IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

MISCELLANEOUS CASE NO. HAM 136 OF 2014S

BETWEEN MANOJ KHERA a.k.a MANOJ KUMAR

APPLICANT

AND THE STATE

RESPONDENT

Counsels : Mr. A. Naco for Applicant

Mr. M. Delaney and Mr. A. Paka for Respondent

Hearing : 18 July, 2014

Ruling : 18 July, 2014

Written Reason: 30 December, 2015

WRITTEN REASONS FOR DENYING ACCUSED'S APPLICATION FOR STAY OF PROCEEDING

---

1. In Suva High Court Criminal Case No. HAC 195 of 2012S, the applicant faced four counts of "false pretences", contrary to section 309 of the Penal Code, Chapter 17 (counts no. 1, 2, 3 and 4) and one count of "money laundering", contrary to section 69(2) and (3) of the Proceeds of Crimes Act 27 of 1997 (count no. 5). Previously, the applicant had pleaded not guilty to all the charges.

2. Seven days before the trial proper on 22 July 2014, the applicant filed a notice of motion and an affidavit in support, asking that the trial be permanently stayed. The application was dated 15 July 2014. On 17 July 2014, the State replied with an affidavit in reply. I heard the parties on 18 July 2014. After hearing the parties, I dismissed the stay application, and said I would give my reasons later.

3. These are my reasons. I agree with Her Ladyship Madam Justice Shameem when she said the following in **Dhansukh Bhika and Others v The State**, Criminal Miscellaneous Case No. HAM 085 of 2008S:

> "...The common law power to stay criminal proceedings for abuse of the process (other than for unreasonable delay), is an injerent power, exercised to protect the administration of justice from manipulation and abuse by the law enforcement authorities. In State v. Waisale Rokotuiwai HAC 0009 of 1995, Pain J summarized the principles thus:
>
> > "I accept that this Court has inherent jurisdiction to prevent abuse of its process in criminal proceedings. Concurrent with that is a duty (confirmed in the Constitution) to ensure that an accused receives a fair trial. This is made abundantly clear in the cases cited by counsel. The ultimate sanction is the discretion invested in the court to grant a permanent stay. However, such a stay "should only be employed in exceptional circumstances". Attorney General's References (No. 1 of 1990) [1992] QB 630 endorsed by the Privy Council in George Tan Soon Gin v. Judge Cameron & Anor. [1992] 2 AC 205"
>
> In R v. Looseley; A-G's Reference (No. 3 of 2000) [2002] Cr. App. R. 29, a case of alleged abuse of the process in a case of entrapment, Lord Nicholls of Birkenhead said this of the jurisdiction:
>
> > "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".
>
> And in S v. Ebrahim (1991) (2) S.A. 553, the South African Court of Appeal said that;
>
> > "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 with clean hands, as it were when it was itself a party to the proceedings and this requirement was clearly satisfied."

The principle is intended to "protect the courts and their proceedings, and to maintain public confidence in the administration of justice (per Gaudron J in Ridgeway [1994-95] 184 CLR).

The remedy was held in Sat Narayan Pal HAC 002.04 (per Gates J). Sat Narayan Pal AAU0036/2006 (in the Court of Appeal) to be one of permanent stay of proceedings. In that case Gates J found that the instigator of the video recording of a conversation between the accused and the instigator's son, had acted in bad faith. Proceedings were permanently stayed. On appeal by the Director of Public Prosecutions who submitted that the remedy should instead have been the exclusion of the recording, the Court of Appeal held that the trial judge did not err and 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 part of the criminal justice system."

In Reg v. Horseferry Road Ct; Ex parte Bennet [1994] 1 AC 42, the House of Lords considered an abuse of the process in a case where a man charged with serious offences was transported from South Africa to the United Kingdom without following extradition procedures and with an intention to avoid such proceedings. The House of Lords permanently stayed the prosecution, holding that it was unconscionable for the courts to countenance a prosecution where there had been gross breaches of fundamental rights.

The jurisdiction is however fraught with danger. The decision to prosecute is an executive one, made by the independent office of the DPP. The DPP is not just independent of the other executive institutions of government but also independent of the courts. The DPP's decisions are only reviewable by the courts where he or she acts in bad faith or for an improper motive. Generally, the courts do not trespass into the territory of the prosecutorial discretion. To do so would undermine the court's own impartiality and independence in that it would force the

judiciary into the partisan arena of deciding who should or should not be prosecuted.

For this reason alone, the stay jurisdiction for abuse of the process, must be exercised with care, bearing in mind that the rights of the accused can usually be effectively protected by decisions to exclude unlawfully obtained evidence, decisions to order further disclosure, or decisions to adjourn to ensure legal representation.

Where however the law enforcement agencies, or any party whose conduct led to the prosecution, have conducted themselves in a way which has abused the processes of the court, and where the court finds that to allow the prosecution to continue would be to undermine the credibility of the administration of justice, then an order for permanent stay must be the only remedy. The exercise of the discretion requires a two-step process..."

4. I have carefully read paragraphs 1 to 26 of the applicant's affidavit, dated 15 July 2014. I have read Detective Inspector Aiyaz Ali's affidavit in reply, dated 17 July 2014. Most, if not, all the matters raised by the applicant and Detective Inspector Ali are trial matters, which could easily be resolved by the trial process. A stay of proceeding is an exceptional remedy, which ought to be used only, if a fair trial was not possible. In my view, the trial process had not been exhausted, and in accordance with the law, a fair trial will be given to the applicant when the trial proper starts on 22 July 2014.

5. For the above reasons, I dismissed the stay application on 18 July 2014.

HIGH COURT OF FIJI
SUVA

Salesi Temo

JUDGE

Solicitor for Applicant : **Naco Chambers, Barrister and Solicitors, Suva.**
Solicitor for Respondent : **Office of the Director of Public Prosecution, Suva.**