IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO.: HAM 200 OF 2015

BETWEEN: **MICHAEL LESLIE CASS**

APPLICANT

AND: **STATE**

RESPONDENT

Counsel : **Mr S. Koya for the Appellant**

Mr J. Niudamu for the Respondent

Date of Hearing : **03rd February, 2016**

Date of Ruling : **04th March, 2016**

RULING ON STAY APPLICATION

1. The Applicant files this Notice of Motion, supported by an affidavit, seeking permanent stay of proceedings of Criminal Case No. CF 863 of 2014 in which the Applicant has been charged with one count of Indecent Assault in the Magistrate's Court at Nadi.

BACKGROUND

2. The Applicant, on the 29th of September, 2014 was initially charged in the Magistrates Court at Nadi with four counts of Indecent Assault and one count of Indecently Annoying Any Person. On the 9th May 2015, the State filed a *Nolle Prosequi* for three Indecent Assault chargers and for one count of Indecently Annoying Any Person. At the same

time, the State filed an amended charge in which the Applicant was charged with one count of Indecent Assault. The particulars of the amended charge are as follows:

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) and (2) of the Crimes Decree, 2009.

Particulars of Offence

MICHAEL LESLIE CASS, between the 15th to 16th September 2014, at Nadi in the Western Division, unlawfully and indecently assaulted **JOSEVA CAQUSAU.**

3. Currently, the matter is at the pre-trial stage in the Magistrates Court at Nadi and a trial date is yet to be fixed.

4. The permanent stay application is based on three grounds:

   a. Prosecutorial misconduct at the investigation stage

   b. Procedural impropriety of police investigators,

   c. Non availability (Non-disclosure) of evidence.

THE LAW ON STAY

5. At common law, the High Court has a general and inherent power to protect its processes from abuse. This power includes a power to stay a case on the ground of unreasonable delay.

6. In the case of ***Takiveikata v State*** *[2008] FJHC 315; HAM 039.2008 (12 November 2008)*, in paragraph 19, it was stated:

   "It is common ground that the High Court of Fiji, being a superior Court of record, has an inherent jurisdiction to stay proceedings which are determined by the Court to be an abuse of the process of the Court. Generally speaking, the circumstances in which this Court might consider the imposition of a stay of proceedings are:

(1) circumstances are such that a fair trial of the proceedings cannot be had; or

(2) there has been conduct established on the part of the executive which is so wrong that it would be an affront to the conscience of the Court to allow proceedings brought against that background to proceed.

The authorities demonstrate that the categories of conduct or set of circumstances (or both) which might justify the imposition of a stay of proceedings are never closed"

7. In the case of ***Tabaloa v State [2010]*** *FJHC 433; HAM 052.2010 (9 September 2010)* Justice Madigan, where the 1st of 2 applicants made an application on the grounds of undue delay and insufficiency of evidence states:

> *In the case of the first applicant, he submits and the State concedes that the case against him is very weak and unsubstantiated however it is not for this Court to determine that and find the application merit worthy on that basis. There is nothing on the record which even suggests, let alone passes the test of balance of probabilities, that he has been prejudiced by the delays. It will be after due process in the Court below which will determine if the case against him is sufficiently weak to warrant acquittal of the charges.*

8. Justice Madigan in the recent decision of ***Karunaratne v State [2015] FJHC 849; HAM 150.2015*** (4 November 2015) stated:

> *"Stay of Proceedings in criminal matters is granted in the rarest of circumstances where there has been undue delay in bringing proceedings against a party, or alternatively where there is undue delay in the conduct of proceedings already brought. Additionally and more importantly it is an inherent power of the High Court in cases of clear and obvious miscarriages of justice and/or abuse of process cases.*

To bring such an application before this Court is in itself an abuse of process. While this Court does have supervisory powers over proceedings in a lower Court, it will not intervene in proceedings already in train below, merely on the submission that the charge cannot be made out. The accused (the applicant herein) has the right to challenge the charge in a submission of no case at the end of the prosecution case and should he not succeed in such an application then he has the right to appeal in accordance with our appellate rules and legislation.

It would be wrong for this Court to stay proceedings in the absence of delay and abuse of process, given that the accused/applicant has perfectly legitimate avenues of redress and this court refuses to do so.

The application for stay on the grounds of abuse of charge is dismissed."

Burden and Standard of Proof on Application for Stay of Proceedings

9. In the case of ***Ratu Inoke Takiveikata & Others v. State*** *(supra)*, Learned Justice Bruce at paragraph 12 stated as follows:

Before a stay of proceedings could be considered, there must be a factual basis for that consideration. It is common ground that the accused bear the burden of proof of establishing the facts which might justify the intervention of this court by way of stay proceedings. It is also common ground that the standard of proof which must be attained is proof to the civil standard. The facts must be established by evidence which is admissible under the law.

Submissions

10. The Applicant submits that the amended charge would likely to be tainted if State proceeds with it. State insists that this court should follow the decision of ***Tabaloa*** *(supra)* and submits that the weakness or strength of any evidence in any matter pending in court should be decided by the Court at trial and should not be used as a ground for a stay application.

11. Moreover, the State submits that there was no evidence of under delay or obvious miscarriage of justice/or abuse of process as submitted by the applicant that warrants the exercise of inherent powers of the High Court to consider an application of a Stay of proceedings in this case.

12. State relies on the decision of ***R v. Derby Crown Court, exp Brooks [1984] 80 Cr. App. R. 164,*** where Sir Roger Ormrod said:

> *"The power to stop a prosecution arises only when it is an abuse of the process of the Court. It may be an abuse of processes if either (a) the prosecution have manipulated or misused the process of the Court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the prosecution of or conduct of his defence by delay on the part of the prosecution which is unjustifiable : for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused or to genuine difficulty in affective service."*

ANALYSIS

Abuse of process

13. The Applicant's grounds of permanent stay are based on abuse of process and prosecutorial misconduct and not on delay. His submission highlights three grounds which he alleges would tantamount to abuse of process: Prosecutorial misconduct at the investigation stage, Procedural impropriety of police investigators and Non availability (Non-disclosure) of evidence.

a. Prosecutorial misconduct at the investigation stage

14. One of the main contentions of the Applicant is that the remaining charge against him is based on false or irregularly obtained statement of the child complainant, Joseva Caqusau. He submits that the child complainants including the virtual complainant of the remaining amended charge, Joseva Caqusau, were alone at the police station during

interrogation/ investigation and they were threatened or forced to give false statements during questioning.

15. To support his submission and to prove the factual basis of the stay application, Applicant advances three arguments:

    Firstly, he argues that by filing a *Nolle Prosequi* in respect of four out of five charges filed along with the residual charge prosecutors have conceded or confirmed that the statements of the complainants in those withdrawn cases were factually false or tainted with illegality.

    Secondly, he argues that since statements relating to all five charges were obtained by police officers who operated under the same investigating officer, the remaining charge relating to Joseva Caqusau must necessarily have been tainted with the same illegality or impropriety.

    Thirdly, since the police have failed to follow the mandatory requirements under the Child Welfare Decree 2010 with regard to interviewing and recording of statements of children, Joseva Caqusau's statement could not have been acted upon by police/ prosecution in framing the charge against the Applicant.

16. Counsel for the Respondent conceded that a *Nolle Prosequi* had been entered in respect of four cases out of five cases filed against the Applicant. However, he emphasized that the investigations are ongoing and not complete.

17. Experience of the court is that complaints made to police are withdrawn due to various reasons and such withdrawals do not give rise to the only inference that the withdrawn complaints are false or improperly recorded. Even if the Court accepted the applicant's contention that the complaints of withdrawn charges were tainted with illegality, the Applicant must adduce some evidence to prove, on the balance of probability, that the complainant Joseva Caqusau's complaint was also tainted with same illegality. DPP's decision to prosecute the case of Joseva Caqusau while dropping other charges confirms that there is a reasonable basis for the remaining amended charge.

18. In ***Regina v Leeds Magistrates Court ex parte Serif Systems Limited and Hamilton***; [1997] EWHC Admin 851 Admn 9 Oct 1997, the applicant sought that summonses be set aside as an abuse of process, being begun to embarrass him as he set out to become an MP. Thirty-one private summonses had been issued. It was held:

> *"Of the summonses to be continued it could not be said that they had no prospect of success or that they were merely technical.* ***Whilst the Director of Public Prosecutions might properly interfere to drop the cases, it was not for the court to do.*** *Gage J: 'As to in what circumstances the court will intervene the authorities go no further than to describe those circumstances in general terms, using such words and phrases as oppressive, vexatious, truly oppressive or a manipulation of the court's process. All the authorities show it will be only in rare and exceptional cases that this court will intervene". [emphasis added]*

19. Merely because some charges had been withdrawn, Court is unable to come to the conclusion that the remaining charge filed along with the withdrawn charges is based on a false or improperly recorded complaint. Charge based on Joseva Caqusau's complaint which is very serious in nature has not been withdrawn. It provides police a strong basis for a charge to be framed and maintained against the Applicant.

20. In ***Connelly v DPP*** [1964] AC 1254, 1304, Lord Morris observed:

> *Generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment, and where either demands a verdict a judge has no jurisdiction to stand in the way of it.*

21. In determining whether there has been an abuse of process, a balance must be undertaken between the character of the conduct complained of by the accused on the one hand, and the public interest that accused persons, charged with serious criminal offences, be duly tried for those offences. A court invested with jurisdiction to try a serious criminal offence should not lightly refuse to exercise that jurisdiction. For, to do so, other than on the grounds of an overriding public interest to the contrary, would be an affront to justice and would undermine public confidence in the administration of justice. ***R v Latif*** [1996]

UKHL 16; [1996] 1 All ER 353; [1996] 1 WLR 104, 112 to 13 (Lord Steyn); ***Walton v Gardiner*** [1993] HCA 77; (1993) 177 CLR 378, 396; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289 (Mason CJ, Deane and Dawson JJ); ***Barton v R*** [1980] HCA 48; (1980) 147 CLR 75, 96; (1980) 32 ALR 449; 55 ALJR 31;

22. There is no evidence that a complaint had been lodged or disciplinary action started against the investigating officer under whom the alleged statements were recorded. Therefore, there is no reasonable basis to conclude that Joseva Caqusau's statement had been recorded by force or under duress.

b. Procedural impropriety of police investigators

23. The Child Welfare Decree 44 of 2010 (CW Decree) has been promulgated for a specific purpose. The preamble reads *'A DECREE TO PROMOTE AND PROTECT THE HEALTH AND WELFARE OF CHILDREN THROUGH MANDATORY REPORTING'*

24. The CW Decree does not confer any right on an accused person who is charged with a juvenile offence. The mandatory reporting procedure under the CW Decree is put in place to safeguard the rights and welfare of children.

25. Under Section 4 of the CW Decree, a Police officer as a designated professional under the Decree is obligated to notify the Permanent Secretary for Women and Social Welfare of the harm or likely harm to a child only where, to his knowledge, no other professional had notified under that section;

Section 4 reads:

> *Where a professional -*
>
> > *(a) becomes aware or reasonably suspects during the practice of his profession, that a child has been or is being, or is likely to be harmed; and*

(b) as far as he is aware, no other professional has notified the Permanent Secretary under this section about the harm or likely harm;

the professional must immediately give notice of the harm or likely harm to such child to the Permanent Secretary in writing or by facsimile, email or other reliable means of communication, where necessary the professional may, subject to section 6 give oral notice under this section.

26. Requirement to give follow up written notice under Section 6 of the CW Decree arises only where an oral notice under Section 4 had been given.

Section 6 (1) reads:

Where a professional has given an oral notice under section 4, he must within 7 days after giving the oral notice, give the Permanent Secretary written notice about the harm or likely harm.

(2) The follow-up notice must include the information set out in section. 5 subsections (1) (a) to (g) inclusive at the time that the notice is given.

(3) The professional must give the notice even if he no longer believes or suspects the child has been, is being, or is likely to be harmed.

27. There is no provision in the CW Decree which requires a statement of a child victim being countersigned or recording of his or her statement being witnessed by a professional.

28. There is nothing in the submission of the Applicant which suggests, let alone passes the test of balance of probabilities, that the Applicant has been prejudiced by the non-compliance of the procedure under CW Decree and how it is going to affect his defence at the trial.

Investigative Procedures and Stay of Criminal Proceedings

29. It is obvious that Applicant's main contention is based on unfairness of investigative procedures. There can be no doubt High Court will exercise inherent power to prevent abuse of its own processes and the processes of courts below. It is highly doubted if that power extends or is broad enough to prevent abuse of procedures of other authorities connected to the administration of justice process *(police)* without reasonable nexus having been established between the alleged abuse and the fair trial safeguards of the accused in his defence.

30. "In ***Moevao v Department of Labour*** [1980] 1 NZLR 464, Richmond P of the New Zealand Court of Appeal considered the doctrine of abuse of process and at p.470 said:

> *"....it cannot be too much emphasized that the inherent power to stay a prosecution stems from the need of the Court to prevent its own process from being abused. Therefore, any exercise of the power must be approached with caution. It must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the Court is itself being wrongly made use of".*

And further at p.482 Richardson P. added:

> *"The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognized purposes of the administration of criminal justice and so constitutes an abuse of process of the Court."*

31. Abuse of process is the doctrine which describes the inherent power of a court to prevent abuse of its judicial processes. Axiomatically, central to that doctrine is the concept of the

court protecting its own judicial processes. The doctrine of abuse of process does not extend to providing relief in non-judicial or ministerial functions of a court or of an inferior court or tribunal. ***Grassby v R*** [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183, and ***Potter v Tural; Campbell v Bah*** [2000] VSCA 227; (2000) 2 VR 612; (2000) 121 A Crim R 318, applied.

32. In ***Mokbel v DPP*** (Vic) & Ors [2008] VSC 433; MC 49/2008, 28 October 2008. Kaye J said:

> *Essentially, the doctrine of abuse of process describes the inherent (or in some cases implied) power of a court or tribunal to protect its own judicial processes from abuse. Ordinarily, the doctrine is invoked before the court whose processes, it is alleged, are the subject of the relevant apprehended abuse. However, and in any event, it is the judicial process which is the subject of the doctrine of abuse of process. In invoking its power to prevent such an abuse, the court is thereby preventing an abuse of its judicial processes, or, where it is acting on review, the judicial processes of an inferior court or tribunal. Thus, the doctrine of abuse of process does not extend to providing relief in relation to non-judicial, ministerial, functions of a court or of an inferior court or tribunal. It is now well established that committal proceedings constitute the exercise by a magistrate of a ministerial, and not judicial, process. Thus, it necessarily follows that the doctrine of abuse of process does not apply, and may not be invoked, where a magistrates' court is exercising its powers to conduct a committal proceeding.*
>
> *Furthermore, a second, associated, principle is brought into application by the plaintiff's claim in this case. It is well established that the courts do not purport to supervise the exercise of the prosecutorial discretion, save and except where, as a consequence, there is an abuse of the court's process, or of the process of a court or tribunal in respect of which the court is exercising relevant supervision. That doctrine reflects the*

important distinction between, on the one hand, the judicial functions of the court, and, on the other hand, the independent functions of the prosecuting authorities" (emphasis added).

33. Recording of witness statements and investigation of crimes are purely non-judicial functions. The role of the investigating officer in holding a criminal investigation is essentially inquisitorial and administrative. In the same way, institution of criminal proceedings based on the findings of an investigation is not amenable to the doctrine of abuse of process.

34. In ***R v. Horseferry Road Magistrates Court Ex parte Bennett*** *[1993] 3 All E.R.138 at p 27* Lord Lowry said:

> *"I agree that prima facie it is the duty of court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely "pour encourager les autres".*

35. In ***Attorney-General's Reference*** (No. 2 of 2001) [2003] UKHL 68, the House of Lords (sitting with 9 members of the court) held by a majority of 7-2, that it will rarely be appropriate to stay proceedings for delay, if the proceedings have not yet begun because of the strong public interest in ensuring that suspects are tried. Lord Bingham held (at paragraph 24):

> *"It will not be appropriate to say or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in this final determination of criminal charges requires that such a charge should not be stayed or*

dismissed if any lesser remedy will be just and proportionate in all the circumstances.

36. In my view, in determining whether the conduct of the police is such as to constitute an abuse of process, the answer is clear cut. It is true, as asserted by Mr. Koya that the prosecution of amended charge might be prejudicial to the Applicant. However, the countervailing considerations are, in my view, of significant magnitude, and far outweigh that consideration. In particular, the countervailing considerations are of such gravity that, in my view, the prosecution of the Applicant on the amended charge could not, on any rational view, be considered to be an abuse of process.

37. Applicant's Counsel in Para 31 submits:

> *"The Court will consider the admissibility or omission of relevant evidence obtained in assessing whether there is likely to be a serious prejudice, thus, the court will consider not only that this would cause an injustice to the defendant to such an extent that public confidence in the judicial system will be affected, it would be an abuse of process by the prosecution in obtaining evidence".*

38. Applicant's submission is apparently based on the wrong premise that statements recorded by police officers do form part of evidence. Witness statements do not generally form part of substantive evidence and they can only be used for limited purposes such as to test the credibility of a witness. It is not the duty of court to examine witness statements to evaluate the maintainability of a criminal case. That part belongs to the DPP or to the prosecutor. Determination of admissibility and evaluation of evidence of course are judicial functions the trial stage. The fairness of the judicial process can be guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system without staying the proceedings.

39. In ***Jago v The District Court of New South Wales*** [1989] HCA 46; (1989) 168 CLR 23, Mason CJ of the High Court of Australia said:

"To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences...."

40. Applicant has a strong weapon; right of cross examination, to challenge the credibility of the complainant's evidence at the trial stage.

41. In a more recent case, the High Court of ***Australia in R v Edwards*** [2009] HC 20(21 May 2009) described stay of criminal proceedings as an extreme step that should be taken only if it is not possible to hold a fair trial.

c. Abuse of Process and Non-Disclosure of Information

42. Position taken by the Applicant in paragraphs 45 and 46 of the submission in respect of non- disclosure of information seems self-contradictory. On one hand it is the position of the Applicant that police had failed to follow the appropriate procedure in accordance with Section 3, 4 and 6 of the CW Decree and failed to meet mandatory requirements when interviewing Joseva Caqusau. On the other hand, Applicant finds fault with the prosecution's failure to disclose the letter written to the Permanent Secretary for Women and Social Welfare under Section 4 of the CW Decree in relation to the complaint and reporting in terms of the harm caused to the complainant.

43. It is obvious that if the prosecution had failed to follow the required procedure under the CW Decree, Applicant can't expect the prosecution to possess any information connected to it that would possibly be relied on by the prosecution or crucial to the defence case at the trial stage.

44. Assuming that such information was in the hands of the prosecutor or a third party, there is no evidence that the Applicant sought a pre-trial order from the Magistrates Court requiring prosecution to disclose such information which he now says, in this court, is crucial to his defence.

45. Applicant submits in Paragraph 46 of his submission that he wrote to the prosecution to disclose the letter and no response was forthcoming. If the prosecution was withholding

such important information, the proper course of action he should have taken was to move the Magistrates court seeking a pre-trial disclosure order. Applicant has failed to do so.

46. If such an order was sought, the Magistrates Court could have inquired into it and determined the materiality of the information to his defence and also the propriety of discloser.

47. The Applicant has placed much reliance on the Canadian Supreme Court decision in ***R. v. O' Connor***, [1995] 4 SCR 411, 1995 CanLII 51(SCC) to support his contention on non-disclosure.

48. It must be said, neither majority nor dissenting judgment in ***O' Connor*** supports the Applicant's arguments.

49. Dismissing the appeal against the decision of the Court of Appeal for British Colombia which ruled against granting of permanent stay, La Forest, L'Heureux-Dube`, Gonthier and McLachlin JJ in the majority decision held:

> *"Where an accused seeks to establish that non-disclosure by the Crown has violated s. 7, he or she must establish that the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence.* ***Such a determination requires reasonable inquiry into the materiality of the non -disclosed information.*** *Inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial is infringed. The focus must be primarily on the effect of the impugned actions on the fairness of the trial. Once a violation is made out, the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Where the adverse impact upon the accused's ability to make full answer and defence is curable by a disclosure order, then such a remedy, combined with an adjournment where necessary to enable defence counsel to review the disclosed information, will generally be appropriate. There may, however, be*

exceptional situations where, given the advanced state of the proceedings, it is simply not possible to remedy the prejudice. In those "clearest of cases", a stay of proceedings will be appropriate. When choosing a remedy for a non-disclosure that has violated s. 7, the court should also consider whether the Crown's breach of its disclosure obligations has violated fundamental principles underlying the community's sense of decency and fair play and thereby caused prejudice to the integrity of the judicial system. If so, it should be asked whether this prejudice is remediable, having regard to the seriousness of the violation and to the societal and individual interests in obtaining a determination of guilt or innocence".(

50. According to ***<u>O' Connor</u>***, if the Applicant is to succeed in the present application he must establish that:

    a. he sought a pre-trial disclosure order from the trial court that from is Magistrates Court.

    b. his application was dismissed without inquiring into the materiality and propriety of the non-disclosed information or; even after issuing the disclosure order and granting adjournments to review the disclosed information to prepare for the defence, it is simply not possible to remedy the prejudice or the adverse impact upon the accused's ability to make full answer and defence is not curable by a disclosure order.

    c. the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his ability to make full answer and defence.

51. Applicant has failed to establish none of these.

52. In the dissenting judgment, Lamer CJ and Sopinka and Major JJ. Explained the factual matrix that justified a permanent stay in following terms:

A stay of proceedings was appropriate here. The Crown's conduct impaired the accused's ability to make full answer and defence. The impropriety of the disclosure order if any does not excuse the Crown's failure to comply with it until immediately before the trial. The Crown never took proper action regarding the objections it had. If it could not appeal the order it should have returned to the issuing judge to request variation or rescission. The letters from the Crown prosecutor to the therapists narrowed the scope of the order. As soon as the order was clarified for the therapists, complete records were disclosed, suggesting that had the letters contained an accurate description of the order, compliance would have occurred at a much earlier time. The Crown also breached its general duty to disclose all relevant information. Each time disclosure was made in this case it was the result of the defence having to raise the matter in court. The conduct of the Crown was such that trust was lost, first by the defence, and finally by the trial judge. It is of little consequence that a considerable amount of the non-disclosed material was ultimately released piecemeal to the defence prior to the trial. The effect of continual discovery of more non-disclosed evidence, coupled with the Crown's admission that disclosure was possibly incomplete, created an atmosphere in which the defence's ability to prepare was impaired. The Crown's delay in making disclosure and its inability to assure the trial judge that full disclosure had been made even after commencement of the trial were fatal to the proceedings. The continual breaches by the Crown made a stay the appropriate remedy. Proceedings had become unworkable and unfair. Remedies under s. 24(1) of the Charter are properly in the discretion of the trial judge. This discretion should not be interfered with unless the decision was clearly unreasonable.....

....The conduct of the Crown during the time the trial judge was involved, as well as in the months before his appointment, was negligent, incompetent and unfair. The trial judge was in the best position to observe

the conduct of the Crown and its effect on the proceedings. He found that the trial had become so tainted that it violated fundamental principles underlying the community's sense of fair play and decency and that the accused was impaired in his ability to make full answer and defence".

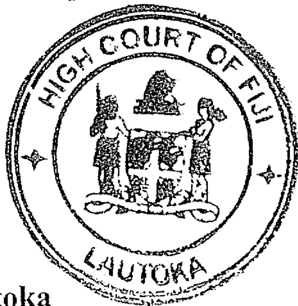
53. Factual scenario of the present case is quite distinguishable from the factual matrix that led to the judicial pronouncement of the dissenting judgment in **O' Connor** in favour of stay of proceedings.

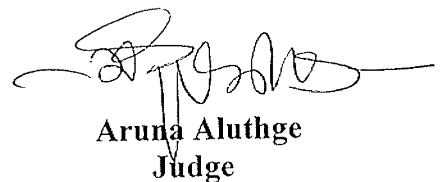
54. In view of Section 14 (2) (e) of the Constitution of the Republic of Fiji, there can be no doubt that there exists a legal obligation on the part of the prosecution in a criminal case to make full, fair and timely disclosure of all relevant facts. However, the Applicant has failed to establish that non-disclosure of information has, on the balance of probabilities, prejudiced or had an adverse effect on his ability to make full answer and defence.

CONCLUSION

55. Applicant has failed on the balance of probability to satisfy this Court that on any of the grounds he advanced he is prejudiced in respect of his defence or fair trial safeguards.

56. No stay should be granted in the absence of any serious prejudice to the defence so that no fair trial can be held. Applying the above principles, I do not find merit in any of the grounds on which the application for stay is founded. The application for permanent stay of the prosecution is, accordingly, disallowed and dismissed.





Aruna Aluthge
Judge

At Lautoka
04th March, 2016

Solicitors: **Siddiq Koya Lawyers for Appellant**
Office of the Director of Public Prosecution for Respondent