

CONTEMPT OF COURT

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"The law on this subject is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should in my judgment be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary, but it cannot be allowed where there would be real prejudice to the administration of justice."

Per Lord Reid in A-G v. Times Newspapers Ltd. [1974] AC 273, 294 H.L.

The law of contempt of court has, as its sole purpose, the maintenance of the authority and the dignity of the courts. Section 124 of the Constitution provides that the Supreme Court, the Court of Appeal and the High Court have power to punish persons for contempt of court in accordance with the law. Jurisdiction for contempt of court exists in a limited form under statute and generally, under common law. Inevitably, in cases of criminal contempt, the interference with the proper administration of justice must be balanced with a citizen's right to freedom of

expression. In cases of contempt in civil proceedings, the courts are more likely to be concerned with the wilfulness of the disobedience of a court order. In this paper, I will deal with issues of interest to a practitioner, in relation to criminal contempt and civil contempt.

Criminal Contempt

I call this topic criminal contempt although of course contempt of court, leading to conviction and sentence, can arise in all court proceedings and is always criminal in sanctions. However, behaviour leading to convictions of contempt for "scandalising the court" usually arise, for some reason, in criminal proceedings.

In an excellent analysis of the history of contempt of court, Townsley J in **Sayed Muktar Shah v. Elizabeth Rice and Others**, explained why contempt jurisdiction should be exercised only in exceptional circumstances. Because it is a common law jurisdiction, only the High Court has powers to summon people for contempt of court. If a magistrate believes that a person is in contempt he/she may report the matter to the police for investigation and prosecution under section 136 of the Penal Code **or** refer the matter to the High Court for the High Court to initiate proceedings. This latter option is rarely exercised.

Section 136 of the Penal Code is specific. It provides as follows:

"(1) Any person who -

- (a) within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being had or taken; or
- (b) having been summoned to give evidence in a judicial proceeding, fails to attend; or
- (c) being present at a judicial proceeding and being called upon to give evidence, refuses to be sworn or to make an affirmation; or
- (d) having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document; or
- (e) having attended a judicial proceeding to give evidence, remains in the room in which such proceeding is being had or taken after the witnesses have been ordered to leave such room; or
- (f) having been ordered by the court to remain within the premises in which any judicial proceeding is being heard or taken or within the precincts thereof departs from such premises or precincts without the leave of the court; or
- (g) causes an obstruction or disturbance in the course of a judicial proceeding; or
- (h) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken; or

- (i) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private; or
- (j) attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he has given evidence, in connection with such evidence; or
- (k) dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding; or
- (l) wrongfully retakes possession of land from any person who has recently obtained possession by a writ of court; or
- (m) commits any other act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken,

is guilty of an offence, and is liable to imprisonment for three months.

(2) When an offence against paragraphs (a), (b), (c), (d), (e), (g), (h) or (m) of subsection (1) is committed in view of the court, other than a magistrate's court presided over by a third class magistrate, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding forty dollars or in default of payment to imprisonment for a term not exceeding one month.

(3) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of the [High Court] to punish for contempt of court."

Section 136 creates several offences. However, like other Penal Code offences, a magistrate cannot be investigator, prosecutor and judge. He or she can only refer the matter to the police (or the DPP) for investigation unless the offence is committed in the view of the court. If and when charges are laid, another magistrate should preside, because the complainant cannot also preside over the case. Section 136 is rarely used however.

The most common form of criminal contempt is the common law jurisdiction of scandalising the court. Fiji has a colourful, not always respectable history of prosecutions for scandalising the court. I say, not always respectable, because past cases show us how the contempt powers of a court can sometimes be used to stifle legitimate submissions by counsel, and forthright and critical comments on judicial conduct, by the media.

A classic example was Syed Muktar Shah v. Elizabeth Rice. I must declare at the outset, that this was a case with which I am very familiar. Elizabeth Rice was a Principal Legal Officer at the DPP's Office when I was DPP. She was instructed to prosecute an Attorney-General's Officer for perverting the course of justice. It was alleged that the Attorney-General's Officer, in his personal (not his professional) capacity, had persuaded a rape victim to change her evidence in the case against the accused. The accused was her father, and she was a 15 year old girl.

On the morning of the trial, the case was listed before Dr. Ilangasinghe. Mysteriously, whilst the prosecutor waited for the case to be called in that court, the file was transferred to Mr. Shah. Ms Rice called me for instructions. I told her to ask Mr. Shah, how the case was listed before him when the cause list said otherwise. She followed my instructions. The media was at the back of the courtroom. This was a high-profile case. The Fiji Times reported Ms Rice's request for information about the transfer. Mr. Shah then summoned Ms Rice, the journalist and the Fiji Times for contempt of court. The summons failed to specify the contempt. It was vague and badly worded. The Fiji Times, at the contempt hearing was represented by Mr. Richard Naidu, Ms Rice by (as he was then) Mr. Anthony Gates. I was a sometimes shocked, always apprehensive, and very dismayed observer. The defence was of course firstly that the charge was defective, secondly that there was no contempt in law, and thirdly that the contempt hearing masked a serious problem of forum-shopping in the Suva Magistrates' Court.

Halfway through the hearing, the magistrate approached one of the accused, a journalist and told him to plead guilty in return for a non-custodial sentence and a better job at the Daily Post. The journalist promptly swore to this in an affidavit, which was put before the magistrate. The magistrate denied the contents of the affidavit. The entire proceedings became a farce. It brought the judiciary into disrepute. And in the eyes of the public, confidence in the courts was diminished. The case is a good example of how contempt proceedings, if not launched with wisdom, will not enhance the authority of the courts,

but will instead erode it. The High Court in quashing all convictions on appeal was scathing. It said that contempt did not exist in substance, that the Magistrates' Courts did not have jurisdiction to deal with it anyway and that the entire episode was a blot on judicial independence, honesty and authority. Embarrassing though it is to be reminded of it, the case serves to show us of the limits of the contempt jurisdiction.

And we do need reminding. Just one year later, the Suva Magistrates' Court again in error punished for contempt without jurisdiction. In the case of Ratu Ovini Bokini v. The State the accused was charged with official corruption. At the preliminary inquiry there were heated exchanges between the bench and the prosecutor, and between the prosecutor and defence counsel. At one point, the prosecutor stood to ask if the witness could be excluded while defence counsel made submissions about some aspect of the evidence. The magistrate told the prosecutor to sit down. The prosecutor asked the magistrate if his application could be heard. The magistrate then said infamously:

"Could you please take him downstairs for contempt of court. Take him downstairs for contempt of court for 5 minutes. Let him go and cool downstairs. You go downstairs right now. Take him downstairs. Drag him downstairs."

The High Court and Court of Appeal found that these words and the detention of the prosecutor gave rise to a reasonable apprehension of bias. The Court of Appeal said further:

"..... the summary power of punishing for contempt should be used sparingly and only in serious cases Izuora v. The Queen [1953] AC 329. The usefulness of the power depends on the wisdom and restraint with which it is exercised: to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended Parashuram Detaram Shamdasani v. King Emperor [1945] AC 264, 270."

Contempt proceedings brought in the High Court have experienced greater success. However, even they are rare. The most recent is Mahendra Pal Chaudhary v. Attorney-General of Fiji. The case was brought in the civil jurisdiction of the High Court but was described as a criminal case. The application by the Attorney was made under Order 52 rule 1 of the High Court Rules.

The facts were that Mr. Chaudhary was then leader of the Labour Party. He was alleged to have published a pamphlet saying that since the 1987 coups many judicial officers had become corrupt. Some lawyers had become receiving agents for magistrates and judges, and a number of lawyers arranged to appear before a preferred magistrate or judge. The High Court, on the Attorney's motion, found the pamphlet to be contemptuous because it scandalised the court. Mr. Chaudhary was found guilty and ordered to pay costs of \$500.

On appeal, the Court of Appeal agreed. The judgment is particularly useful in the way contempt jurisdiction should be balanced with the freedom of expression provisions of the Constitution. Although the relevant

provision was then in existence under the 1990 Constitution, a similar provision exists in the 1997 Constitution.

Section 30 of the Constitution provides:

"(1) Every person has the right to freedom of speech and expression, including:

- (a) freedom to seek, receive and impart information and ideas; and
- (b) freedom of the press and other media.

(2) A law may limit, or may authorise the limitation of the right to freedom of expression in the interests of:

- (e) maintaining the authority and independence of the courts ...

but only to the extent that the limitation is reasonable and justifiable in a free and democratic society."

In Chaudhary the Court of Appeal traced the history of contempt by scandalising the court and considered the law on contempt in relation to freedom of expression. Drawing comparisons with the Canadian Charter of Rights and Freedoms and the Ontario Court of Appeal decision in R v. Kopyto, the Fiji Court of Appeal expressed the view that there was no need to prove a "real, substantial and immediate danger to the proper administration of justice" to overcome the freedom of expression hurdle. At pages 8 and 10 of the judgment, the Court of Appeal said of Kopyto:

"With respect, we think that the majority view puts the threshold unduly high. In effect it means that scandalising contempt would be virtually impossible to establish a fact acknowledged by at least one Canadian commentator who said it was reasonable to assume that this form of contempt no longer exists in the light of R v. Kopyto (Martin Media Law in Canada (1997).) There have been no reported cases of scandalising contempt since then."

The Fiji Court of Appeal preferred the test adopted by the New Zealand Court of Appeal in Solicitor General v. Radio Avon Ltd. [1978] 1 NZLR 225. In that case the court said:

"The courts in New Zealand, as in the United Kingdom, completely recognise the importance of freedom of speech in relation to their work provided that criticism is put forward fairly and honestly for a legitimate purpose and not for the purpose of injuring our system of justice."

Further, the defence of truth or fair comment is available on a charge of contempt by scandalising. The alternative was to say that the imputing of improper motives to judges must always be contemptuous, even when such criticism was true. The New Zealand Court of Appeal said:

"If this were the law then nobody could publish a true account of the conduct of a judge if the matter published disclosed that the judge had in fact acted from some improper motive. Nor would it be possible, on the basis of facts truly stated, to make an honest and fair comment suggesting some improper motive, such as partiality or bias,

without running the risk of being held in contempt."

The Radio Avon case was an interesting one, both on the facts and the law. In 1976, a privately owned Christchurch radio station, broadcast a news item saying that a judge of the then Supreme Court was at the centre of "another" closed court controversy, and that he had dismissed a criminal charge in a closed court. In fact the judge had sat in chambers, a matter which was later agreed to be non-controversial. A few months earlier, the judge's son had been convicted of drink drug charges in the magistrates' court in a closed court. There had been allegation of preferential treatment. The radio station after a police investigation, broadcast an apology. Nevertheless, the Solicitor-General moved the Supreme Court for contempt of court. The Supreme Court (per Wild CJ and Casey J) found the radio station and one of its officers, guilty of contempt and fined them both. On appeal, the conviction in respect of the officer was allowed. In the course of argument, it was submitted that the offence of scandalising the court had become obsolete. The Court of Appeal made the following finding about the law of contempt:

1. **The law of contempt exists to protect the administration of justice, not the dignity of the judges.**
2. **Because of the wide powers given to the courts to punish for contempt, these powers should be used only from a sense of duty and in cases where there is a clear case of contempt beyond reasonable doubt.**

3. One class of contempt is an act done to bring a Court or a judge into contempt, or to lower his/her authority. The second class is to do something calculated to interfere with the due process of justice.
4. Fair comment, based on truth, is not contempt.

What types of criticisms of the courts are justified in a free and democratic society? Two Canadian cases summarise the principles clearly. One is Oakes (1986) 26 DLR (4th) 200. The other is R v. Chaulk (1991) 2 CR (4th) 1, 27-28. In Chaulk they were set out as follows:

- "1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.
2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass the proportionality test; that is to say they must:
 - (a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations;
 - (b) impair the right or freedom in question 'as little as possible'; and

(c) be such that their effects on the limitation on rights and freedoms are proportionate to the objective."

This was the test applied in relation to the 1990 Constitution in Chaudhary.

The other type of criminal contempt tends to be acts which pervert the course of justice. Newspapers which publish proceedings in a trial within a trial, accused persons who threaten witnesses, and people who persuade others not to give evidence in accordance with their statements all fall into this category. However, because perverting the course of justice is a statutory offence in Fiji, members of the bench prefer to await the normal course of police investigations and prosecutions. Where swift action is needed to stop a continuing breach, by a newspaper for instance, a judge may prefer to verbally warn the erring newspaper rather than taking the step of instituting contempt proceedings.

Contempt in Civil Proceedings

These are contempt proceedings under Order 52 of the High Court Rules. Because contempt generally is an exceptional step with penal consequences, the law requires that all procedural steps under Order 52 be strictly complied with. As Lord Denning said in McElraith v. Grady [1968] 1 QB 648 at 477:

"No man's liberty is to be taken away unless every requirement of the law has been strictly complied with."

Under Order 52 rule 2(1), application for leave must first be obtained by ex parte motion to a judge in chambers. The motion must be accompanied by a statement including grounds for the application. The statement must set out the particular matter of the contempt, with the order and alleged breach specified. (Harmsworth v. Harmsworth [1987] 3 ALL ER 816 at 819). Further, accompanying the motion and statement must be an affidavit verifying the facts which are relied upon.

Once leave is granted, the court must allow 8 clear days from service of motion to date set for hearing, and the motion must be entered within 14 days thereafter for hearing or leave will lapse (Order 52 r.3(2).)

There must be personal service on the person who is to be committed and the Notice of Motion, Statement, Affidavit and Order granting leave are all to be served on that person. The Court does have powers under Order 52 r. 3(4) to dispense with service if he or she thinks it just to do so. One reason to so dispense might be where the person to be committed is evading service.

If the hearing of the motion is adjourned, there must be personal service of the adjourned hearing date and affidavit of such service must be available for production to court on the adjournment date. Of course, where the defendant was told in court of the new date, no such proof is required (Chiltern District Council v. Keane [1985] 1 WLR 619.)

The contempt hearing itself must be in open court unless they are related to proceedings for wardship, adoption, guardianship, custody, mental disorders, secret processes or interests of national security or the administration of justice.

The order which is alleged to have been disobeyed must be clear and unambiguous. In Prem Chand and Others v. Ram Chandar Fiji Civil App. ABU0021 of 2002S, the Court said:

"But we will not make orders which are too uncertain to be capable of enforcement. Each of the orders obliges the respondent in question to yield possession of the whole 149 acres comprised in the certificate of title. That, of course, is absurd and should be corrected. The form of the orders is a matter for the court. It is not a matter that concerns only the parties. The court will not make orders that ought not to be made. It has to be remembered that the order may have to be enforced by execution and anyone executing a writ of execution must know precisely what it is that he or she is to do. No court officer entrusted with execution of the order sought by the appellants in this case could possibly have any certainty as to what was required."

The order must be indorsed with an appropriate Penal Notice (Order 45 r.6) and the sealed order should be indorsed, with appropriate variations as follows (in matrimonial cases):

"Take notice that if you fail to carry out the acts required of you by the within decree (or order) within the time specified in the decree (or order) for carrying out those acts, further legal proceedings may be

taken against you for the purpose of compelling you to carry out those acts."

In cases against an individual, the order must be indorsed as follows:

"If you neglect to obey the order within the time specified herein, or, if the order is to abstain from doing an act, that if you disobey the order, you are liable to process of execution to compel you to obey it."

In the case of body corporate it should be indorsed as follows (Order 45 r. 6(4)(b)):

"If you the above-named body corporate neglect to obey the order within the time so specified or, if the order is to abstain from doing an act, that if you disobey the order, you are liable to process of execution to compel you to obey it."

At a trial for contempt of court, the onus of proof is on the mover of the motion. The standard of proof is one of proof beyond reasonable doubt and the court must be satisfied that the disobedience was "wilful." In Vijay Kumar v. Shiv Ram and Ainul Nisha Civil Action HBM0026 of 2000S, I said, relying on the House of Lords decision in R v. Sheppard (1981) AC 394 that "wilful" meant "either deliberately doing an act knowing that there is some risk of the consequences, or doing an act not caring about the consequences."

Although the proceedings are civil, criminal rules of evidence are often imported (Barclays de Zoete Wedd Securities Ltd. and Others v. Nadir [1992] TLR 141.) The

grounds for moving for contempt can only be amended with the leave of the court (Order 52 r.5(3), Order 20 r.7).

The possible punishments which can be imposed are a fine, imprisonment or security to be of good behaviour. In **Abbas Ali and Others v. Chaudhary and Others** Civil Action HBC 0061.01L, Gates J considered the conduct of a man who attempted to lodge caveats on certain property which interfered with the day to day operations of the company, which in turn amounted to a contempt of court. The man was 65 years old and had experienced frustration and delay in obtaining repayment of the loan made to the company. He was fined \$1000 in default 30 days imprisonment. He was also ordered to pay \$2000 in costs.

Conclusion

The contempt jurisdiction of the High Court should be exercised sparingly and with wisdom. Where the contempt is in the form of scandalising the court, it is preferable that the judge who is the victim, should not hear the matter. Truth or fair comment is a defence to the charge of contempt and honest and forthright criticism of the court system is not contempt unless it falsely imputes improper motives on a judge's conduct. In civil contempt, the wilful disobedience of a court order must be proven beyond reasonable doubt, and the order itself must have been clearly and concisely worded so the contempt is clear.

This is not always a clear area of the law and much emotion often features in contempt prosecutions. Indeed, in many situations, judges and magistrates would be far

wiser to report a suspected contempt (under section 136 of the Penal Code) to the police, or to request the Attorney General to move the High Court on the matter. In that way, one avoids being victim, prosecutor and judge in the same cause.
