

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Misc. No. HAM 174 of 2020**

**BETWEEN** : **DESHWAR KISHORE DUTT**  
**APPLICANT**

**A N D** : **THE STATE**  
**RESPONDENT**

**Counsel** : Applicant in person.  
: Mr. S. Seruvatu for the Respondent.

**Date of Hearing** : 03 October, 2022

**Date of Ruling** : 21 October, 2022

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**RULING ON APPLICATION FOR STAY OF PROCEEDINGS**

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**APPLICATION**

1. The applicant by Notice of Motion dated 19<sup>th</sup> March, 2020 supported by his affidavit sworn on 19<sup>th</sup> June, 2020 and supplementary affidavit sworn on 13<sup>th</sup> October, 2020 seeks a permanent stay of proceedings in respect of criminal case no. 13 of 2018 pending in this court.
2. In his application the applicant seeks the following orders and declarations:

1. *That Criminal Case No. 13/18 pending against the applicant in the High Court of Fiji at Lautoka Court No. 2 be declared an “Abuse of Court Process” by the Executive – State in this matter; and*
  2. *The matter (HAC 13/18) be ‘permanently stayed’ based on the undeniable fact that the Executives has abused their powers excessively (during interrogation of this matter) from the 3<sup>rd</sup> till the 6<sup>th</sup> of Jan. 2018 on the applicant whilst the applicant was in their custody at Namaka Police Station; and*
  3. *Further declaration that “irreparable prejudice would be caused to the integrity of the Judicial System” if the prosecution were continued in this case and that no fair trial can be heard.*
3. The application filed by the applicant is opposed by the prosecution, they have filed the affidavit in reply of Assistant Commissioner of Police Abdul Khan sworn on 11<sup>th</sup> December, 2020.

### **BACKGROUND INFORMATION**

4. The applicant has been charged with four counts of aggravated robbery contrary to section 311 (1) (a) and (b) of the Crimes Act 2009. The consolidated information filed in this court dated 26<sup>th</sup> March, 2018 reads as follows:

### **FIRST COUNT**

#### ***Statement of Offence***

**AGGRAVATED ROBBERY:** Contrary to section 311 (1) (a) and (b) of the Crimes Act 2009.

**Particulars of Offence**

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29<sup>th</sup> day of December 2017 and 30<sup>th</sup> day of December 2017 stole one Alcatel one touch mobile phone valued \$49.00 and one torch valued \$60.00, properties of BHAGUTY PRASAD, all to the total value of approximately FJD\$109.00 and at the time of such theft, the said DESHWAR KISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied force on the said BHAGUTY PRASAD.

**SECOND COUNT**

***Statement of Offence***

**AGGRAVATED ROBBERY:** Contrary to section 311 (1) (a) and (b) of the Crimes Act 2009.

**Particulars of Offence**

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29<sup>th</sup> day of December 2017 and 30<sup>th</sup> day of December 2017 stole \$10,000 cash in Fijian and US currencies, Samsung J7 brand mobile phone valued \$250USD and Samsung On5 brand mobile phone valued \$350USD, 1 Vido brand mobile phone valued \$100FJD, 1 Forme brand Mobile phone valued \$100FJD and a Toyota Prius motor vehicle registration number JC 367 valued \$17,000 properties of JAI REDDY, all to the total value of approximately FJD\$28,400.00 and at the time of such theft, the said DESHWAR KISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied force on the said JAI REDDY.

### **THIRD COUNT**

#### ***Statement of Offence***

**AGGRAVATED ROBBERY**: Contrary to section 311 (1) (a) and (b) of the Crimes Act 2009.

#### **Particulars of Offence**

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29<sup>th</sup> day of December 2017 and 30<sup>th</sup> day of December 2017 stole about 50 assorted jewelries and watches valued approximately USD\$102,000, \$2000 cash in Fijian and US currencies, Elizabeth Arden Red Door perfume valued at USD \$79.00, the properties of MUNI LAKSHMI REDDY all to the total value of approximately FJD\$206,160.00 and at the time of such theft, the said DESHWAR KRISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied forced on the said MUNI LAKSHMI REDDY.

### **FOURTH COUNT**

#### ***Statement of Offence***

**AGGRAVATED ROBBERY**: Contrary to section 311 (1) (a) and (b) of the Crimes Act 2009.

#### **Particulars of Offence**

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29<sup>th</sup> day of December 2017 and 30<sup>th</sup> day of December 2017 stole a gold Samsung J7 brand mobile phone valued \$250USD, USD\$100 cash, Adidas backpack valued \$80USD, old spice brand deodorant valued \$10USD, Tommy Bahama brand body spray valued \$20USD and a white mobile phone charger valued \$10USD, the properties of BRANDON REDDY, all to the value of approximately FJD\$940.00 and at the time of

such theft, the said DESHWAR KISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied force on the said BRANDON REDDY.

5. By way of a brief background the applicant had escaped from lawful custody on 15<sup>th</sup> December, 2017 an investigation was carried out by the police. A recap team was formed to recapture the applicant headed by A/ASP Saimoni Qasi. On 2<sup>nd</sup> January, 2018 the applicant was seen around the Vuda area. A search was conducted and on 3<sup>rd</sup> January, 2018 the applicant was arrested from Vuda.
6. At the time of arrest the applicant was resisting and he had tried to hit SC Pauliasi Boseiwaqa with a stone. The other police officers present then came to assist SC Boseiwaqa, the applicant was arrested and charged with one count of serious assault.
7. The applicant was produced in Nadi Magistrate's Court in CF 54 of 2018. The prosecution denies any assault by the police officers as alleged by the applicant.
8. After numerous adjournments for one reason or another particularly at the request of the applicant who had to undergo a surgery and for him to engage counsel and consult an expert witness in India this matter was finally heard on 3<sup>rd</sup> October.

#### **APPLICANT'S CONTENTION**

9. The applicant's primary argument is that he was assaulted badly by the police officers at the time of his arrest, in transit to the Namaka Police Station then on the way to Namaka Health Centre and during the caution interview of the substantive matter (HAC 13 of 2018) at the Namaka Police

Station. As a result of the assaults the applicant was confined to a wheel chair and had to undergo a major surgery. The applicant denies resisting arrest.

10. According to the applicant the police officers torture on him was so painful that he made confessions in the caution interview to avoid further assault. The admissibility of the confession has been challenged by the applicant in the substantive file. However, in this application the applicant says that the actions of the police officers as agents of the executive were so unbecoming that he was subjected to punishment and harm by the use of excessive force at the time of his arrest.
11. The applicant submits that a similar situation had arisen in the case of *Ratu Inoke Takiveikata and others vs. The State, criminal misc. case no. HAM 039 of 2008 (12<sup>th</sup> November, 2008)*. The applicant submitted the 10<sup>th</sup> applicant Ballu Khan was a victim of heavy handedness by the police and military officers after his arrest. The High Court had granted a permanent stay of proceedings in respect of all the charges that were laid against Ballu Khan.
12. The applicant also submits that the facts in Ballu Khan's situation is the same as his although less severe in terms of brutality. The applicant also added that he was ill-treated to the extent that he wanted to commit suicide in the police cell. This court should follow the above case of *Ratu Inoke Takiveikata and others* (supra) and permanently stay the substantive proceedings.

### **LAW**

13. The applicant bears the burden of proof in establishing the factual basis on balance of probabilities which would justify the intervention of this

court by way of granting a stay of proceedings. The above was stated by Bruce J. in *Ratu Inoke Takiveikata and others* (supra) at paragraph 12 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 of 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.”*

14. The principles governing permanent stay of proceedings are settled and uniform as expounded in *R v. Derby Crown Court, ex parte Brooks* [1984] 80 Cr. App. R. 164, where it was held:

*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 process if either:*

*(a) the prosecution [has] manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the 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 preparation 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.*

15. The power to stop a prosecution should only be used in most exceptional circumstances see *Director of Public Prosecutions v Humphrys* (1976) 63 Cr. App. R. 95, 107 and *R. v Oxford City Justices, Ex parte Smith* (1982) 75 Cr. App. R. 200, 204. The ultimate objective of the exercise of this power is to ensure that there is a fair trial according to law, which involves fairness both to the accused and to the prosecution. Lord Diplock stated in *R v Sang* (1979) 69 Cr. App. R. 282, 290 that:

*...the fairness of a trial... is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted...*

16. The court's jurisdiction to order stay of proceedings has to be decided on the basis whether a fair trial is possible. Archibald 2018, at paragraph 4.77 [pages 417 – 418] states as follows:

*“...A stay will not be granted where the trial process is itself equipped to deal with the matters complained of: R (Ebrahim) v. Feltham Magistrates’ Court; Mouat v DPP [2001] 2 Cr. App. R. 23, DC, post and Att.-Gen’s Reference (No 1 of 1990) [1992] Q.B. 630, 95 Cr. App. R. 296, CA, adopting the point made in R. v Heston –Francois [1984] Q.B 278, 78 Cr. App. R. 209, CA, in which it was held that the Court’s jurisdiction to order a stay does not include an obligation upon the judge to hold a pre-trial enquiry into allegations such as improper obtaining of evidence, tampering with evidence or seizure of the defendant’s documents prepared for his defence. Such conduct is not ordinarily an abuse of the Court’s process. It is conduct which falls to be dealt with at the trial itself by judicial control on admissibility of evidence, the judicial power to direct a verdict of not guilty (usually at the close of prosecution’s case), or by the jury taking account of it in evaluating the evidence before them.*



## **DETERMINATION**

17. The applicant vehemently argued that he has been ill-treated by the agents of the state and the only remedy he is asking for is that all the charges filed against him be stayed. His human rights have also been violated and he has been a victim of torture by police officers.
18. The applicant further says that he has submitted all the evidence to back his argument of torture in his application which this court should accept. The applicant reiterated that *Ratu Inoke Takiveikata and others* case (supra) should be followed without any reservations.
19. I have had the opportunity to peruse the judgment by the High Court in *Ratu Inoke Takiveikata and others* (supra) and I would like to state that this court is not bound by the decision given in that case. The fact that an applicant has been a victim of police conduct during investigation is not a direct route to permanent stay of proceedings. A permanent stay is an exception and not a rule and no stay would be granted in the absence of any serious prejudice caused to an applicant in respect of a fair trial.
20. It is noted that the applicant has filed his grounds of voir dire in regards to the admissibility of his confessions obtained by the police officers after his arrest in the substantive matter. The admissibility of the confessions is for determination after the voir dire hearing in the substantive matter.
21. Moreover, in deciding an application for stay of proceedings and its effect on fair trial the interest of the complainants and the interest of the applicant will have to be weighed in light of the facts presented to the court. An applicant cannot bring an out of court conduct of individuals even though they are agents of the state to avoid defending a legitimate prosecution.

## **ABUSE OF EXECUTIVE POWER**

22. Archibald 2018, at paragraph 4.99 [page 432] states as follows:

*“In the leading judgment of the Privy Council in Warren v. Att. Gen. for Jersey [2012] 1 A.C. 22, Lord Dyson stated that the court had to strike a balance between the public interest in ensuring that those who are accused of serious crimes should be tried and the completing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute...”*

23. There are other avenues available to the applicant to seek specific redress in regards to the conduct of the police officers. The interest of the complainants cannot be ignored when an application for a permanent stay is made. Interest of justice requires a holistic evaluation be undertaken in balancing the rights of the complainants and the applicant.

24. In this case the prosecution of the offences mentioned in the consolidated information filed is not an abuse of court process and there is no impediment for the applicant to get a fair trial.

25. In short the case of *Ratu Inoke Takiveikata and others* (supra) is distinguished this court has taken into consideration that the offences alleged are valid in law and there are complainants whose rights also matter. The discretion of the court in granting a permanent stay is to be exercised judicially in most exceptional circumstances.

26. There is no evidence before this court that the accused cannot get a fair trial. The court will uphold the law in accordance with the evidence adduced. There is no connection between the alleged conduct of the police officers and the pending substantive trial which cannot be dealt with by the trial court in ensuring a fair trial.

27. Archibald 2018, at paragraph 4.100 [page 432] states as follows:

*“For a stay to be imposed there must be a connection between the wrong doing and the trial, such that not only that wrong doing but also the trial would be an affront to the public conscience... “*

### **CONCLUSION**

28. Having considered the evidence before this court and the submissions made by both parties I am not satisfied that the allegations raised by the applicant justifies a permanent stay of proceedings. I also find that there is no prosecutorial misconduct or abuse of court process or serious prejudice caused to the applicant which will affect fair trial or undermine public confidence in the criminal justice system and bring it to disrepute.

29. The applicant can be tried fairly and he is at liberty to vigorously defend the charges in the conduct of his defence. The trial court has processes to deal with issues pertaining to the charges filed and admissibility of evidence. To start with the applicant has filed his voir dire grounds which are for hearing on 1<sup>st</sup> November, 2022.

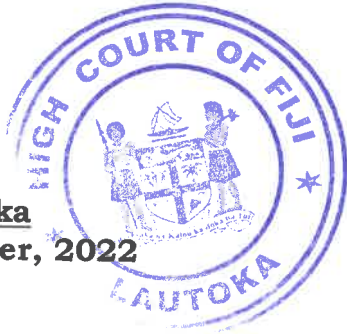
30. The application for stay of proceedings is refused and dismissed.

**ORDERS**

31. The application for permanent stay of proceedings in respect of criminal case no. 13 of 2018 pending in this court is refused and dismissed due to lack of merits.



**Sunil Sharma  
Judge**



**At Lautoka  
21 October, 2022**

**Solicitors**

**Applicant in person**

**Office of the Director of Public Prosecutions for the Respondent**