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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.

4:

JUDICIAL CONDUCT

1 Ethical Principles

On appointment as a Magistrate in Fiji, you have sworn the following oath:

“I swear by Almighty God that I will well and truly serve the Republic of the Fiji Islands in the office of [Resident] Magistrate. I will in all things uphold the Constitution; and I will do right to all manner of people in accordance with the laws and usages of the Republic, without fear or favour, affection or ill will. So help me God.”

The judicial role is a public one and your conduct will be under public scrutiny. The respect and confidence of the public in the justice system requires that Judges and Magistrates respect and comply with the law, and conduct themselves in a manner which will not bring themselves or their office into disrepute.

The Oath can be divided into parts to illustrate a number of well-established ethical principles of judicial conduct.

1.1 “Well and Truly Serve”

Diligence

You should be diligent in the performance of your judicial duties.

This means you should:

- devote your professional activity to your judicial duties, which include not only presiding and sitting in Court and making decisions, but other judicial tasks essential to the Court’s operation;
- bring to each case a high level of competence and be sufficiently informed to provide adequate reasons for each decision;
- take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for your role;
- not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in your colleagues.

Decisions should be delivered as quickly as circumstances permit. Always try to do this immediately. This means you must:

- be familiar with common offences, jurisdiction and procedures; and
- prepare well before sitting in Court.

1.2 “Do Right”

Integrity

You should strive to conduct yourself with integrity so as to sustain and enhance public confidence in the judiciary.

This means you should:

- make every effort to ensure that your conduct is above reproach in the view of reasonable, fair minded and informed persons; and
- encourage and support your judicial colleagues to observe this high standard.

1.3 “All Manner of People”

Equality

You should conduct yourself and proceedings before you so as to ensure equality according to the law. You must be careful to preserve your impartiality and must not take either side or give the appearance of doing so.

This means you should:

- carry out your duties with appropriate consideration for all persons (for example, parties, witnesses, Court personnel and judicial colleagues) without discrimination;
- strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background;
- avoid membership in any organisation that you know currently has practices that contravene the law;
- in the course of proceedings before you, disassociate yourself from, and disapprove of, improper comments or conduct by Court staff, counsel, or any other person subject to your direction. Improper conduct can include sexist, racist, or discriminatory language or actions.

1.4 “The Laws and Usages of the Republic”

Lawfulness

You must always act within the authority of the law. This means you should:

- not take into account irrelevant considerations when making your decisions. The exercise of judicial discretion should only be influenced by legally relevant considerations;
- not abdicate your discretionary powers to another person. **You** are the decision-maker;
- defend the constitutionally guaranteed rights of the people of Fiji.

1.5 “Without Fear or Favour, Affection or Ill Will”

Judicial independence

An independent judiciary is indispensable to impartial justice under the law. You should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.

This means you must:

- exercise your judicial functions independently and free of irrelevant influence;
- firmly reject any attempt to influence your decisions in any matter before the Court outside the proper process of the Court;
- encourage and uphold arrangements and safeguards to maintain and enhance the independence of the judiciary;
- exhibit and promote high standards of judicial conduct so as to reinforce public confidence, which is the cornerstone of judicial independence.

Impartiality

You must be, and should appear to be, impartial with respect to your decision making.

This means you should:

- strive to ensure that your conduct, both in and out of Court, maintains and enhances confidence in your impartiality and that of the judiciary;
- not allow your decisions to be affected by:
 - ≡ bias or prejudice;
 - ≡ personal or business relationships; or
 - ≡ personal or financial interests;
- as much as reasonably possible, conduct your personal and business affairs so as to minimise the occasions on which it will be necessary to be disqualified from hearing cases;
- review all commercial, social and political groups you are a member of, or have an interest in, and ask yourself, “could this involvement compromise my position as Magistrate?”

You must not only be impartial, but you must be seen to be impartial. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair-minded and informed person.

This principle touches several different areas of your conduct.

a) Judicial demeanour

While acting decisively, maintaining firm control of the process and ensuring cases are dealt with quickly, you should treat everyone before the Court with appropriate courtesy.

b) Civic and charitable activity

You are free to participate in civic, charitable and religious activities, subject to the following considerations:

- Avoid any activity or association that could reflect adversely on your impartiality or interfere with the performance of your judicial duties.
- Do not solicit funds or lend the prestige of the judicial office to such solicitations.
- Avoid involvement in causes and organisations that are likely to be engaged in litigation.
- Do not give legal or investment advice.

c) Political activity

You should refrain from conduct which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in your impartiality with respect to issues that could come before the Courts.

All partisan political activity must cease upon appointment. You should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that you are engaged in political activity.

You should refrain from:

- membership in political parties and political fundraising;
- attendance at political gatherings and political fundraising events;
- contributing to political parties or campaigns;
- taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the Courts, the independence of the judiciary or fundamental aspects of the administration of justice;
- signing petitions to influence a political decision.

Members of your family have every right to be politically active. Sometimes this may adversely affect the public perception of your impartiality. You should not sit in any case before the Court where there could reasonably be such a perception.

d) Conflict of interest

You must disqualify yourself in any case in which you believe that you will be unable to judge impartially.

You should also disqualify yourself if a reasonable, fair minded and informed person would have a personal suspicion of conflict between your personal interest (or that of your immediate family or close friends or associates) and your duty.

Never preside over a case where the defendant or witness:

- is a near relative;
- is a close friend;
- is an employer or employee; or
- has a close business relationship with you.

In Fiji, family relationships can sometimes be a major problem. Decide how closely that person is related to you, then take the option that you think would best preserve a position of impartiality.

Do not preside over a case where you may have or appear to have preconceived or pronounced views relating to:

- issues;
- witnesses; or
- parties.

For example, if you witness an accident, do not preside over any case arising out of that accident.

Disqualification is not appropriate if:

- the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification;
- no other Magistrates are available to constitute a Court to deal with the case; or
- because of urgent circumstances, failure to act could lead to a miscarriage of justice.

2 Conduct in Court

2.1 Preparing for a Case

Ensure you have studied and understood the files you will be dealing with.

Try to have the relevant legislation at hand, otherwise get the parties to provide you with them.

Criminal jurisdiction

- Consider the offences – make sure you know what elements must be proved.
- Be prepared for interlocutory applications that may arise in the course of proceedings.
- Be prepared to deliver rulings at short notice.

2.2 Principle that Affected Parties have the Right to be Heard

It is a well established principle, evolved from common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before the decision is made.

This principle focuses on the *procedural* steps implemented by the Court. The purpose of the principle is to ensure that you consider all relevant information before making a decision.

To give effect to this principle, you have to consider what has to be done to allow a person to be heard. This extends to:

- allowing the person sufficient notice to prepare his or her case; and
- allowing sufficient time to enable the person to collect evidence to support his or her case;
- allowing sufficient time to enable the person to collect evidence to be able to rebut or contradict the other party's submissions.

Note that a person may be heard, but the view they have expressed does not have to prevail. You are entitled to reject it for what might be a good reason. The relevance and weight of the information is to be determined by you.

There are three aspects to the principle:

1. Prior notice

- You should be satisfied that adequate notice has been given, as prescribed by law.
- If the defendant or respondent does not take any steps or appear at the hearing, you will need some evidence that the documents have been served before proceeding with the hearing.
- You will need proof of service of the warrant or summons.
- Notice must be sufficient to allow the person to prepare their case. Where you are not satisfied that a party has been given sufficient notice for this, adjourn the matter to allow them more time.

2. Fair hearing

- The way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.
- The general rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with a new and relevant issue.
- The principle always requires you to ensure you have all the relevant facts and materials before deciding.

3. Relevant material disclosed to parties

- Generally, all relevant material should be disclosed to the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you propose to take into account.

Before a hearing is concluded, you should ask yourself, “has each party had a fair opportunity to state his or her case?”

2.3 Courtroom Conduct

You should exhibit a high standard of conduct in Court so as to reinforce public confidence in the judiciary:

- Be courteous and patient.
- Be dignified.

- Be humble:
 - ⇒ If a mistake is made you should apologise - there is no place on the Bench for arrogance.
- Continually remind yourself that a party is not simply a name on a piece of paper:
 - ⇒ The parties are looking to the Court to see justice is administered objectively, fairly, diligently, impartially, and with unquestionable integrity.
- Never make fun of a party or witness:
 - ⇒ A matter which may seem minor to you, may be very important to a party or witness.
 - ⇒ Remember there are no unimportant cases.
- Show appropriate concern for distressed parties and witnesses.
- Never state an opinion from the Bench that criticises features of the law:
 - ⇒ Your duty is to uphold and administer the law, not to criticise it.
 - ⇒ If you believe that amendments should be made, discuss the matter with relevant authorities.
- Never say anything or display conduct that would indicate you have already made your decision before all parties are heard.
- Do not discuss the case or any aspect of it outside of the judiciary.

2.4 Maintaining the Dignity of the Court

Ensure that all people appearing before the Court treat it with respect by:

- keeping order in Court;
- being polite and respectful and expecting the same from them.

Deal effectively with unruly defendants, parties, witnesses and spectators by:

- decisiveness and firmness;
- dealing promptly with interruptions or rudeness;
- clearing the Court or adjourning if necessary.

2.5 Communication in Court

Speaking

- Use simple language without jargon.
- Make sure you know what to say before you say it.

- Avoid a patronising and or unduly harsh tone.
- Generally, do not interrupt counsel or witnesses.
- Always express yourself simply, clearly and audibly. It is important that:
 - ≡ the party examined and every other party understands what is happening in the Court and why it is happening;
 - ≡ the Court Clerk is able to hear what is being said for accurate interpretation; and
 - ≡ the public in the Courtroom are able to hear what is being said.

Listening actively

- Be attentive and be seen to be attentive in Court.
- Take accurate notes.
- Maintain eye contact with the speaker.

Questioning

Criminal

- The criminal justice system is based on an adversarial procedure, which requires the prosecution to prove the case. Your role is not to conduct the case for them, but to listen and determine.
- You should generally not ask questions or speak while the prosecution or defence are presenting their case, examining or cross-examining witnesses.
- You may ask questions at the conclusion of cross-examination, but only to attempt to clarify any ambiguities appearing from the evidence. If you do this, you should offer both sides the chance to ask any further questions of the witness, limited to the topic you have raised.
- Never ask questions to plug a gap in the evidence.

Dealing with parties who do not understand

You may frequently be confronted with unrepresented defendants and parties who do not appear to understand what the proceedings are about.

It is your responsibility to ensure that the defendant understands:

- the criminal charges faced; and
- the procedures of the Court.
- what the Court is doing; and
- why the Court is following that course.

When dealing with unrepresented defendants, you should explain to them:

- the nature of the charge;
- the legal implications of the allegations, including the possibility of a prison term if he or she is convicted;
- that legal representation is available;
- that he or she has an obligation to put his or her case.

Dealing with language problems

Ideally, an interpreter should be obtained and sworn in when there is a language problem.

However, when none is available, you should be able to:

- explain the nature of the charge or issues as slowly, clearly and simply as possible; and
- if you are in any doubt about whether the defendant or a party properly understands what is happening, adjourn the hearing to enable an interpreter to be obtained.