

3:

CRIMINAL LAW AND HUMAN RIGHTS

1 Introduction

Chapter 4 of the *Fiji Constitution* sets out the fundamental rights and freedoms that are protected in Fiji. Its application binds all branches of the State and all persons performing the functions of any public office: *s21(1)(a),(b) Constitution*.

You should ensure that all fundamental rights are respected in the administration of justice.

The rights to *secure protection of the law* under the Constitution are particularly important for criminal trials: *ss27, 28, 29 Constitution*.

For general discussion, some of these rights are explained below.

2 Right to a Fair Hearing within a Reasonable Time by an Independent and Impartial Court

The Constitution states that a person charged with an offence has the right to a fair trial within a reasonable time, before an impartial Court of law: *s29(1),(2),(3) Constitution*.

Reasonable time

In *Apatia Seru & Anthony Stevens v The State* Crim App No AAU0041 of 1999S₂, the Court adopted a list of factors which may be considered when considering whether delay is reasonable or unreasonable. These include:

- the length of the delay;
- waiver of time periods;
- reasons for the delay, including the inherent time requirements of the case;
- the actions of the defendant;
- the actions of the State;
- the limits on institutional resources and other reasons for delay; and
- prejudice to the defendant.

In the above case, the Fiji Court of Appeal held that a delay of 4 years and 10 months from laying of the charges to the end of trial was unreasonable, and upheld the Canadian authority of *R v Morin* (1992) CR (4th) 1, as applicable to Fiji.

Also, see *State v Peniasi Kata* Cr. Action HACOO09 of 1994 and *Sailasa Naba & Ors v State* No.HAC0012 of 2000L.

Bias

On the issue of bias, the case of *Koya v State* (1997) FCA Crim App No. AAU0011 of 1996 is relevant.

Section 9 Magistrates' Courts Act reinforces the principle that the Court should be impartial. It states:

“Where a Magistrate is a party to any cause or matter, or is unable, from personal interest or any other sufficient reason, to adjudicate on any cause or matter, the Chief Justice shall direct some other Magistrate to act instead....”

The existence of judicial bias should be determined according to the reasonable bystander test, and the effects of judicial statements should be taken as a whole, see: *Johnson v Johnson* [2000] 5 LRC 223 High Court of Australia.

Other cases: *Rt Ovini Bokini v State* Crim App No. AAU001 of 1999S; *State v Bhawani Prasad* Suva High Court Crim App No. HAA056/2002; *Ramesh Chand v State* Suva High Court Crim App No. 6/2000.

3 Presumption of Innocence

Section 28(1)(a) states:

“Every person charged with an offence has the right to be presumed innocent until he is proven guilty according to law”.

This is an extremely important principle in criminal law.

You must ensure that:

- you do not base your finding of guilt on previous knowledge of the defendant; and
- the prosecution bears the burden of proving the defendant's guilt beyond reasonable doubt.

See *Azzopardi v R* [2001] 4 LRC 385, High Court of Australia.

4 Right to Freedom from Cruel or Degrading Treatment

Section 25(1) states:

“Every person has the right to freedom from torture of any kind,...and from cruel, inhumane, degrading or disproportionately severe treatment or punishment”.

A strong interpretation has been endorsed by the Fijian judiciary. “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. For us there is no luxury of a declaratory theory of law. We need to be dynamic and creative, sensitive to popular expectations and democratic values.”: *Sailasa Naba & Ors v State Criminal Jurisdiction* No HAC0012 of 2000L.

In *Taito Rarasea v State Crim Appeal No.27* of 2000, the High Court considered the appellant’s contention that he had been punished twice for the same offence and had been subjected to inhumane treatment. The Court held that the Commissioner of Prisons’ power under the *Prisons Act* was contrary to international instruments in the use of food as a means of control, and contravened *s25* as amounting to degrading and inhumane treatment. The Court therefore declared it null and void.

Two other recent cases of significance are *Naushad Ali v State Crim Appeal No.CCCP0001* of 2000L regarding the use of corporal punishment; and the removal of mandatory minimum custodial imprisonment terms for drug offenders in the case of *Audie Pickering v State* HAM 007/01.

5 Right to an Interpreter

Section 28(1)(b) states:

“Every person charged with an offence has the right to be given details in legible writing, in a language that he or she understands, of the nature of and reasons for the charge”.

A defendant must be able to:

- fully understand the charge(s) he or she faces;
- fully understand the implications of the charge(s);
- instruct his or her legal representative.

For the defendant to have a fair trial, interpreters and Court clerks must be:

- impartial;
- fluent in the language(s) being interpreted;
- understand that they need to be accurate.

Note that *s13 Magistrates' Court Act* places the Court clerk/interpreters under your immediate control and direction.

6 Right to Adequate Time and Facilities including Right to Counsel

Section 28 (1)(c) & (d) states:

“Every person charged with an offence has the right to be given adequate time and facilities to prepare a defence...and the right to defend himself or herself in person or to be represented ...by a legal practitioner of his or her choice or,...to be given the services of a legal practitioner under a scheme for legal aid ”.

It is essential to uphold this right in order to guarantee a fair hearing for the defendant.

In many cases, it will be important for a defendant to have legal representation, or at least the advice of a lawyer, in order to understand the charges against him or her and to be able to defend him or herself against those charges.

The Court must not deny the defendant time to meet with a legal representative if he or she so chooses.

What constitutes adequate time will depend upon the circumstances of the case.

Note that the right to be given the services of a legal practitioner under a scheme of legal aid exempts foreign nationals detained, arrested or charged in Fiji: see *Reginald Alan Lyndon v The Legal Aid Commission and the State* Misc. Case No. HAM 38 of 2002.

Shameem J sets out a recommended format for informing a defendant of their rights under *s28(1)(d)* and *s29(1)* of the *Constitution* in *Suren Singh & 4 Ors v The State* (unreported) Suva High Court Cr. App. No 79 of 2000.

7 Right to Not Give Evidence in Court

Section 28(1)(f) states:

“Every person charged with an offence has the right ...not to be a compellable witness against himself or herself”.

In criminal cases, the prosecution has the burden of proving the charges against the defendant.

The defendant may give evidence in his or her own defence once the prosecution has finished presenting his or her case, but is not required to do so.

The Court may not infer anything whatsoever from the defendant’s choice not to give evidence. In such cases you must base your decision solely on the evidence presented by the prosecution and decide whether the prosecution has met the required burden and standard of proof.

8 Right to be Present in Court

Section 28(1)(h) states:

“Every person charged with an offence has the right not to have the trial take place in his or her absence...”

This provision protects the right of the defendant to be present and hear the proceedings and the evidence against him or her. However, this right is qualified by two limitations. The proceedings may take place in his or her absence if:

- after having being served with summons requiring his or her attendance, he or she chooses not to attend; or
- his or her conduct in Court is such that the continuation of proceedings is impracticable.

Nevertheless, if the offence charged is punishable by a term of imprisonment, then the above qualifications do not apply: *s28(2) Constitution*.

Section 189 CPC supports this principle by requiring that:

“Except as otherwise expressly provided, all evidence taken in any inquiry or trial under this Code shall be taken in the presence of the defendant, or when his personal attendance has been dispensed with, in the presence of his barrister and solicitor”.

An exception for the requirement for the defendant to be present during his or her trial is provided for in *s8 CPC*. A Magistrate may dispense with the personal attendance of the defendant in cases where:

- a summons is issued for any offence other than a felony; **and**
- the punishment is only a fine and/or imprisonment not exceeding 3 months; **and**
- the defendant has pleaded guilty, in writing or through a lawyer.

Also note the provision under *s199 CPC*, where the Court may proceed with the hearing in the absence of the defendant in cases where the term of imprisonment does not exceed 6 months and/or a fine not exceeding \$100.

9 Right to Not be Found Guilty of a Criminal Offence if, at the Time, it Does Not Constitute an Offence

Section 28(1)(j) states:

“Every person charged with an offence has the right not to be found guilty... of an offence unless such act or omission ... at the time it occurred ... constituted an offence”.

Upholding this right prevents a person from being tried for something that is not an offence in law at the time they committed an act or omission. If there is no law, there is no offence.

This right also prevents a person from being tried in the future according to future legislation, for an act or omission they committed before the legislation making it unlawful came into existence.

For example, if a person commits an act in 2001, but no legislation exists regarding that offence until 2003, the person cannot then be tried for the act committed in 2001 using the 2003 legislation.

10 Right to Not be Tried Again for the Same Offence

Section 28(1)(k) states:

“Every person charged with an offence has the right not to be tried again for an offence of which he or she has previously been convicted or acquitted”.

In particular, this right prevents three abuses:

- a second prosecution for the same offence after acquittal;
- a second prosecution for the same offence after conviction; and
- multiple punishments for the same offence.

Upholding this right also guarantees that a person will not be subjected to endless proceedings regarding the same set of circumstances.

See *Ministry of Labour v Merchant Bank of Fiji* Crim App No. HAA 011 of 2002; and *State v Atish Jeet Ram* Crim App No. AAU004 of 1995S.