IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL MISCELLANEOUS JURISDICTION

MISCELLANEOUS CASE NO: HAM 79 of 2017

ASHISH PRASAD

V

STATE

Counsel : Mr. Naipote Vere for the Applicant
Mr. Taitusi Tuenuku for the Respondent

Date of Hearing : 14 September 2017

Date of Ruling : 30 October 2017

RULING

Introduction

[1] This is an application made by the Applicant for a permanent stay of criminal proceedings. The Applicant is the second accused in Suva High Court Criminal Case No: HAC 286/2016.

[2] In the consolidated Information filed by the Director of Public Prosecutions ("DPP") in the substantive matter, Vineeta Devi and the Applicant, Ashish Prasad, are charged with the following Information:

COUNT ONE

Statement of Offence

ABORTION: Contrary to Section 234 (1) and (4) (a) (b) of the Crimes Act of 2009.

Particulars of Offence

VINEETA DEVI between the 20th day of July 2016 to the 23rd day of July 2016, at Nausori in the Eastern Division, unlawfully performed an abortion on **PAYAL PRITIKA DEVI.**

COUNT TWO

Statement of Offence

ABORTION: Contrary to Section 234 (1) and (4) (b) of the Crimes Act of 2009.

Particulars of Offence

ASHISH PRASAD between the 20th day of July 2016 to the 23rd day of July 2016, at Nausori in the Central Division, committed certain acts with intent to procure the abortion of **PAYAL PRITIKA DEVI.**

[3] When the substantive matter was called before this Court on 3 April 2017, both Vineeta Devi and the Applicant pleaded not guilty to the charges in the information.

[4] By way of Notice of Motion, filed on 1 May 2017, the Applicant seeks the following order from this Court:

> That an order is made for a permanent stay of criminal proceedings against the Applicant in Suva High Court Criminal Action No: HAC 286 of 2016 for the Respondent's various abuses of the Court process.

[5] The Notice of Motion is supported by an Affidavit deposed to by the Applicant. Therein, the Applicant submits as follows:

THAT I humbly pray to this Honourable Court that the criminal charge against me be permanently stayed on the following grounds of abuse of the Court process briefly summarised as follows according to what my lawyer advised me:

(a) Police unlawfully detained and locked me up in the cell without being arrested for any offence contrary to Section 10 of the Criminal Procedure Act No. 43 of 2009, Section 286 of the Crimes Act No. 44 of 2009 and Section 11(1) and 21 of the Constitution.

(b) Police failure to supply me of any meal for a whole day whilst being escorted from Taveuni to Suva by Police contrary to Section 11(1) of the Constitution and it amounts to a criminal offence of abuse of office contrary to Section 139 of the Crimes Act No. 44 of 2009.

(c) Police failed to inform my wife or any immediate member of my family that I am held in police custody and refused bail contrary to Section 11(2) of the Bail Act No. 26 of 2002.

(d) Police failed to bail me out as required under Section 3 (1) (2) and (3) of the Bail Act No. 26 of 2002 and Section 13 (1) (h) of the Constitution. In addition they failed to consider if there are grounds existing at the relevant time where bail may be granted or refused against me. These grounds are clearly outlined in the ruling in ***Sanjana Devi v State [2003] FJHC 47; HAM 0003.2001s.*** A copy of this judgment will be annexed in the Written Submission filed by my lawyer.

THAT my lawyer advised me that the police do not have clean hands or follow the law to bring prosecution against me and he advised me that he will submit to this Honourable Court to consider the maxim of equity *(a) he*

who comes to equity must come with clean hands and (b) equity follows the law.

[6] DC 3101 Thomas Timoata, Station Sergeant attached to the Tukavesi Police Station, filed an Affidavit in Opposition to this application.

[7] The Applicant filed an Affidavit in Response to the aforesaid Affidavit in Opposition filed by DC 3101 Thomas Timoata.

[8] This application was taken up for hearing on 14 September 2017. Both counsel for the Applicant and the Respondent were heard. The parties also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

The Affidavit in Opposition filed by DC 3101 Thomas Timoata

[9] DC 3101 Thomas Timoata has filed an Affidavit in Opposition to this application for permanent stay. Therein, he deposes that there is very strong evidence against the Applicant in the current case.

[10] He submits further, that the Applicant was called by the Station Officer, Inspector Seremaia Nawabale, on 17 November 2016, to come over to the Taveuni Police Station, as there were allegations against him of procuring an abortion. The Applicant had arrived at the Taveuni Police Station the same day. He was informed of the allegations against him. The Applicant understood the allegations against him and the reasons he was required to be present at the Police Station.

[11] DC Thomas deposes further that the Applicant was lawfully arrested as he was informed of the allegations against him and he voluntarily submitted himself to custody at the Taveuni Police Station.

[12] DC Thomas had been instructed by the Station Officer to charge the Applicant for procuring an abortion, according to instructions received from the Divisional Crime Officer Eastern Division. Prior to charging the Applicant, on 18 November 2016, he had informed the Applicant the reasons for which he was being charged. The Applicant had understood the allegations against him and the reasons why he was being charged.

[13] After the Applicant was charged, he was lawfully detained at the Taveuni Police Station, as he was charged with a serious offence. The Applicant was refused bail by the Police because of the seriousness of the offence. His immediate family members and close relatives knew that the Applicant was being detained at the Taveuni Police Station.

[14] Whilst being detained at the Taveuni Police Station, the Applicant was given meals and the opportunity to contact his relatives or other close family members.

[15] On 20 November 2016, on the request of the Applicant, DC Thomas had escorted the Applicant to his home so that he could obtain his clothes and other belongings. Prior to this, the Applicant had been provided breakfast at the Taveuni Police Station.

[16] Thereafter, DC Thomas had escorted the Applicant from the Police Station to the Taveuni Jetty, where he had been handed over to SC 1869 Eroni Tuisese, who was to escort the Applicant to Suva, on board the vessel travelling from Taveuni to Suva. The Applicant's wife and son had also accompanied him to Suva. The Applicant had opted to personally pay for his own meals, and even for his own room on board the vessel, since his wife and son were travelling with him.

[17] For the aforesaid reasons, DC Thomas deposes that this application for permanent stay be dismissed.

Legal Provisions and Analysis

[18] Stay of proceedings in a criminal trial is a legal remedy which has its origins in the common law jurisdiction as an extension of the inherent power of the Court to control its proceedings and thereby ensuring a fair trial to both the prosecution and the defence. Its common law origins can be traced back to the case of ***Connelly v Director of Public Prosecutions*** [1964] AC 1254 at 1301, where Lord Morris stated:

> *"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its*

rules of practice and to suppress any abuse of process and to defeat any attempted thwarting of its process...."

[19] The term *"abuse of process"* used in this judgment has been further elaborated on by the subsequent authorities to identify and demarcate two specific areas of concern. In ***R v. Derby Crown Court, exp Brooks*** [1984] 80 Cr. App. R. 164, 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 effecting service."*

[20] It is accepted law in Fiji that the High Court has the inherent jurisdiction to stay proceedings following common law tradition. In ***State v Waisale Rokotuiwai*** [1998] FJHC 196; HAC 09d of 1995S (21 August 1998); Justice D.B. Pain held as follows;

> *"It is submitted that this Court has inherent power to make any order to prevent an abuse of its process and this includes an order for permanent stay. That power will be exercised to protect the accused from oppression and prejudice but its scope is not limited to those considerations. The Court has a duty to secure a fair trial for an accused. Allied to this is a need to protect the integrity and reputation of the judicial system and administration of justice. Infringement of these requirements are proper considerations for the Court in deciding whether a trial should be terminated."*
>
> .....

"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 Reference (No.1) of 1990 [1992] Q.B. 630, endorsed by the Privy Council in ***George Tan Soon Gin v Judge Cameron & Anor*** *[1992] 2 AC 205."*

[21] This position was further reiterated in ***Ratu Inoke Takiveikata and 9 others v State*** [2008] FJHC 315; HAM 39 of 2008 (12 November 2008); where Justice Andrew Bruce held that;

"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."

[22] It was further held in this case that the burden of proof in such instances is on the Applicant and the standard of proof which must be attained is proof to the civil standard (on a balance of probabilities).

"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."

[23] This position was followed by Justice Priyantha Fernando in the cases of ***Bavoro v State*** [2011] FJHC 235; HAM 236 of 2010 (27 April 2011); and ***Salauca v State*** [2012] FJHC 959; HAM 6 of 2012 (20 March 2012).

[24] In the case of ***Ganesh Chand v FICAC;*** HAM 65 of 2016 (16 December 2016) (Unreported); His Lordship Justice Achala Wengappuli made reference to the following cases from New Zealand and Australia, which dealt with stay of proceedings and the doctrine of abuse of process as follows:

> "In ***Moevao v Department of Labour*** [1980] 1 NZLR 464, the New Zealand Court of Appeal offered a further clarification to the applicability of the doctrine of abuse of process at p. 470 ;
>
> > *"....it cannot be too much emphasised 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".*
>
> "In the neighbouring Australian jurisdiction, another dimension was added to the considerations that are to be taken into account, when granting a stay of proceedings with the pronouncement of the judgment in ***Jago v. The District Court of New South Wales*** [1989] 168 CLR 23. The High Court of Australia held:
>
> > *"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..."*
>
> "In the same judgment the term "*abuse of process*" received additional treatment by the High Court as it was held:

"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amount to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process".

[25] It was held by Justice Fernando in the case of ***Tuisolia v Director of Public Prosecutions*** [2010] FJHC 254; HAM 125 of 2010; HAC 19 of 2010 (19 July 2010); that an example of a circumstance where the process of a criminal trial will be incapable of serving the purpose it is intended to serve would be where the proceedings are such that *"they can clearly be seen to be foredoomed to fail"* following ***Walton v Gardiner*** **[1933] 177 CLR 378.**

[26] However, Justice Wengappuli stated in ***Ganesh Chand v FICAC*** *(supra)* "Although the Courts would grant a stay in proceedings where it can clearly be seen that the prosecution is foredoomed to fail, a weak case for prosecution need not be stayed." He quoted Lord Justice Brooke who said in *Ebrahim,* ***R (on the application of) v Feltham Magistrate's Court*** [2001] EWHC Admin 130, at 133 that:

"It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. "

[27] His Lordship Justice Wengappuli further stated in ***Ganesh Chand v FICAC*** *(supra)*: "In a rare but deserving situation, even if a strong case is available to the prosecution, Courts have intervened and stayed prosecutions." His Lordship cited ***State v Sat Narayan Pal*** [2008] FJCA 117; [2009] 1 LRC 164 (8 February 2008); as one such instance. In that case, the Court of Appeal followed the judgement of ***R v Horseferry***

Road Magistrates' Court, ex p Bennett [1993] 3 LRC 94, where the House of Lords clearly laid down the criterion for such intervention when it 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."*

[28] However, it must be reiterated that, it is common factor in all jurisdictions to have considerations limiting the granting of stays. In ***R v Jewitt*** 1985 CanLII 47 (SCC), the Supreme Court of Canada held that the power to stay criminal proceedings should be exercised only in clearest cases where compelling an accused to stand trial would undermine the community's sense of fair trial and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings (As per Justice Wengappuli in ***Ganesh Chand v FICAC*** *(supra)*).

[29] I now propose to consider the four grounds submitted by the Applicant in support of a permanent stay of proceedings.

1. That the Police unlawfully detained and locked the Applicant up in the cell without him being arrested for any offence.
2. Failure of the police to supply him with any meals for a whole day whilst being escorted from Taveuni to Suva.
3. Failure by the Police to inform his wife or any immediate member of his family that he was held in police custody and refused bail.
4. Failure of the Police to grant bail to him as required under the law and failure to consider if there are grounds existing at the relevant time where bail may be granted or refused to him.

[30] Having considered the applicable legal principles enunciated in the above judgments, I am firmly of the view that none of the grounds submitted by the Applicant justifies a stay of proceedings in this case.

[31] DC 3101 Thomas Timoata, has filed an Affidavit in Opposition, refuting each of the above grounds.

[32] In any event, since the Applicant is alleging a breach of his constitutional rights by Police Officers, the appropriate remedy should have been by way of a Constitutional Redress application, in terms of section 44(1) of the Constitution of Fiji 2013 (Constitution).

[33] As per the first ground the Applicant is alleging that he was unlawfully arrested and detained. Section 13 (1) (a), (b) and (c) of the Constitution provides that:

> *"Every person who is arrested or detained has the right—*
>
> *(a) to be informed promptly, in a language that he or she understands, of—*
>
> *(i) the reason for the arrest or detention and the nature of any charge that may be brought against that person;*
>
> *(ii) the right to remain silent; and*
>
> *(iii) the consequences of not remaining silent;*
>
> *(b) to remain silent;*
>
> *(c) to communicate with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission;"*

[34] As the second ground the Applicant is alleging that the Police failed to supply him with any meals for a whole day whilst being escorted from Taveuni to Suva. This is an alleged violation of Section 13 (1) (j) of the Constitution which stipulates that *"every person who is arrested or detained has the right to conditions of detention that are consistent with human dignity, including at least the opportunity to exercise regularly and the provision, at State expense, of adequate accommodation, nutrition, and medical treatment."*

[35] As the third ground the Applicant is alleging that the Police failed to inform his wife or any immediate member of his family that he was held in police custody and refused bail. This is an alleged violation of Section 13 (1) (k) of the Constitution which reads:

> *"every person who is arrested or detained has the right to communicate with, and be visited by,—*
>
> *(i) his or her spouse, partner or next-of-kin; and*
> *(ii) a religious counsellor or a social worker."*

[36] The fourth ground urged by the Applicant is failure of the Police to grant bail to him as required under the law and failure to consider if there are grounds existing at the relevant time where bail may be granted or refused to him. This is an alleged violation of Section 13 (1) (h) of the Constitution which states *"every person who is arrested or detained has the right to be released on reasonable terms and conditions, pending a charge or trial, unless the interests of justice otherwise require."*

[37] Thus it is clear that all the four grounds submitted by the Applicant in support of the permanent stay of proceedings are for alleged violations relating to Section 13 (1) (a), (b), (c), (h), (j) and (k) of the Constitution.

[38] Section 44 (1) of the Constitution states thus:

> *"If a person considers that any of the provisions of this Chapter (Chapter 2- Bill of Rights) has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress."*

[39] Therefore, it is abundantly clear that the most appropriate remedy available for the Applicant in the instant case was to file an application for Constitutional Redress, in terms of Section 44(1) of the Constitution, for the alleged infringements of his

constitutional rights. He has failed to do so. Instead he has filed an application for a permanent stay of proceedings in this case.

Conclusion

[40] As stated before, considering the applicable legal principles articulated in the judgments cited in this Ruling, I am firmly of the view that none of the grounds alleged by the Applicant justifies a stay of proceedings in this case.

[41] Accordingly, this application for a permanent stay of criminal proceedings in Suva High Court Criminal Action No: HAC 286 of 2016 is dismissed.

[42] I make no order for costs.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA
Dated this 30th Day of October 2017

Solicitor for the Applicant : **Naipote Vere & Associates, Nausori.**
Solicitor for the Respondent : **Office of the Director of Public Prosecutions, Suva.**