

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A NO.: S-2089/03

**IN THE MATTER OF AN APPLICATION BY ANSARIE
MOHAMMED FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW PURSUANT TO ORDER 53 OF RULES OF THE
SUPREME COURT AND THE JUDICIAL REVIEW ACT 2000**

AND

**IN THE MATTER OF THE DECISIONS AND/OR ACTIONS OF THE
COMMISSIONER OF PRISONS TO PERMIT OR ALLOW THE PRISON
AUTHORITIES TO SHAVE THE APPLICANT'S BEARD WHILST IN
CUSTODY ON OR ABOUT THE 3RD DAY OF SEPTEMBER, 2003 AND ON
OR ABOUT THE 16TH SEPTEMBER, 2003 NOTWITHSTANDING THE
APPLICANT'S PROTEST THAT HIS BEARD OUGHT NOT TO BE
SHAVEN SINCE HIS BEARD FORMED PART OF HIS RELIGIOUS
BELIEF AND PRACTICE**

BETWEEN

ANSARIE MOHAMMED

Applicant

V

THE COMMISSIONER OF PRISONS

Respondent

Before the Honourable Justice P. Moosai

APPEARANCES:

Mr. Sunil Gopaul-Gosine for the Applicant

JUDGMENT

A. The Issue

The issue to be decided in the instant case is whether the Commissioner of Prisons acted outwith the powers conferred upon him by Rule 248 of the Prison Rules in causing

and/or permitting and/or allowing the beard of the Applicant/prisoner, a Muslim, to be cut.

B. Background

This matter came on for trial on Tuesday 4th January, 2005. On that occasion there was no appearance by the Respondent. Despite adjournments from day to day, on Friday 7th January Attorneys for the Solicitor-General, who had sought and were granted leave to appear amicus, were granted leave to withdraw as they had had no written instructions from the Respondent. In the circumstances all that the Court is left with is the Applicant's version of events.

C. The Facts

The Applicant is a Muslim and a devout follower of the religion of Islam. On 2 Sep 2003, the Applicant was sentenced to six (6) weeks simple imprisonment for failing to pay maintenance arrears for his daughter.

On the said 2 Sep 2003 the Applicant was taken to the Photography office at the State Prison, Frederick Street, Port-of-Spain. There Prison Officer Troy Fletcher took the Applicant's photograph. At that time the applicant's beard was approximately one fist length long.

Officer Fletcher then instructed the Applicant to go to the prison barber to get his hair cut and his beard shaven. The Applicant complained that the Prison Authorities had no legal right to shave off his beard because he was a Muslim and his beard formed part of his religious beliefs and practices. Officer Fletcher proceeded to inform the Applicant that he could not do anything about that as he was simply following instructions, in consequence whereof the Applicant presented himself to the barber where his hair was cut and his beard shaven.

On the said 2 Sep 2003, the Applicant reported the incident to the Assistant Superintendent of Prisons, Mr. Murray and the Prison Welfare Officer, Mr. Gomez.

As a result of a request made by the Applicant, on 11 Sep 2003, the Applicant saw the Prison Superintendent, Mr. James. The Applicant reported the shaving incident and further requested that he be allowed to grow his beard during his stay in prison. Mr. James informed the Applicant that he would look into the matter.

On 16 Sep 2003, the hair on the Applicant's face was again shaven. On 11th September 2003, the Applicant appeared before the Allocation Board and complained to Assistant Commissioner of Prisons, Mr. Rojas, about the shaving of his beard and the request that he had made to grow same. Mr. Rojas informed the Applicant that he had not received any correspondence in the matter.

On 1 Oct 2003, the Applicant was released from prison.

D. The Applicant's Contention

The Applicant's assertion is that his beard is important to him in his religious practice and observance. The tradition of the beard can be traced back to the Prophet Mohammed himself. His decision to have the beard permanently was part of a category of religiously motivated acts called "sunnah".

The Applicant therefore seeks a declaration that the decision and/or action of the Commissioner of Prisons to permit or allow the prison authorities to shave the Applicant's beard on 3 Sep 2003 and on 16 Sep 2003, notwithstanding the Applicant's protests, is illegal, procedurally improper and/or unreasonable, ultra vires, null and void. The Applicant also claims damages.

E. The Law

It cannot be disputed that a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication: **Raymond v Honey** [1983] 1 A.C. 1 at 10. So for example under section 13 of the Representation of the People Act, Chapter 2:01, no person is qualified to be or to remain registered as an elector who is under a sentence of death imposed on him by a Court in any part of the Commonwealth or is serving a sentence of imprisonment exceeding 12 months imposed on him by such a Court.

Moreover convicted prisoners do not forfeit all right to the protection of their fundamental human rights and freedoms guaranteed by the Constitution, even though "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights": **Price v Johnston** (1948) 334 US 266, 285.

It should also be noted that in England, where a prisoner complained that by his detention he was subjected to "cruel and unusual punishment" contrary to the Bill of Rights Act, 1688, it was held that where the alleged breach was breach of a fundamental right, relief could be granted by way of judicial review: **R v Secretary of State for the Home Department, ex parte Herbage (No. 2)** (1987) 1 Q.B. 1077. See also **Sumayyah Mohammed v Moraine** (1995) 49 W.I.R. 371.

Against that background I can now examine the Prison Rules. These Rules were made by the Governor and Executive Council under the West Indian Prisons Act, 1838. The Commissioner of Prisons is the person vested with the authority for the custody, care and control of prisoners held at the State prisons of Trinidad and Tobago. Rule 248 of the Prison Rules, Chapter 11 No. 7 provides:

"The hair and beard of a Mohammedan shall not be cut except on the written order of the Medical Officer on account of vermin or dirt or on the grounds of health."

This Rule was no doubt premised on the existence at the material time of the fundamental freedom of the individual to have or to adopt a religious belief of his choice and to the practice of his religious belief. That the fundamental freedom of religious belief and observance was in existence prior to the coming into force of the Constitution is made clear by the provision of section 4 of the Constitution which expressly provides:

"4. It is hereby recognised and declared that in Trinidad and Tobago **there have existed** and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely --

(h) freedom of conscience and religious belief and observance;"
[Emphasis Added.]

On the facts of this case, the power of the Commissioner of Prisons to cut the Applicant's hair and beard was circumscribed by the provisions of Rule 248, requiring the written order of the Medical Officer for the reasons set out therein, namely on account of vermin or dirt or on the grounds of health. No such written order was sought or obtained. The Commissioner of Prisons therefore acted outwith the powers conferred upon him by the Prison Rules. The decision of the Commissioner of Prisons in the circumstances was therefore unlawful.

Having regard to my findings on the ground of illegality, there is no need for me to consider the grounds of irrationality and/or procedural impropriety.

F. DAMAGES

The Applicant has included a claim for damages. In **Josephine Millette v Sherman McNicolls** Civil Appeal No. 155 of 1995, it was held that damages are only recoverable in judicial review proceedings if they would have been recoverable in an

ordinary action brought either by writ or some other form of originating process, for example by constitutional motion.

In the instant case, the decision to shave the Applicant's beard was a violation of the Applicant's constitutional right under section 4 (h), namely his freedom of religious belief and observance, which would have entitled the Applicant to constitutional relief.

The Applicant claims to have suffered distress and inconvenience. Further the Applicant is contending that the shaving of his beard made him feel that he had betrayed his religion and also the mandates of God in carrying out his religious beliefs.

In **Siewchand Ramanoop v AG** Civil Appeal No. 52 of 2001, the learned Chief Justice Sharma CJ opined that a nominal conventional sum could be awarded for breach of a constitutional right. I therefore propose to award the Applicant damages in the sum of \$7,500.00 for breach of his fundamental right. I do not consider this an appropriate case for the award of punitive damages.

G. ORDER

1. There will be a declaration that the decision of the Commissioner of Prisons in permitting or allowing or causing the Applicant's beard to be shaven on 3 Sep 2003 and 16 Sep 2003 is illegal, null and void.

2. Damages in the sum of \$7,500.00 are to be paid by the Respondent to be Applicant.
3. Costs of the Motion are to be paid by the Respondent to the Applicant to be taxed in default of agreement.

DATED this 12th day of January, 2005.

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PRAKASH MOOSAI
JUDGE