [1961] INSC 281; AIR 1962 SC 305 at 311:

"It must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our constitution as fundamental and, therefore, while considering the nature and content of those rights the court must not be too astute to interpret the language of the constitution is so literal a sense as to whittle them down. On the other hand the court must interpret the constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it is the fullest measure subject, of course to permissible restrictions."

This perspective is reflected in section 3 of the Constitution. The preamble itself reaffirms recognition of the human rights and fundamental freedoms of all individuals and groups as well as respect far human dignity. The compact set out in sections 6 and 7 recognises inter alia the equal rights of all citizens.

Therefore any consideration of section 25 must be approached with the understanding that any treatment or punishment that impinges upon the inherent dignity of the individual will contravene the provision.

Article 10 clause 1 of the International Covenant on Civil and Political Rights reinforces section 25(1) in these terms:

"All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

Section 43(2) of the Constitution allows recourse to be had to international instruments in the interpretation of the Bill of Rights set out therein. Reading article 10 clause 1 with section 25(1) the court is respectfully of opinion that the former reinforces the obligation to ensure that persons in custody are treated humanely and with dignity. This is supported by reference to the preamble, the compact and section 3 of the Constitution. The obligation includes the duty to provide sanctions for prison infractions that have due regard for the dignity of a person. Furthermore, article 11 clause 1 of the International Covenant on Economic, Social and Cultural Rights which has been ratified by the Republic of the Fiji Islands recognises the right of everyone to adequate food. Where a country has ratified an international convention, it is an indication that it will not take any action inconsistent with its commitments. As was stated by Mason CJ and Deane J in Minister of State for Immigration and Ethnic Affairs v Teoh [1995] HCA 20; (1995) 128 ALR 353 at 357:

"Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention."

Those dicta are equally relevant to the present case. Any reduction in rations as was meted out to the appellant was not consonant with the Republic of the Fiji Islands undertaking to provide its people with adequate food. Although a state party's obligations under the said covenant are not mandatory, the action taken by the Commissioner was, in the court's respectful opinion, contrary to the spirit of the international instrument mentioned in the use of food as a means of control.

Although article 32(1) of the Standard Minimum Rules for the Treatment of Prisoners issued by the United Nations Commission for Human Rights (the "Minimum Rules") envisages the reduction of diet under medical supervision as an acceptable sanction, the spirit of our Constitution inclines the court to respectfully determine otherwise. It is difficult to reconcile the reduction of prison rations with the respect for human dignity that the preamble to the Constitution proclaims. It must also be borne in mind that the Minimum Rules were first approved in 1957 and clause 3 of its Preliminary Observation recognise "the rules cover a field in which thought is constantly developing." The concept of human rights has evolved since then and from the vantage point of the Constitution, which came into effect in 1997, has also deepened in its scope.

Food is a basic necessity for daily sustenance. To reduce prison rations as a form of punishment is a concept that is offensive in principle. Not only may it affect a person's capacity to survive but it deprives him/her of a portion of rations that are at best adequate. The amount of reduction is not of any importance. The very idea that the state would employ such means is intrinsically unacceptable for the reason that it uses what is a necessity of life as a means to punish proscribed behaviour. This devalues persons such as the appellant because it assumes their status as prisoners justifies such sanctions. The short answer to that proposition is that they are no less human for being incarcerated with an entitlement to an inherent dignity no bars or walls can violate. The rationale for such treatment harks back to a time when prisoners were not considered deserving of much consideration as human beings. The court is respectfully of opinion that

section 83(l) A(vi) of the Act contravenes section 25(1) of the Constitution as amounting to degrading and inhumane treatment and is null and void.

Section 28(1)(k) of the constitution and its effect on paragraph 123(3) of the Regulations and sections 83(1) A(i) and (vi) of the Act now have to be considered.

Paragraph 123 of the Regulations state:

"Any prisoner who commits any of the following offences shall be guilty of a prison offence for the purposes of section 82 of the Act:-

(3) escapes, conspires with a person to procure the escape of a prisoner or assists another prisoner to escape from the prison in which he is detained or from any other lawful custody."

Sections 83(1)(A)(1) [sic] and (vi) of the Act provide:

"83. (i) For the purpose of the trial of prison offences under the provisions of this Act, there shall be the following tribunals:-

C. The Controller, who shall have power to impose any of the following punishments or any combination thereof:-

i. forfeiture of remission of sentence not exceeding three months;...

vi. reduced diet for any period not exceeding fourteen day....."

The Commissioner purported to punish the appellant under those provisions. In his memorandum referenced P31/6/3 of 4 May 2000 to the Director of Public Prosecutions, the Commissioner concluded that:

"The prisoner was not punished twice for the same offence as alleged. He was punished for committing the offence under Prison Regulations and Penal Code which have different interpretations under the law."

In the court's respectful opinion the second sentence appears to contradict the first sentence in the passage cited. For if the appellant was punished under both the Regulations and the Penal Code is that not by definition the very thing he complains of?

Section 28(1)(k) of the Constitution is in these terms:

"28.-(1) Every person charged with an offence has the right:

(k) not to be tried again for an offence of which he or she has previously been convicted or acquitted; ...."

The appellant was convicted of the offence of escaping from lawful custody on 20 April 1999

and sentenced accordingly. Subsequently it was determined he had also contravened paragraph 123(3) of the Regulations. Under section 83(1) of the Act, the Commissioner then "tried" the appellant and imposed the penalties set out in subsections (1) A(i) and (vi) thereof. In the court's respectful opinion that was a clear breach of section 28(1)(k) of the Constitution as the appellant had already been sentenced to six months imprisonment by the court at first instance. The contention that the Penal Code and Regulations were separate instruments with their respective penalties has no merit. Both punished the same conduct i.e. escaping from lawful custody. It follows that section 83(1) A(i) and (vi) where they are in addition to any sentence imposed by a court are ultra vires that provision and the Commissioner may not apply them in such circumstances as the present case. Paragraph 123 of the Regulations itself is valid and may co-exist with section 138 of the Penal Code although the latter would take precedence being a statutory provision.

However, the appellant can only be punished for breach of one of them because they are identical offences although framed under different legislations. As an aside, the court has assumed for present purposes that the Commissioner conducted a formal hearing before imposing the said sanctions. The phrase "trial of prison offences" obliges him to do so. If that was not done, the appellant could have impugned the penalties imposed on that basis as well.

As regards the sixty-six days the Commissioner saw fit to add to the appellant's consecutive sentence being time he was at liberty, paragraph 114 of the Regulations was cited as the basis for the decision. It states:

"114. The period during which an escaped prisoner is at large shall not be counted as part of the sentence he was undergoing at the time of his escape."

In the memorandum referred to earlier, the Commissioner explained his position thus:

"The 66 days is the period he was at large when he escaped on 25/1/99. This was automatically added to his sentence in accordance with Regulation 114 of Cap 86."

With respect, the provision states the direct reverse of what the Commissioner asserts. It cannot be prayed in aid to justify the decision taken because it specifically prohibits that being done. Moreover section 83 of the Act which details the penalties that may be imposed for prison offences is silent on the issue. That would be the logical place for such punishment. However, there is no reference to time a prisoner spends at large being added to his/her sentence. The Commissioner cannot impose such a measure unless it is authorised by law. Even were paragraph 114 to authorise the prison authorities to so act, it would fall foul of the double jeopardy rule enshrined in section 28(1)(k) of the Constitution. The very thought of the Commissioner having such powers is breathtaking in its implications. It is tantamount to saying that an administrative official has the authority to incarcerate persons albeit prisoners without any reference to judicial bodies. The separation of powers doctrine as reflected in the Constitution reposes this power in the courts after due process of law for good reason. It is the clearest example of a restriction on an individual's liberty. In the court's respectful opinion,

neither the Commissioner nor his officers have any legal or constitutional basis to impose the additional custodial sentence for those reasons.

The six month consecutive sentence will stand but the appeal is allowed to the extent that the punishments meted out by the Commissioner of Prisons will be set aside. The reduction of remission (section 83(1) A(i)) of the Act) and rations (section 83(1) a(vi) of the Act) breached section 28(1)(k) of the Constitution as the appellant had already been visited with a six month consecutive sentence for escaping from lawful custody. Furthermore section 83(1) A(vi) contravened section 25(1) of the Constitution and is null and void, the reduction of rations amounting to inhumane and degrading treatment. The remission period of one month seven days which was deducted will be restored accordingly.

Joni Madraiwiwi
PUISNE JUDGE

At Suva
12 May 2000