IN THE SUPREME COURT OF SEYCHELLES

Ranzo Kilindo

v/s

The Republic

Case No: C.A. 14 of 2010.

Mr B. Julie standing in for Mr. B. Hoareau for the Appellant

Mrs C. Cesar for the Respondent

Appellant present.

JUDGMENT

Dodin. J

The Appellant was convicted on the 31st May 2010, by the Family Tribunal for contempt of a Family Tribunal Order and was sentenced to 6 months imprisonment. The Appellant now appeals against the conviction and sentence imposed by the Family Tribunal. The grounds of appeal are as follows:

1. That the Family Tribunal in convicting the Appellant failed to follow and apply the principle of natural justice and / or fair hearing as laid down in Article 19 of the Constitution.

2. That the Family Tribunal failed to comply with the provision of sections

68, 111 and 114 of the Criminal Procedure Code.

3. That as the Appellant was unrepresented the Family Tribunal had an obligation to inform the Appellant of his right to be represented by a lawyer of his choice and further to assist the Appellant to put forward his defence.

And against sentence:

4. That the sentence is manifestly harsh and excessive.

The undisputed facts of the case are as follows:

The Appellant was in a relationship with one Cheryl Sopha and they have one child who is in the custody of Cheryl Sopha. For a period of time the Appellant, Cheryl Sopha and their child lived with Cheryl Sopha's mother, Beryl Onezime at Roche Caiman. Sometime during the year 2009, problems arose amongst the three persons which resulted in Cheryl Sopha and Beryl Onezime filing a complaint under the Family Violence (Protection of Victims) Act against the Appellant before the Family Tribunal. The result of the complaint was that the Family Tribunal made a Restriction Order against the Appellant which prohibited the Appellant from approaching the house of the Beryl Onezime and Cheryl Sopha.

O the 28th May 2010, the Appellant was arrested by police and produced before the Family Tribunal on the 31st May where he was asked to account for his alleged failure to comply with the Restriction Order imposed on him by the Family Tribunal.

From the records of the Family Tribunal, the Appellant initially denied having breached the Family Tribunal Order, maintaining that he had approached Cheryl Sopha in the street and taken the child from her, but after the Family Tribunal had heard the complainants' versions, the Appellant maintained that it was Cheryl who told him to come to the house. After asking the Appellant to show cause why he should not be given a sentence of imprisonment for breaching the Family

Tribunal Order, the Appellant was convicted and sentenced to a term of 6 months imprisonment.

Learned Counsel for the Appellant submitted that the Family Tribunal failed to apply the relevant provisions of Article 19 of the Constitution of the Republic of Seychelles and the provisions of Sections 68, 111 and 114 of Criminal Procedure Code. Learned Counsel submitted that there was no proper hearing of the case against the Appellant by the Family Tribunal in that the Appellant was not given the opportunity to test the evidence against him since the doctrine of *Audi Alteram Partem* was not observed.

Learned Counsel submitted that no formal charge was ever laid against the Appellant and that he was not given adequate time and facilities to prepare for his defence. Learned Counsel submitted further that the Appellant was not informed that he had a right to be defended by a legal practitioner of his choice or assisted by the Family Tribunal to present his defence. Learned Counsel maintained that there is no difference between a charge for contempt of court and an ordinary criminal charge and therefore the same principle and procedures must be applicable to all. Learned Counsel referred the Court to the case of *Francois v. The Queen [1975] Mauritius Law Report 237* and the case of *Sunassee v. State [1998] Mauritius Law Report 84* in support of his submission. Learned Counsel submitted that the sentence of 6 months imprisonment for the Appellant is harsh and excessive considering all the circumstances of this case.

Learned Assistant State Counsel for the Republic submitted in response that the Appellant was in breach of a Restraining Order made by the Family Tribunal and that he was brought before the Family Tribunal to answer the complaint against him. Learned Assistant State Counsel submitted that the Family Tribunal informed the Appellant of the complaint and called on him to make his defence. After initially denying that he had breached the order, he admitted that he had indeed gone to the Complainants' house in defiance of the Restriction Oder. He was asked to show cause why he should not be sentenced to a term of imprisonment and he failed to do so. Learned Assistant State Counsel submitted that Family violence is a serious matter and that is why the Family Tribunal has been given

sufficient power to deal with such matter speedily and without the formality of the courts.

Learned Assistant State Counsel submitted that the sentence of 6 months imprisonment imposed by the Family Tribunal is reasonable in the circumstances considering that the maximum sentence set by law is 3 years imprisonment or a fine of Rs.30,000/- , or both fine and imprisonment.

The facts which resulted in the Appellant being arrested and produced before the Family Tribunal are not in dispute. The issues raised in this appeal concern the procedures of the Family Tribunal *vis-à-vis* the Constitution and the Law, namely Sections 68, 111 and 114 of Criminal Procedure Code.

The Appellant was under a Restraining Order made by the Family Tribunal under Section 4 of the Family Violence (Protection of Victims) Act 2000. Section 6 of the Family Violence (Protection of Victims) Act state as follows:

> *"A person who intentionally contravenes an interim protection order or a protection order shall be guilty of an offence and liable on conviction before the Family Tribunal to a fine of R30,000 or to imprisonment for 3 years or to both such fine and imprisonment."*

The Family Tribunal derives its procedural powers under the Children's Act… Section 78A(4) and (5) are pertinent to this case. Section 78A (4) states:

> *"The Tribunal shall before making a decision-*
>
> a) *Afford all interested parties the opportunity to be heard;*
>
> b) *Generally observe the rules of natural justice;*
>
> c) *Consider any report submitted by the Director in respect of a child."*

Section 78A(5) states:

> *"Except as otherwise provided under this Act, the Tribunal shall establish its own procedure for the hearing or determination of any matter falling under its jurisdiction."*

The first ground of appeal states that the Family Tribunal in convicting the Appellant failed to follow and apply the principle of natural justice and / or fair hearing as laid down in Article 19 of the Constitution.

The Constitution is the supreme law and the violation of any of its provisions is indeed a very serious issue. Article 46 of the Constitution sets out the specific procedures by which breach of the provisions of the Constitution should be addressed. Article 46 (1) states:

> *"A person who claims that a provision of this Charter has been or is likely to be contravened in relation to the person by any law, act or omission may, subject to this article, apply to the Constitutional Court for redress."*

A person who pleads that his constitutional right has been violated cannot do so by way of appeal to a higher or supervisory court. The Appellant therefore cannot plead violation of his constitutional right as a ground of appeal against the conviction and sentence imposed by the Family Tribunal.

The principle of natural justice however applies to all decisions of the Family Tribunal. Indeed Section 78A(4)(b) states clearly that this must be so. Learned Counsel for the Appellant emphasized that the Family Tribunal reach its decision with complete disregard to the doctrine of *audi alteram partem,* which literal meaning is "hear the other side". This doctrine embodies the concept in Criminal Law that no person should be condemned unheard; it is akin to "due process". It is the notion that an individual, whose life, liberty, or property is in legal jeopardy, has the right to confront the evidence against him or her in a fair hearing. This is one of the fundamental principles of natural justice.

This principle is clearly stipulated in the case of *R v. Camille No:2 [1972] SLR 58* which states:

"Such jurisdiction must in all cases be exercised in the …manner so that the essential principle of natural justice known as audi alteram partem be complied with."

It is noted that the jurisdiction mentioned in this case was that of the Magistrate's Court which procedures are explicitly set out in the Criminal Procedure Code.

In this case, the records of the Family Tribunal show that the Appellant appeared before the Family Tribunal on the 31st May, 2010 together with the complainants. The first exchanges between the Appellant and the Family Tribunal were as follows:

"Tribunal: Ranzo, this Tribunal made an order for you not to approach the house where the 2 Applicants are living. What happened?

Respondent: I haven't been to this lady's house.

Tribunal: What happened? Why are you here today?

Respondent: I had a little problem with Cheryl, while she was working on Friday I decided to visit my child at her nanny's place. I didn't know she was off-duty. On my way to the nanny's place I saw Cheryl talking to a girl with my daughter in her arms. I took Sierra from her. When I was with Sierra on the road, I saw the police and they came to arrest me."

After hearing the depositions of the Applicants and the Appellant's response, the family Tribunal stated:

"Tribunal: Ranzo, you have breached a Family Tribunal Order made against you. You were told not to approach the house of the Applicant and not to commit violence against her.

Respondent: I didn't go to the house of this lady."

After the 2nd Applicant's account of the alleged incident the Family Tribunal again addressed the Appellant as follows:

"Tribunal: Why did you go and fight at the house of the Applicant? It means the

order we made does not mean anything to you?

Respondent: Cheryl told me to come."

Later the Family Tribunal again told the Appellant:

Tribunal: Do you have any reason why we should not sentence you for breaching this Tribunal's order?

Respondent: I did not to the house of that lady."

Tribunal: We are asking you if you have any reason to give us why we should not send you to prison for breaching this Tribunal's Order…."

The above exchanges clearly indicate that the Appellant was given clear and ample opportunities to put forward his case. Obviously, from the above extracts it is clear that the Family Tribunal did not believe the Appellant and there is no reason to challenge the Family Tribunal's conclusion on the facts.

A fair hearing means the right to be notified of the charge being brought against a person and the chance to meet that charge. In order for a hearing to be fair and comply with due process requirements, it must be held before an impartial tribunal. A fair hearing must provide a reasonable opportunity for an individual to be present at the designated time and place, during which time he or she may offer evidence, cross-examine opposition witnesses if the procedures allow and offer a defense.

In view of the above, this Court is satisfied that the doctrine of *audi alteram partem* was duly observed by the Family Tribunal to the extent that it was necessary to deal with the complaint that the Appellant had breached the protection order made against him. The 1st ground of appeal is therefore rejected.

The 2nd ground of appeal is based on the provisions of Sections 68, 111 and 114 of the Criminal Procedure Code. Learned Counsel for the Appellant submitted that since the Family Violence (Protection of Victims) Act is silent on the procedures to be used by the Family Tribunal in dealing with breaches of its orders, the provisions of Sections 68, 111 and 114 of the Criminal Procedure Code must be

followed and hence require the formal drafting of charges and particulars to be served on the Appellant and calling on the Appellant to formally plead to the charges.

This argument is faulty on two accounts. Firstly, whilst the offence committed was under the Family Violence (Protection of Victims) Act the powers and procedures have been established under Section 78A of the Children's Act. Sections 78A(4) and (5) (supra) are clear and provide the Family Tribunal with the necessary framework to operate without having to apply the formality of court processes. Hence the provisions of the Criminal Procedure Code mentioned above do not apply directly and *in toto* to the Family Tribunal to the exclusion of Section 78A.

Secondly the Family Tribunal is not considered to be a court of records where formalized procedures are of primary necessity. The provisions of Section 78A(4) and (5) have been complied with and the Respondent, now Appellant, understood the case against him and was given adequate opportunity to contest the complaint against him. Since the procedures of the Family Tribunal in this case are not governed by the Criminal Procedure Code, the Family Tribunal was not wrong to adopt the procedures it did.

For the above reasons the 2nd ground of appeal is also rejected.

The third ground of appeal is that since the Appellant was unrepresented the Family Tribunal had an obligation to inform the Appellant of his right to be represented by a lawyer of his choice and further to assist the Appellant to put forward his defence.

In view of this Court's findings on the 1st and 2nd grounds of this appeal, the obligation to inform a person of the right to legal representation by a lawyer of his choice does not extend to the Family Tribunal. In any event this right is given to a person at the time of arrest or detention and not on production of the person before a Court or Tribunal. Arguably, had the Appellant made such a request before the Family Tribunal and was refused, the decision of the Family Tribunal might have been open to challenge as the case *of Francois v. The Queen* (supra) contended. Where a person appearing before a Court or Tribunal does not make

such a request, it would be unreasonable to impose on a Court or Tribunal an obligation to impart to that person rights given to a person at the time of arrest or detention.

The second limb of the 3rd ground of appeal concerns assistance that the Family Tribunal could have given to the Appellant. Learned Counsel for the Appellant relied on the case of *Sunassee v. State* (supra) in support of this contention. In the case of *Sunassee*, the court stated:

> *"The Accused in a criminal case certainly has a number of rights and is entitled to take several courses of action as the trial proceeds. When an accuse person is inops consilii, it is the court's duty to offer him a certain amount of guidance in order to help him not to miss important opportunities which are open to him, under the existing procedure, to challenge the evidence of the prosecution or to present his own defence."*

The court however continued as follows:

> *"It stands to reason, however, that whilst the essential stages of the procedure are to be brought home to an accused who is unrepresented by counsel, the Court cannot act as an advisor to the accused as to various tactical possibilities open to him as the trial unfolds, nor can the Court indicate to him all possible moves open to him at every stage and which could have been adopted by counsel if there was one assisting the accused."*

This case may be applicable to situations arising at a trial of an accused who is undefended by counsel. There is however a difference between the case of an accused charged with the commission of a criminal offence and brought before court for trial by the prosecution and a person who is summonsed by the court or tribunal for contempt of that court or tribunal's order. In the former, the court or tribunal acts as arbiter called upon by both sides to dispense justice, whilst in the latter the person is brought before the court or tribunal for an act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or tribunal or respect for its authority. It follows

therefore that the role and procedures that must be adopted by the court or tribunal in each situation would differ substantially. However in both cases the court or tribunal must give reasonable guidance on the specific peculiarities of the procedures applicable to each case.

In the present case, the record of the Family Tribunal shows that the Appellant was requested at every stage of the proceedings to address the complaint against him, to make representations on the findings of the Family Tribunal and mitigate the consequences. In the circumstances it cannot be said that the Appellant was not properly guided by the Family Tribunal during the course of his appearance on the 31st May, 2010.

The third ground of appeal is therefore rejected.

Having considered and rejected all grounds of appeal against conviction the appeal against conviction is consequently dismissed.

The appeal against sentence shall now be considered. The Appellant maintains that the sentence imposed by the Family Tribunal upon him is manifestly harsh and excessive.

The Appellant was sentenced to a term of 6 months imprisonment. Under Section 6 of the Family Violence (Protection of Victims) Act, a person who is found guilty of contravening a protection order is liable on conviction to a maximum fine of R30,000 or to imprisonment for a maximum period of 3 years or to both fine and imprisonment.

Clearly the sentence imposed by the Family Tribunal is not *ultra vires* its powers and jurisdiction. Although neither counsel made substantial submissions on sentence the Court takes note that the Appellant is a young man and first offender who by bravado or ignorance committed the offence for which he has been sentenced. The court is generally reluctant to interfere with a sentence lawfully imposed by a lower court or Tribunal. In a case of contempt the role of the court or Tribunal is not only to punish but also to restore and impose its

authority on the person who has shown disrespect of the court or Tribunal, and its processes, which consequently amounts to obstruction of the administration of justice.

Nevertheless the Court or Tribunal in imposing sentence must consider imposing a sentence that commensurates with the gravity of the offence. Having considered the specific circumstances of this case, the Court finds that the sentence of 6 months imprisonment is on the high side and a sentence of not more than 2 months imprisonment would have had the necessary effect for a first offence and would have been more appropriate in the circumstances of this case than a lengthy prison sentence.

The Court consequently reduces the sentence of imprisonment imposed on the Appellant to 2 months imprisonment.

Subject to the variation of sentence, the appeal is dismissed.

C. G. DODIN

JUDGE

Dated this 6th day of August, 2010.