IN THE COURT OF APPEAL FIJI ISLANDS
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU0036/2006
(High Court Action No. HAA 2/2004)

BETWEEN:

THE STATE

Appellant

AND:

SAT NARAYAN PAL

Respondent

Coram: Pathik, JA
Mataitoga, JA
Scutt, JA

Hearing: 8 February 2008

Counsel: Ms A. Driu for the State
Mr M. Raza for the Respondent

Date of Judgment: 8 April 2008

JUDGMENT OF THE COURT

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1. **Introduction**

In the penultimate paragraph of the High Court judgment determining this case at the conclusion of the trial within a trial, the presiding judge said:

> ... the court cannot stand by and lend credence to ... unjust maneuvers which undermine the credibility of the judicial system: ***Reg. v. Horseferry Rd Ct; Ex parte Bennett*** [1994] 1 AC 42; ***R. v. Shaheed*** [2002] 2 NZLR 377

2. In accepting this dictum, his Lordship referred to authorities from South Africa, Australia and the United Kingdom dealing with abuse of process, entrapment, and inherent jurisdiction, issues which arose squarely in the present

case where the accused, Mr Narayan Pal, was charged with four counts of official corruption, contrary to section 106(a) of the Penal Code, Cap. 17.

3. The essence of the allegations was that Mr Narayan Pal, a public servant, at the relevant time held the post of Inspector with the Department of Fair Trading. His responsibility was to investigate complaints received by his employer. It was alleged that he had corruptly solicited money for himself, on three occasions from Mr Ajay Punja and on one occasion from Mr Rakesh Chand and Mr Jae Wook Lee. In return for the solicited bribe, it was alleged, Mr Narayan Pal undertook to ensure that Blue Gas, a company managed by Mr Punja and owned by Mr Punja's father (Court Record, p. 77), would not be prosecuted for selling underweight gas.

4. The question before the trial court, and to be determined at the trial within a trial, was whether a video recording of a meeting between Mr Narayan Pal and Mr Punja was admissible as evidence. The recording was objected to on grounds including entrapment. Mr Narayan Pal did not give evidence; nor did he call any witnesses. Five witnesses were called, all by the State. The parties then made submissions. Subsequently, holding that Mr Narayan Pal had not been lured improperly to commit the crimes alleged, the trial judge ruled against there having been entrapment.

5. However, rather than admitting the video evidence or otherwise determining it to be inadmissible and continuing with the trial, His Lordship went on to consider whether what Mr Punja had done which led to the creation of the video was done in good faith. Having found it was not, on that basis he stayed the proceedings permanently. That stay, says the State in this appeal, is tantamount to an acquittal: ***R. v. Jewitt*** [1985] 2 SCR 128 This Court is asked to overturn it.

6. **The Appeal – Procedural Fairness**

The principle ground upon which the appeal is based is that in doing what he did, the trial judge denied procedural fairness to the State. This follows, it is said, upon the basis that His Lordship provided no opportunity for the State to be heard on whether a permanent stay should be granted.

7. The Notice of Appeal sets out the questions of law as follows:

1. The Learned Trial Judge erred in law ordering a stay of the whole proceedings when the impugned evidence that appeared to be the basis of the Stay Order, namely a videotape of the accused allegedly soliciting a bribe, related only to count 4 of the Information preferred against the Respondent.

2. The Learned Trial Judge erred in law when he failed to consider each count separately, allowing the Appellant to proceed on all four counts, or at least the other counts unaffected by the impugned evidence.

3. The Learned Trial Judge erred in law when he did not restrict his ruling to the impugned videotape evidence, which related to count 4 only.

4. The Learned Trial Judge erred in law when he ordered a permanent stay of proceedings when a proper legal basis for the exercise of such discretion did not exist.

5. The Learned Trial Judge erred in law when he refused to allow the Appellant to lead oral evidence in the trial proper, in support of all counts alleged in the Information.

6. The Learned Trial Judge erred in law when he failed to extend to the Appellant a right of procedural fairness and natural justice namely, His Lordship ordered the Stay where:

   (a) the defence had not sought a permanent stay, and
   (b) the State had never been invited to address the Court on this question.

8. On denial of procedural fairness or natural justice, the State says 'it was common knowledge' that Mr Narayan Pal challenged the admissibility of the video evidence solely on the ground of entrapment. Therefore, the State 'quite naturally' responded to that issue alone and to admissibility of the impugned evidence which, it says, related to count 4 only:

> The State was not invited to make submissions on the issue of permanent stay of all the counts and therefore was denied natural justice ...
>
> ... once the learned Judge had heard the evidence and by his own motion decided to consider the issue of permanent stay, he should have reconvened the court and afforded the parties an opportunity to make submissions. Such course would have at least afforded the State an opportunity to persuade the Judge to decide in its favour. The failure was a fundamental error as the State was denied natural justice and procedural fairness. As a result, the learned Judge's order granting permanent stay of the proceedings is a nullity. This ground should be upheld: State's Written Submissions, p. 3

9. For Mr Narayan Pal, in response to the State's contention vis-à-vis natural justice it is said that there were three grounds upon which Counsel for the (then) defendant relied in challenging the recording/video evidence:

(a) That Mr Narayan Pal was induced, coaxed and entrapped;
(b) That those involved in the process acted in bad faith;

(c) That the recording by the person(s) involved breached Mr Narayan Pal's constitutional rights, namely section 37(1), the right of personal privacy, and section 26(1), the right of freedom of unreasonable search.

10. Hence, says Counsel for Mr Narayan Pal, the present appeal is misplaced in its assertion that the trial judge 'in his own motion' made a further inquiry into the conduct of Mr Punja, 'to determine whether it was conducted in good faith' and hence deprived the State of procedural fairness. Procedural fairness was extended to the State because the State had the opportunity to address 'bad faith' and hence abuse of process, upon which the stay was based.

11. **The Appeal – Additional Grounds**

As to the remaining grounds, the State says these 'can be summarized into one issue: whether the learned Judge was correct in granting the permanent stay of proceedings on the ground of abuse of process when he found no entrapment'.

12. Here, the State says that in relying upon the English House of Lords decision in ***R. v. Looseley*** [2002] 1 Cr App R 29 'to justify the granting of permanent stay', His Lordship 'misconstrued the principle in ***Looseley***' for:

> The principle in ***Looseley*** extends protection against the unacceptable and improper conduct of the police in procuring evidence by entrapment. In the present case, the learned Judge found that the alleged crime was not procured by entrapment. The learned Judge then went a step further and imputed the State with improper motives in obtaining the impugned evidence, for conduct of a private person, Mr Punja. Mr Punja was not a State agent when he gathered the impugned evidence. In fact, no State agents played any role in the obtaining of the impugned evidence, as the learned Judge observed that Mr Punja had not reported the matter to the proper authorities namely the police. The police investigation and prosecution were conducted after the impugned evidence was televised on the Fiji Television One. Under these circumstances, the conduct of Mr Punja cannot be attributed to the State to justify granting of a permanent stay of the proceedings: Written Submissions, pp. 5-6

13. As observed by the State in this appeal, and uncontested by Counsel for Mr Narayan Pal, there was no proposition by the defence that the prosecution should be stayed, or stayed permanently, by reason of the matters raised in the trial within a trial. However, Counsel for Mr Narayan Pal says that having considered 'all the evidence of all the witnesses for the Prosecution' and 'made a finding that the video evidence was obtained in bad faith', because that evidence 'was closely linked to all the counts', therefore it was open to the trial court to determine that 'in totality of all the evidence the case amounted to an abuse of process': Respondent's Written Submissions, para **[2.1]**

14. Further:

> ... the [State is] not challenging the Learned Trial Judge's findings of the facts that the evidence obtained was by means of bad faith and thus is an abuse of process of Court. Instead, the primary contention is that the Learned Trial Judge did not allow the [State] to make further submissions on the issue of Stay, which is not the case: Respondent's Written Submissions, para **[2.2]**

15. **High Court Ruling**

The nature of the case, the Ruling and the appeal require that the facts underpinning the prosecution and the High Court's determination that it should be stayed permanently require the facts to be set out in some detail.

16. The High Court Ruling carries the following headnote which supports submissions from Counsel for Mr Narayan as to there being multiple grounds put forward for rendering the videotape evidence inadmissible:

> Admissibility of conversation and of video tape recording; challenge to evidence on grounds of entrapment; first challenge on basis of luring of Accused to commit offence; second, that private persons who were not State authorised investigative agents had acted in bad faith; third, possible commission of offences by instigators; whether breaches of constitutional rights of privacy and freedom from unreasoned searches, tilted balance away from investigators; importance of bona fides of actors; admission by participant actor of default by his company; prosecution of his company likely; conflicts of interest with TV company and coverage of conversation and case against Accused; rival gas supply company; deflection of focus from participant's offending company to Accused; role of courts to prevent abuse of process in board sense and to avoid injustice; remedy not to exclude impugned evidence but to stay proceedings for abuse: Court Record, p. 21

17. The basis upon which the evidence was challenged on the voir dire are set out by His Lordship in the first four paragraphs of the ruling, commencing with the following outline:

> ... From a premises in Cumming Street, Suva a DV camcorder was aimed through a shop window across the road at a small restaurant known as the Curry House. The camcorder recorded pictures of the outside of the restaurant and of passersby. It did not show the three participants seated inside, but recorded the conversation via a wireless transmitter attached to one of the three. The State wishes to adduce evidence of that conversation. It has prepared an acceptable transcript which also includes translation of the parts which were spoken in Hindustani: Court Record, p. 22

18. The three subsequent paragraphs are consistent with the submissions made to this Court by Counsel for Mr Narayan Pal, namely that entrapment was not the only basis upon which the evidence was challenged. Rather, in addition to that bad faith (and hence abuse of process) and Constitutional breaches were a part of the Defence argument.

19. These paragraphs of the Ruling conclude with the proposition put by the Defence on the voir dire, which is acknowledged by both Counsel in this appeal, that the High Court 'should conclude its balancing process by coming down in favour of excluding all evidence of the conversation'.

20. The facts upon which His Lordship's decision was based appear under the heading, 'Was the Accused lured improperly?' They are as follows.

21. Mr Rakesh Chand, who gave evidence on voir dire, was a driver for the company Blue Gas. Blue Gas sells bottled gas to the public and retailers. On 12 November 2002, a weighing of 10 gas cylinders showed some were underweight. Mr Narayan Pal, as Inspector in the Department of Fair Trading, asked Mr Chand to accompany him to the Weights and Measures office. There, Mr Chand found Mr James Lee and Mr Ajai Punja. Mr Lee was Mr Chand's immediate superior and Suva Manager for Blue Gas. Mr Punja was the Managing Director of Blue Gas.

22. Some six days later, on 18 November 2002, Mr Narayan Pal called Mr Chand in for an interview at the conclusion of which he told Mr Chand:

- he (Mr Narayan Pal) had not worked for some six years;
- he was going oversea on 7 December 2002; and
- 'could Rakesh get him something': Court Record, p. 23.

23. Mr Narayan Pal also said that he was obliged to answer to Fiji Gas, the rival company supplying gas to Fiji consumers. Following this interview, Mr Chand told Mr Lee and Mr Punja that Mr Narayan Pal 'wanted something from Blue Gas'.

24. Mr Lee's evidence was that 10 to 12 gas cylinders had been unloaded from the truck and weighed. On 18 November 2002 he went to the Weights and Measures office with Mr Chand to be interviewed. His interview was not recorded as Mr Narayan Pal's computer was said to have 'developed a virus'.

25. Albeit not formally interviewed, Mr Lee was spoken to by Mr Narayan Pal. He was invited into Mr Narayan Pal's office where Mr Narayan Pal told him of being 'pressurized by Fiji Gas' and showed Mr Lee 'the file or complaint, which he said was not to be shown to anyone else'. He told Mr Lee 'it could be a big case if it went to the media' and that he (Mr Narayan Pal) 'was the only one who could help them'. He then said: 'Pay me 6 years of my salary', inviting Mr Lee to return the following day with Mr Punja for his (Mr Punja's) interview. This interview would 'not be saved on the hard drive, only on a floppy and a private copy'.

26. On 19 November Mr Punja attended at Mr Narayan Pal's office. Mr Punja said that the Department of Fair Trading claimed he had under-filled his gas bottles, and that Mr Narayan Pal told him he was 'the only person who could solve Mr Punja's problem'. Rival supplier Fiji Gas had 'complained of Blue Gas selling underweight gas cylinders and of filling up Fiji Gas bottles'.

27. Mr Punja said 'he could feel [Mr Narayan Pal] wanted something', and that Mr Narayan Pal told him:

> ... he had been out of work for 6 years and had lost salary for all of those years, which he wanted to claim. He calculated his loss out aloud as $28,000 per annum for 6 years which equaled $168,000 in all. He wanted that kind of money to close the file: Court Record, p. 27

28. Mr Punja came to no agreement on this, and left. At an evening cocktail party, he told Mr Richard Broadbridge about it (see below).

29. Mr Lee's evidence of the 19 November meeting was that following Mr Punja's interview, Mr Narayan Pal told them 'the walls have ears', pointing to his office partition (indicating his mobile phone). Having then walked outside, they were advised to communicate by mobile phone. Mr Narayan Pal said that Mr Punja should 'have a good meeting with his Directors re the $168,000 for his salary', that is 'the 6 years of salary [he] had lost whilst interdicted'. Mr Punja said he 'needed time to sort it out': Court Record, pp. 24-25

30. On 20 November, Mr Narayan Pal called Blue Gas office. A meeting was arranged to take place at the Curry House in Cumming Street. After concluding the call, Mr Punja attended Fiji TV's premises where he was wired with a transmitter. Mr Lee and Mr Punja then went to the Curry House, from whence the conversation between them and Mr Narayan Pal was transmitted to the camcorder installed in the shop (a jeweller's) in Cumming Street, across from the Curry House: Court Record, p. 25

31. According to Mr Punja:

> During the course of prior telephone calls [Mr Narayan Pal] had told Mr Punja he was a very poor man with no house, no car and no bank account. Mr Punja sensed that [Mr Narayan] was trying to extort money from him. But he made no complaint either to [Mr Narayan's] Departmental superior or to the police: Court Record, p. 27

32. Mr Punja said 'he did not have any evidence before 19th November, no back up as he put it. He believed by taping the conversation at the Curry House he would obtain that evidence': Court Record, p. 27

33. This series of events – the wiring and transmission of conversation – came about in consequence of an evening function, the cocktail party about which evidence was given by Mr Punja and Mr Richard Broadbridge, at that time a journalist with Fiji TV.

34. Mr Broadbridge said he was told by Mr Punja at the evening function of a government official's 'attempting to extort money from him'. As a journalist and with Fiji TV, Mr Broadbridge:

> ... was very interested in capturing this story. Broadbridge wanted to get the next encounter on tape. He said the decision was entirely Ajai Punja's. He had some communication with Lee in the Curry House by mobile phone, but no direct part in how the conversation when with [Mr Narayan Pal]: Court Record, p. 27

35. His Lordship then canvassed what had transpired according to the voir dire evidence, and whether it showed 'these private investigators were simply presenting [Mr Narayan] with an opportunity to develop his corrupt request which they would capture on tape and thus have a record of the actual words expressed as opposed to a less accurate account vaguely recalled orally, or whether it was that they had given encouragement or stimulation to offences which would not otherwise have been committed': Court Record, p. 29, citing ***R. v. Pethic*** [1977] 1 NZLR 448, at 451; ***Amato*** (1982) 140 DLR (3d) 405, per Estey, J. (dissenting)

36. Summing up the evidence 'thus far', His Lordship held:

> ... though there is no evidence of prior inclination to carry out regular corrupt acts, there was evidence fit for the assessors that [Mr Narayan Pal] was angling for a payment in order to drop the prosecution against Blue Gas to avoid publicity, and to close the file. Those ideas came from his side and he was not incited by Punja or Lee. [Mr Narayan Pal] took the initiative: ***R. v. Latif & Shahzad*** [1996] 2 Cr App R 92: Court Record, p. 28

37. Referring to ***Sherman v. United States*** 356 US 369 (1958), His Lordship said there was in the evidence 'no suggestion of [Mr Narayan Pal's] being lured into a situation unwillingly, of a trap being set up for an unwary innocent'. Further, 'suggestions and hints were all instigated and made, from the uncontradicted evidence at this stage', by Mr Narayan: Court Record, p. 27

38. Citing ***R. v. Looseley,*** A-G's Reference (No. 3 of 2000) [2002] 1 Cr App R 29, His Lordship found Mr Narayan was not, therefore, 'lured into a trap' or 'pulled away from a straight path'. Citing ***The Queen v. Veneman and Leigh*** [1970] SASR 506, he further held that neither was it 'a case where the witness "beguiles and seduces an unwilling accused to commit or attempt to commit the crime"': Court Record, p. 31

39. His Lordship then went on to consider whether the 'investigation' undertaken by Mr Punja and his cohort was conducted in good faith. Were 'these private individuals ... acting in the course of a bona fide inquiry': Court Record, p. 31, citing ***Amato*** (1982) 140 CLR (3d) 405. He observed that if the inquiry were 'carried out in good faith for proper purpose, ... courts may overlook the partial involvement of investigators in crime'. Good faith by itself is not sufficient, however 'it is at least an essential when put against the overriding of the liberties of the individuals thereby adversely affected': Court Record, pp. 30-31, citing ***Birtles*** (1969) Cr App R 469, at 472 per Parker LCJ

40. In this regard, Counsel for Mr Narayan submitted that Mr Punja and Mr Lee 'acted out of self-interest and to protect Blue Gas':

> They were not concerned to intercept crime or to bring a criminal to justice. Uppermost in their intentions and actions was the need to stifle any information getting to the public that Blue Gas had been selling gas cylinders which were under-filled. [Mr Narayan] himself had reported to them that their rivals wanted exposure of this conduct and official condemnation of misleading conduct and poor trade practices. Blue Gas had been pretending to sell cheaper gas, which in reality was not true because the bottles were not fully filled. Their rivals were not concerned about the likely prosecution, only the revelation to the public: Court Record, p. 33

41. His Lordship observed that Mr Punja had not told Mr Broadbridge:

- of his having been interviewed under caution as Managing Director and public representative of Blue Gas;
- of his having made 'frank admissions in a caution interview that most of the bottles weighed were found to have significant deficiencies in the quantity of gas filled'; or
- of the statement he had made to [Mr Narayan] as to 'what could he do about it?': Court Record, p. 35

42. There was extensive media coverage of Mr Narayan's Curry House conversation. Mr Broadbridge ran a television story of how the conversation was recorded. Later, television covered Mr Narayan's arrest at his home. There were television follow-ups 'for another 3 days'. Mr Punja was interviewed saying 'he wanted to expose corruption'. No information was provided to viewers 'of the investigation and probable prosecution of Blue Gas ... The underweight problem was brushed aside as being a problem ... now fixed, and anyway the deficiencies in quantity of gas supplied was [said to be] within acceptable limits': Court Record, p. 35

43. Mr Broadbridge's evidence was that he was interested solely 'in obtaining a great story' when he provided his DV camcorder assistance. His Lordship accepted Mr Broadbridge as being 'an innocent party in all this', albeit he 'may have been

naive in accepting at face value everything he was told' by Mr Punja at the cocktail party, and 'more research and more probing' were properly to be required of him: Court Record, pp. 36-37

44. In evidence it transpired that Mr Punja's father, owner of Blue Gas (Court Record, p. 77) had a substantial interest in Fiji TV Limited - some 300,000 shares as well as being on the Board of Directors.

45. His Lordship concluded:

> At the end of the day the tables were indeed turned on [Mr Narayan]. His caution interview of the Managing Director for Blue Gas in which full and clear admissions of the under-filling of the gas cylinders had been made, never resulted in any further action against Blue Gas. There was no prosecution of Blue Gas, nor was a letter of warning issued even. [Mr] Punja was not even sure what happened to the underweight cylinders: Court Record, p. 37

46. It was at this stage that His Lordship concluded that the appropriate remedy was not an order for exclusion of evidence but a permanent stay of proceedings. This was by reference to ***Looseley***, A-G's Reference (No. 3 of 2000)[2000] 1 Cr App R 29; ***Connelly v. Director of Public Prosecutions*** (1964) 48 Cr App R 1983; ***Fu Kuang Hsing*** [1991] 56 A Crim R 88; ***S. v. Ebrahim*** (1991) 2 SA 553; ***Ridgeway*** [1994-95] 184 CLR 19; ***Reg. v. Horseferry Rd Ct; Ex parte Bennett*** [1994] 1 AC 42; and ***R. v. Shaheed*** [2002] 2 NZLR 377.

47. It bears setting out all His Lordship said by reference to these authorities. He commenced with the opening remarks of Lord Nicholls of Birkenhead in ***Looseley***, namely:

> ... every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the State do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state: at [1]: Court Record, p. 37

48. His Lordship then went on to say that courts accept:

> ... that the detection and prosecution of consensual crimes committed in private would be extremely difficult if they were to admit the evidence of passive observers only. Drugs, terrorism, and corruption offences are obvious examples where detection can be extremely difficult. It is the extent of permissible active participation that presents the dilemma.
>
> In spirit of improper motives on the part of the persons gathering evidence here and what might be regarded as a manipulation of the process for their

own ends, a fair trial of the charges against [Mr Narayan Pal] could still take place. However that is not the sole consideration. The courts "cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of the law is not abused": ***Connelly v. Director of Public Prosecutions*** ..., at p. 268. The judiciary should accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law: per Lord Nicholls ***Looseley***, ... para **[13]**

If the decision is to come down on the side of the line to exclude the impugned evidence, the better course is for the matter to be stayed (***Looseley*** paras **[16][17]**). The artificiality of evidentiary exclusion is to be avoided in favour of an order that the proceedings be stayed as an abuse of process: ***Fu Kuang Hsing*** ..., at p. 96.

No two set of facts in cases are the same. But as was noted in the South African Court of Appeal in ***S. v. Ebrahim ...*** :

> ... the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The state was bound by these rules and had to come to court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied.

In ***Ridgeway*** ..., at p. 74 Gaudron, J. said of entrapment and abuse of process:

> The inherent ... powers of superior courts to prevent an abuse of process exist to protect the courts and their proceedings, and to maintain public confidence in the administration of justice... And the maintenance of public confidence in that regard depends on ensuring that judicial proceedings serve the ends of justice, not injustice ...

In considering the overall circumstances in which the conversation was approached and recorded, I find that there has been a lack of bona fides amounting to an abuse of process. Had there been good faith, an absence of conflict of interest, and no manipulation of the process, I might have found otherwise for the fruit of the recording may well have established guilt. But the court cannot stand by and lend credence to such unjust maneuvers which undermine the credibility of the judicial system: ***Reg. v. Horseferry ...***; ***R. v. Shaneed*** ...

As I have already indicated the appropriate remedy is not an order for exclusion of evidence but rather one for permanent stay of proceedings. I so order: Court Record, pp. 37-41

49. **Issues Raised on the Voir Dire**

As noted, the State contends in this appeal that the voir dire concerned only, and was restricted solely, to the question of entrapment. Counsel for Mr Narayan Pal says that is not so, and that the issues in the voir dire were inducement, coaxing and entrapment; acting in bad faith; and breach of rights of personal privacy and freedom of unreasonable search under sections 37(1) and 26(1) of the Constitution.

50. Addressing this aspect of the appeal first, this Court observes that His Lordship's Ruling sets out the bases upon which Counsel for Mr Narayan put forward his submissions on the voir dire. These are stated as being:

- first, that the 'statements made by the Accused were brought about by inducements, coaxing and entrapment': Court Record, p. 7
- secondly, 'it is said that the persons, who were purporting to act to expose corruption, who were not police officers or official investigators, had acted in bad faith': Court Record, p. 8
- lastly, 'it is said the recording amounted to a breach of the Accused's constitutional. rights, of personal privacy [section 37(1)], and the freedom from unreasonable search [section 26(1)]: Court Record, p. 8

51. Further, albeit 'entrapment' is noted most often, all those matters referred to by Counsel for Mr Narayan Pal as having been in issue upon the voir dire are confirmed by the trial judge's notes as having been raised at that time.

52. 'Entrapment' is referred to on a number of occasions in the trial judge's notes of the voir dire. At the commencement of the voir dire, the notes attribute to Mr Raza, Counsel for Mr Narayan Pal, the following:

> Issue is entrapment, not transcript or tampering: Court Record, p. 71

53. The trial judge's notes further indicate that Mr Punja's evidence was that he:

> ... knew there would be a trial within a trial of entrapment. DPP lawyer told me that. I am not sure what entrapment means. I recall saying we recorded the conversation. I understand recording rather than entrapment. It was to expose Sat Pal as a corrupt person: Court Record, p. 81

54. 'Coaxing' is referred to by Counsel for Mr Narayan Pal in cross-examination of Mr Broadbridge:

> Put: You colluded with Ajai Punja to record the conversation, and coaxing James – No. (page 6 Depositions): Court Record, p. 87
>
> ... I did not collude with Ajai Punja: Court Record, p. 87

55. Inducement, coaxing and entrapment, acting in bad faith (including reference to 'self-interest by Mr Punja to have the recording by way of conversation with the Accused'), and constitutional rights per section 26(1), 28(1)(e) and 37(1) are all referred to in submissions made by Counsel at the conclusion of the evidence, and in reply reference is made by Counsel to improper conduct, inducing an innocent person, and 'interest of their own to serve': Court Record, pp. 96-97, 101

56. Further, the trial judge's notes of the State's submissions indicate in our opinion that more than entrapment was submitted and acknowledged by the State as being in issue on the voir dire. Submissions by Counsel for the State recognised that the defence said 'it was to deflect attention away from Blue Gas'; that the 'Right channels not followed'; and replied that 'There was no set up.' Further: 'It was an act of good faith.' 'Accused not entrapped.' 'Not absolute right to privacy when crime involved.' 'Not an absolute right': Court Record, p. 99

57. The trial judge's notes do not show the State as addressing every issue said by Counsel for Mr Narayan Pal to have been raised in the voir dire. This does not in our view lead to the conclusion that those matters were not in fact before the Court. On the contrary, both the Ruling and the notes confirm that they were and, as we have said, we accept this. Nor can the absence in the trial judge's notes of reference to the State's addressing every issue mean the State had no opportunity to address on them. It is apparent that the State had such an opportunity, for the issues were clearly before the Court and at least in relation to some of those issues (beyond entrapment) the State did so. If the State chose not to address on all three issues raised, that was a matter for it at the voir dire and it cannot now be seen to complain. We are not therefore persuaded as to this aspect of the State's appeal.

58. **Entrapment and Abuse of Process**

Fundamental to the State's appeal is the proposition that in granting the permanent stay, His Lordship imputed to the State the bad faith he found on the part of those engaged in the video recording (apart from Mr Broadbridge whom he considered may have been 'naïve' but was not engaged in any 'bad faith' conduct). The State's submission is that the grant of the stay was premised upon the basis that it was the State which effectively engaged in the bad faith conduct; alternatively, that as it was private persons rather than State operatives (police, undercover agents, etc) who engaged in the bad faith conduct, then His Lordship wrongly extended or 'misconstrued' the ***Looseley*** principal that police involvement in entrapment can properly found a stay, where it amounts to abuse of process.

59. As to the first matter, this Court can find nothing in what His Lordship said which gives rise to a proposition that the State was being held responsible for the actions of Mr Punja and his cohort in engaging themselves in the plan to record Mr Narayan Pal and with Mr Broadbridge's help and assistance in fact doing so. Nor does His Lordship impute bad faith to the State or State operatives, or impugn them with, or impute to them 'improper motives in obtaining the impugned evidence'. Rather, His Lordship looks beyond police and the prosecution not only at the

reliance by the State on the evidence but to the role of the courts in their inherent jurisdiction and the responsibility the courts have for ensuring the integrity of the justice process.

60. This is evident in His Lordship's reliance upon the words of Gaudron, J. in ***Ridgeway*** [1994-95] 184 CLR 19, at 74 when she said that the inherent powers of superior courts to prevent an abuse of process 'exist to protect the courts and their proceedings, and to maintain public confidence in the administration of justice': Court Record, p. 76

61. His Lordship made clear that he was looking specifically to the conduct of the principal actors in the 'tape and tell' or 'tape and televise' exercise when he summed up, saying:

> In considering the overall circumstances in which the conversation was approached and recorded, I find that there has been a lack of bona fides amounting to an abuse of process. Had there been good faith, an absence of conflict of interest, and no manipulation of the process, I might have found otherwise for the fruit of the recording may well have established guilt. But the court cannot stand by and lend credence to such unjust maneuvers which undermine the credibility of a judicial system ...: Court Record, p. 77

62. 'The overall circumstances' were the conduct and actions of Mr Punja and his colleagues, in conjunction with Mr Broadbridge (excused from the 'bad faith' finding). The 'lack of bona fides' were, as is clear from this paragraph and the Ruling as a whole, on the part again of Mr Punja and his colleagues. The absence of good faith and the existences of 'conflict of interest' and 'manipulation of the process' again, from this paragraph and the Ruling as a whole are attributed and attributable solely to Mr Punja and his colleagues.

63. As to the second proposition, true it is, Gaudron, J's words were uttered in the context of *entrapment* and abuse of process. However, in our opinion they are not or cannot be limited to instances where State agents – police, undercover personnel, etc – are those who engage in conduct which is such as to bring the justice system into disrepute or destroy public confidence in the courts or judicial process. As was said in ***R. v. Horseferry Road Magistrate's Court; Ex parte Bennett*** [1994] 1 AC 42 by Lord Lowry:

> The first essential is to define abuse of process, which in my opinion must mean abuse of the process of the court which is to try the accused. Archbold, Criminal Pleading Evidence & Practice, 43rd ed. (1993) para. 4-44 calls it 'a misuse or improper manipulation of the process of the court'. In ***Rourke v. The Queen*** (1977) 76 DLR (3d) 193 Laskin [*74] CJC said, at p. 205, 'The court is entitled to protect its process from abuse' and also referred, at p. 207, to 'the danger of generalising the application of the doctrine of abuse of process'. In ***Moevao v. Department of Labour*** [1980] 1 NZLR 464, 476,

> Woodhouse J. spoke approvingly of 'the much wider and more serious abuse of the criminal jurisdiction in general', whereas Richmond P., giving expression to reservations about the view in which he had concurred in ***Reg. v. Hartley*** [1978] 2 NZLR 199, referred, at p. 471, to the need to establish 'that the process of the court is itself being wrongly made use of': at 19, 20

64. Lord Lowry went on to say that he thought the words used by Woodhouse, J. 'involve a danger that the doctrine of abuse of process will be too widely applied'. He preferred the narrower definition adopted by Richmond P. We consider that both definitions apply in the instant case. The abuse of process here was in our view certainly one where the process of the court itself was being wrongly made use of. Albeit those who engaged in the conduct of surreptitiously recording the conversation at the Curry House were not police officers or 'agents of the state', what was thereby done was to be employed in the trial as the foundation of the prosecution case.

65. Looking to ***Looseley***, true it is also that Lord Nicholls of Birkenhead's opening remarks, cited by His Lordship, advert to the situation where 'executive agents of the State' are taken to task in the 'misuse [of] the coercive law enforcement functions of the courts ... thereby oppress[ing] citizens of the state'. However, this statement follows from the fundamental proposition, again cited by His Lordship, that every court 'has an inherent power and duty to prevent abuse of its process' as 'a fundamental principle of the rule of law'.

66. Again in ***Ex parte Bennett***, against the strong and some would say compelling dissent of Lord Oliver of Aylmerton, the majority held that the proceedings in question should be stayed on the ground of abuse of process. Having adverted to conflicting authority in the United States, Lord Lowry went on to consider the 'philosophy which inspires the proposition that a court may stay proceedings' in the case of a person unlawfully abducted in a foreign country by State authorities or agents of the state and brought to trial. Albeit revolving around that question – unlawful abduction – his words are nonetheless salient here:

> ... the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation of the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused. Therefore, although the power of the court is rightly confined to its inherent power to protect itself against the abuse of its own process, I respectfully cannot agree that the facts relied on in cases such as the present case (as alleged) 'have nothing to do with that process' just because they are not part of the process. They are the indispensable foundation for the holding of the trial: at 21

67. We accept that ***Ex parte Bennett*** was, as observed, a matter of abduction in the absence of taking extradition proceedings. We accept that it involved the executive arm of the state in the abduction, or agents of the executive arm. Yet the principle holds for the circumstances arising in the present case, in accordance with the inherent jurisdiction of this Court, and the responsibility the Court has to guard against abuse of process.

68. Judge of the Supreme Court of Fiji, Mason, J. has pointed out in 'The Inherent Jurisdiction of the Court' (1983) 57 ***Queensland Law Journal*** 449, inherent jurisdiction exists in superior courts:

- to ensure convenience and fairness in legal proceedings;
- to prevent steps being taken that would render judicial proceedings inefficacious;
- to prevent abuses of process; and
- to act in aid of superior courts and in aid or control of inferior courts and tribunals.

69. ***Halsbury's Laws of England*** says:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them: ***Halsbury's Laws of England***, 4th edn, Butterworths, London, England; also Isaac H. Jacob, 'The Inherent Jurisdiction of the Court' (1070) 23 ***Current Legal Problems*** 23, 51

70. It is our view that what occurred here – as appears from the facts as set out in His Lordship's Ruling – was so lamentable as to raise the highest level of concern about reliance upon such conduct as a proper foundation for the administration of justice. Indeed, we agree that it was so lamentable as to bring the conduct well within the inherent jurisdiction of the Court. It was a clear abuse of process.

71. His Lordship's Ruling is, in our opinion, properly founded in the authorities he cites. The ways in which the administration of justice can be abused are not limited to rogue conduct of state officials, be they police officers, undercover agents or others.

72. The state ought not to take advantage or be seen to take advantage of rogue conduct, nor should the courts be a party to it.

73. **Four Counts and the Impugned Evidence**

The first three grounds of appeal relate to the fact that there were four counts in the (amended) Information, and the proposition that the impugned evidence 'related only to count 4 of the Information preferred against the Respondent': Ground 1 Hence, the State's proposition on appeal that His Lordship erred in failing to 'consider each count separately, allowing the Appellant to proceed on all four counts, or at least the other counts unaffected by the impugned evidence': Ground 2 Further, the State's proposition that His Lordship erred in 'not restrict[ing] his ruling to the impugned videotape evidence, which related to count 4 only': Ground 3

74. The voir dire ran for three (3) days. A perusal of the trial judge's notes and the Ruling in our view indicates that the impugned evidence – the videotape – was considered by His Lordship in conjunction with all four counts and we are unable to say that His Lordship was wrong in his determination that the stay should apply to all four counts. His Lordship canvasses evidence relating to the events which are put forward as the foundation for the first three counts as well as the fourth, and in our opinion the four counts effectively 'hang together'. That is, without the videotape evidence which specifically relates to count 4, but which effectively relates back to counts 1, 2 and 3, it is difficult to see that counts 1, 2 and 3 could stand alone or independently. They are dependent upon evidence which in the absence of the video is unsatisfactory.

75. Because it is the basis of three of the appeal grounds that they could (and should) stand independently of the fourth count and the video, and each is capable of standing alone (and should have been allowed to do so), it bears setting the four counts in the (amended) Information:

FIRST COUNT

Statement of Offence (a)

OFFICIAL CORRUPTON: Contrary to section 106(a) of the Penal Code, Cap. 17.

Particulars of Offence (b)

SAT NARAYAN PAL s/o Kuar Pal, on a date between the 12th day of November, 2002 and the 19th day of November, 2002 at Suva in the Central Division, being employed in the Public Service as an Inspector with the Department of Fair Trading, being charged with the performance of a duty of investigating for the purposes of complaints received by the Department of Fair Trading, corruptly solicited for property namely money from Ajai Punja for himself on account of acts to be omitted to be done afterwards by him namely forbearing to prosecute Blue Gas for selling underweight gas in the discharge of the duties of his office.

SECOND COUNT

Statement of Offence (a)

OFFICIAL CORRUPTON: Contrary to section 106(a) of the Penal Code, Cap. 17.

Particulars of Offence (b)

SAT NARAYAN PAL s/o Kuar Pal, on the 18th day of November, 2002 at Suva in the Central Division, being employed in the Public Service as an Inspector with the Department of Fair Trading, being charged with the performance of a duty of investigating for the purposes of complaints received by the Department of Fair Trading, corruptly solicited for property namely money from Rakesh Chand and Jae Wook Lee aka James Lee for himself on account of acts to be omitted to be done afterwards by him namely forbearing to prosecute Blue Gas for selling underweight gas in the discharge of the duties of his office.

THIRD COUNT

Statement of Offence (a)

OFFICIAL CORRUPTON: Contrary to section 106(a) of the Penal Code, Cap. 17.

Particulars of Offence (b)

SAT NARAYAN PAL s/o Kuar Pal, on the 19th day of November, 2002 at Suva in the Central Division, being employed in the Public Service as an Inspector with the Department of Fair Trading, being charged with the performance of a duty of investigating for the purposes of complaints received by the Department of Fair Trading, corruptly solicited for property namely money from Ajai Punja and Jae Wook Lee aka James Lee for himself on account of acts to be omitted to be done afterwards by him namely forbearing to prosecute Blue Gas for selling underweight gas in the discharge of the duties of his office.

FOURTH COUNT

Statement of Offence (a)

OFFICIAL CORRUPTON: Contrary to section 106(a) of the Penal Code, Cap. 17.

Particulars of Offence (b)

SAT NARAYAN PAL s/o Kuar Pal, on the 20th day of November, 2002 at Suva in the Central Division, being employed in the Public Service as an Inspector with the Department of Fair Trading, being charged with the performance of a duty of investigating for the purposes of complaints

received by the Department of Fair Trading, corruptly asked for property namely $80,000 from Ajai Punja for himself on account of acts to be omitted to be done afterwards by him namely forbearing to prosecute Blue Gas for selling underweight gas in the discharge of the duties of his office.

76. Thus, the fourth count alone covers the 20 November 2002 and the $80,000 proposition. The first count covers the period 12-19 November 2002 as to 'corruptly soliciting for money' from Mr Punja. The second and third counts relate, respectively, to 'corruptly soliciting for money' from Mr Chand and Mr Lee, and 'corruptly soliciting for money' from Mr Punja and Mr Lee.

77. As to matters prior to 20 November 2002 and the taping, prime witness Mr Punja himself stated in his evidence that he was uncertain as to Mr Narayan Pal's position or proposition, that he 'had a feeling' he was being asked for something, that he 'felt' he was being asked for something (prior to 20 November 2002). The strongest evidence he gives of any purportedly 'firm' proposition by Mr Narayan Pal is that at the cocktail event on the evening prior to 20 November 2002 he told Mr Broadbridge that he was 'being blackmailed' by a government official. It is not insignificant that Mr Broadbridge was a television journalist whose assistance Mr Punja acknowledged he was courting to 'expose' Mr Narayan Pal. Mr Broadbridge's evidence was to the effect that he 'wanted a story'.

78. It is apparent from the evidence of Mr Punja, Mr Lee and Mr Chand (running over three days of the voir dire), and indeed from all the facts and most particularly the matters going to whether or not the taping evidence should be excluded, that the very 'broadbrush' painted by Mr Narayan Pal, or even an 'ambit claim' (putting it in the strongest terms) engendered uncertainty as to the discussions and 'propositions' prior to 20 November 2002 and the Curry House episode. This was why (or at least in part why) Mr Punja engaged in the 'tape and tell' or 'tape and televise' exercise. Others named in the counts state uncertainty. Mr Lee says he thought it was 'a joke' having earlier said he realized 'it was not a joke'. Another (Mr Chand) says he was 'a small fish' and has little to say, except that he told Mr Lee and Mr Punja that Mr Narayan Pal 'wanted something'.

79. Insofar as counts 1 and 3 are in issue (reliant principally upon Mr Punja's evidence) Mr Punja's evidence appears in the trial judge's notes at Court Record, pp. 73-83. Amongst other matters, in evidence in chief he stated:

> ... I recall 20th November 2002. I recall 19th November 2002. In the morning I got a call from Mr Sat Pal to meet him in his office with Mr James Lee. I met him. Had some discussions, then left. I met Richard Broadbridge in a cocktail.
>
> The discussions with Mr Sat Pal were *basically about my gas cylinders*. They were claiming I had under-filled. Mr Sat Pal showed me the legislation how much I could be fined. *He was the only person who could solve my problem*

he said. We left then. The alleged problem was that he had received complaints. He said we were filling up Fiji Gas cylinders. We did not come to any agreement.

I could feel Mr Sat Pal wanted something. He mentioned he was once out of work for 6 years. 6 Years salary lost he wanted to claim. Words to that effect. He was out of work, salary 28,000; 168,000 in all. He wanted me to give him that kind of money to close the file. There was no agreement. I did not do anything. I did not discuss apart from the cocktail in the evening.

I told Richard Broadbridge that *this chap is trying to blackmail me. I was lost. I would like to expose this I said ...*

On 20th November 2002 I went to work ... Mr Sat Pal gave a call. He asked to meet at the curry House Restaurant for 10 am. I called up and said 10.30-11am I would be there. I called Richard Broadbridge ...

80. In cross-examination, Mr Punja said:

... Before 19th November Sat Pal met up with my branch manager. I had a few conversations with Sat Pal over the phone. I did not meet up with him. I recall the conversation. Mr Sat Pal was accusing my company of doing unlawful things, selling gas in opposition bottles and under-filled cylinders. He said he is very poor man, no house, no car, no bank account. *I felt he was trying to extract money from me. I thought he was wrong. I did not complain to the police. Nor to Sat Pal's boss. I have no reason.*

I knew that demanding money is unlawful. I did not complain to anyone. I have done a Diploma in Business Administration. On 19th November 2002 I went to his office to meet him. By Sat Pal. Not for a caution interview. Maybe he did. May be it was recorded on his computer.

It could be I signed it and James Lee signed too ...

Qu and Answers put:

I recall the nature of the interview now. I did not recall the answers I gave. I accept the amounts I gave ... I agreed most of the bottles were underweight. I was concerned about my company when I was interviewed.

On 12th November 2002 the underweight carriage of gas did not come into the press. My boys fill up with gas. I never received a formal complaint. We were within the legal requirements On 12th November 2002 I was aware of underweight bottles ...

19th November 2002: I was concerned about the complaint. Household name Punja in Fiji. Blue Gas is my father's company. I was not concerned that I would be charged and prosecuted.

I was told that the fines on Fair Trading could go up to 300,000 per count. I was concerned. No scheme was devised.

I did not make any reference in my statement to meeting Broadbridge on 19.11.02. The police did not ask me about that. I did not mention anything about the 'entrapment'. I met Broadbridge at a cocktail at my Dad's house, Kavika Place. There was no plan. I asked for the conversation to be recorded. Broadbridge is not a law enforcement officer. *Sat Pal had threatened me. I did not go to the police. I felt Sat Pal was trying to blackmail me. It could be right or wrong.* I spoke to Broadbridge for about 10 minutes.

I was not really angry with Mr Pal. I did not know about recording. But Broadbridge could find out about it he said. Sat Pal was pressurizing me, and on 19th November as well. I decided to expose the Government official. *A few of the things Sat Pal said I could see where he was leading to.* Our whole conversation was recorded. On 19th November night, I did not know I would meet him the next morning. I wanted to get the conversation recorded ...

I did not have any evidence before 19th November. No back up. I though the recording would become evidence.

... [The next part relates to 20 November 2002]

Mr Sat Pal was asking for money. I said I cannot give money. It could be an offer. Yes, I was offering him that.

I do not know if it was a bribe.

I do not think I was offering this amount. I was not inducing him 50 or something was not an offer. *I did not know what he wanted. I did not offer him anything ...*

The editing was done in our boardroom. What we discussed on 19th we succeeded in doing on 20th. I had no other interest with Sat Pal. I went to the Curry House wired up and *had no idea what Sat Pal was going to ask me. I did not know what Sat Pal would be asking about the money. Then he was asking about the money. I had no idea what he wanted.* (Emphasis added)

81. As to counts 1 and 2 and 3, Mr Lee's evidence appears in the trial judge's notes at pp. 87-99 of the Court Record. Amongst other matters he said:

I am the Suva Manager and a concerned party. On 19th November, when I asked how can we solve this problem, *I was told pay me 6 years salary. I thought he was joking. 18th November I thought he was joking, it appeared so to my knowledge* ... (Emphasis added)

82. Earlier, Mr Lee referred to Mr Narayan Pal's making a comment as to 'the walls having ears' and 'pointing to his mobile'. He then says at the stage of going outside the office he 'knew he [Mr Narayan Pal] was not joking'.

83. Mr Chand's evidence appears at pages 99-93 (sic) of the Court Record and is relevant to counts 1 and 2. His evidence is extremely sketchy. He says that he was called for an interview by Mr Narayan Pal on 19 November, going with Mr Lee. After he was asked his name, address, employment and what he did (for his employment) Mr Narayan Pal 'told me he has not worked for 6 years and he is going overseas on 7th December 2002 and *if I can get him something*. He told me he has to answer to Fiji Gas. He has to answer to Fiji Gas. I am just a small fish'. Then: 'He said computer has virus. I went out. James [Lee] was inside. We returned together.' In cross-examination Mr Chand said he was 'just a driver in November 2002. *I told my boss, James and Jai for him to get something from Blue Gas'.* (Emphasis added)

84. His Lordship canvassed the above evidence, observing amongst other matters that there were comments alleged to have been made by Mr Narayan Pal as to his being out of work for 6 years and hence being 'out of pocket' in the amount of salary over that period; that he 'wanted that kind of money to close the file' but there was no agreement on this (in the conversation with Mr Punja) and Mr Punja left, telling Mr Broadbridge about it at the evening cocktails. His Lordship notes that Mr Punja '*sensed* that the Accused was trying to extort money from him' (emphasis added) however made 'no complaint' either to Mr Narayan Pal's departmental superior or the police. Further that Mr Punja 'said he did not have any evidence before 19th November, no back up as he put it. He believed by taping the conversation at the Curry House he would obtain that evidence'.

85. His Lordship recites this in looking at whether Mr Narayan Pal was enticed, coaxed or entrapped, noting that 'the suggestions and hints were all instigated and made from the uncontradicted evidence at this stage', by Mr Narayan Pal. At the same time, this Court accepts that in so doing, His Lordship properly saw the four counts as hanging together, and the first three as effectively reliant upon the fourth. Further, it was not a case of the witnesses' evidence being truncated or directed to the fourth count alone. It extended over some three days of voir dire, that being devoted principally to the evidence of Mr Punja (which extended from 22 May 2002 and well into 23 May 2002) with evidence in chief, cross-examination and re-examination covering the entirety of the period relevant to the whole four counts. Mr Lee's evidence included counts 1, 2, 3 and 4 (he was named in counts 2 and 3, and the matters prosecuted in counts 2 and 3 were relevant to count 1). Mr Chand's

evidence includes counts 1 and 2. We do not accept the first three grounds of the appeal as warranting a quashing of His Lordship's ruling.

86. As to the fourth ground of appeal, namely that His Lordship 'erred in law when he ordered a permanent stay of proceedings when a proper legal basis for the exercise of such discretion did not exist', as we have said, such a proper basis did and does exist and His Lordship's discretion was, in that regard, properly exercised.

87. Insofar as the fifth ground of appeal is in issue, we have dealt with this in the context of grounds one to four.

88. **Ground Six – Natural Justice/Procedural Fairness**

The right of natural justice or procedural fairness is not dependent upon the personality of the litigant but upon the nature of the body making the decision or the context in which the decision was made and its nature.

89. As Lord Bridge said in ***Lloyd v. McMahon*** (1987) AC 625:

> The so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates; at 702

90. Similarly in ***R. v. Commission of Racial Equality; Ex parte Cottrell and Rothon*** (1980) 3 AER 265, Lord Lane said:

> Indeed, all that the rules of natural justice mean is that the applicant should be treated fairly. Accordingly, before assessing the fairness of the manner in which the decision complained of was taken ..., it is necessary to analyze the context in which it was made and the nature of the decision: at 271

91. Just as individuals have a right to natural justice or procedural fairness, so too the State. This was acknowledged by Shameem J. in ***State v. Tanidrala & Ors*** Criminal Misc. Case No. HAM 042 of 2005S/Crim App No. HAA 096 of 2005. There, Her Honour quashed a Magistrates' Court decision granting bail without extending the State the right to be heard, referring to ***Michael Anthony Lewis*** (1988) 34 A Crim R 212. There, the Australian High Court said

> Once it be conceded, as in our view it must be, that the Crown counsel was denied an opportunity to make a general summation of the evidence with a view to demonstrating that notwithstanding the submissions advanced for the respondent the verdict was neither safe nor satisfactory, then it must follow that the proceedings were marked by a serious irregularity in procedure

whereby the Crown was denied natural justice. The Crown is as much entitled to natural justice as any other litigant: at 216

92. Counsel for Mr Narayan Pal says that because abuse of process was squarely before the High Court, most particularly (as we understand it) because the matter of bona fides had been raised and submissions made on it (whether the State took the opportunity to do so or not – and it is apparent to us from the trial judge's notes that it did), then ground six of the State's appeal has no substance.

93. Because the matter is of such importance, we restate the ground here:

> 6. The Learned Trial Judge erred in law when he failed to extend to the Appellant a right of procedural fairness and natural justice namely, His Lordship ordered the Stay where:
>
> (c) the defence had not sought a permanent stay, and
> (d) the State had never been invited to address the Court on this question.

94. As far as the record indicates, the Defence did not seek a permanent stay: the position of the Defence as it appears from the material in the Court Record was that the video recording should be wholly excluded from the trial, and not more. As noted, there certainly was an opportunity for the parties to address the Court on abuse of process, the foundation for the grant of the permanent stay, however, the record further indicates that there was no invitation to the State or indeed to the Defence to address the Court on the question of a permanent stay.

95. We consider that this was an error of law.

96. At the same time, we consider that this is a matter where, taking all the foregoing into consideration, and in particular the submissions made by the parties in the appeal and the authorities cited, and all the circumstances of the case, this Court should apply the proviso in section 23(1) of the ***Court of Appeal Act*** namely that no substantial miscarriage of justice has occurred, and hence the decision should not be quashed. Taking all matters into account, we do not believe that the outcome would be any different were the State given the opportunity to make submissions on the permanent stay question. We do not believe that the outcome should be any different.

97. In this regard, the Court refers particularly to ***Reg. v. Horseferry Rd Ct; Ex parte Bennett*** [1994] 1 AC 42, which was referred to by His Lordship. There, Mr Bennett was transported from South Africa to the United Kingdom without the benefit of extradition proceedings, which in the ordinary course should have been undertaken. In this he was deprived of access to extradition proceedings and the opportunity to make submissions as to whether or not he should be extradited. His

transportation from South Africa to the United Kingdom was, in fact, effected specifically to avoid extradition proceedings.

98. The charges against Mr Bennett were serious. The evidence of which a trial court could avail itself was strong. Nevertheless, the English House of Lords held that the proceedings against him should be permanently stayed in consequence of the abuse of process that had occurred in the evasion of extradition proceedings. The English House of Lords held that it was unconscionable for the courts to allow a prosecution, however well substantiated, to go ahead in circumstances where gross breaches or a gross breach of fundamental rights and the system of justice had occurred. The English House of Lords held that this would be to give imprimatur to abuse of process and should not be countenanced. To do otherwise would be to bring the justice system into disrepute and to allow the justice system to be used to subvert the rights of an accused person. This subversion was so gross as to warrant the permanent stay.

99. We consider that what occurred in this case was unconscionable and a gross abuse of process. The State should not be a party to such an abuse, and nor should the courts allow such conduct to found a prosecution or be a part of the criminal justice system.

100. The appeal is dismissed.

FIJI COURT OF APPEAL

Hon. Justice D. Pathik
Judge of Appeal

Hon. Justice I. Mataitoga
Judge of Appeal

Hon. Justice J. A. Scutt
Judge of Appeal

Solicitors
Director of Public Prosecutions Office for the Appellant
Mr M. Raza for the Respondent