IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

MISCELLANEOUS CASE NO: HAM 205 of 2024

BRADLEY ROBERT DAWSON

V

STATE

Counsel : Mr. Anil Prasad for the Applicant

Mr. Alvin Singh for the Respondent

Date of Hearing : 12 September 2024

Date of Ruling : 25 September 2024

RULING

Introduction

[1] This is an application made by the Applicant for a permanent stay of criminal proceedings. The Applicant is the Accused in Lautoka High Court Criminal Case No: HAC 107 of 2022.

[2] As per the Information filed by the Director of Public Prosecutions (DPP) in the substantive matter, the Applicant is charged with one count of Murder, contrary to Section 237 of the Crimes Act No. 44 of 2009 (Crimes Act).

The full details of the Information reads as follows:

Statement of Offence

MURDER: Contrary to Section 237 of the Crimes Act of 2009.

Particulars of Offence

BRADLEY ROBERT DAWSON, on the 9th day of July 2022, at Turtle Island Resort, in the Western Division, murdered **CHRISTE JIAO CHEN.**

[3] The Applicant pleaded not guilty to the charge and the matter is fixed for trial from 30 September to 11 October 2024.

[4] This application has been made by way of a Notice of Motion, which was filed on 6 August 2024. As per the Notice of Motion the Applicant seeks the following Orders from this Court:

(a) The Applicant/Accused is asking for Constitutional Redress in accordance with Section 44 of the 2013 Constitution of Fiji Islands (Constitution).

(b) That this action be permanently stayed on the ground of breach of constitutional rights of the Applicant/Accused due to non-service of part of the disclosures.

(c) That the time of service of this Motion be abridged.

[5] The Notice of Motion is supported by an Affidavit deposed to by the Applicant on the same day.

The Affidavit of Bradley Robert Dawson in Support of the Notice of Motion

[6] In the Affidavit in Support of the Notice of Motion the Applicant, inter-alia, deposes as follows:

1. THAT he is charged with the offence of Murder and that the matter is now set for trial.

2. THAT he did not receive the following documents as disclosures to prepare for his defence as stipulated under Section 14 (2) (c) of the Constitution.

(a) Statement of Ratu Sefanaia as per Special Case Diary entry number 18;

(b) Statement of Delai Batiki as per Special Case Diary entry number 36;

(c) Statement of Petero Mataca as per Special Case Diary entry number 38.

[A copy of the said Special Case Diary entries are attached and marked as Annexure BRD 1].

3. THAT although his Counsel had requested for service of these statements, they have not been disclosed with the same. The Learned State Counsel had only provided the mobile numbers of Ratu Sefanaia and Delai Batiki for them to be contacted if needed.

4. THAT a statement was given by Inspector Netava Yalayala (the Investigating Officer in this case), dated 12 February 2024, wherein he has stated that all statements recorded were analysed and the statements of Ratu Sefanaia, Delai Batiki and Petero Mataca were not included as part of the investigation nor disclosed to the Applicant, as these statements were not relevant to the case and unreliable as they did not see or notice as to what had transpired on 8 and 9 July 2022, at the Turtle Island Resort.

[A copy of the said statement of Inspector Netava Yalayala is attached and marked as Annexure BRD 2].

5. THAT the Learned State Counsel in carriage of this matter had informed Court that the statements of Ratu Sefanaia, Delai Batiki and Petero Mataca have been destroyed by the police.

6. THAT the police cannot destroy any statement or evidence without the order of Court.

7. THAT the Police have acted in contravention of his constitutional rights in terms of service of these statements.

8. THAT the Police Officer who destroyed the three statements of witnesses has committed a criminal offence of Destroying Evidence.

9. THAT he is still entitled to the statements of Ratu Sefanaia, Delai Batiki and Petero Mataca, according to Section 14 (2) (c) of the Constitution as this will

enable him to prepare his defence and also to get a fair trial. It is not for the State Counsel to give the name and telephone numbers of the witnesses, but he or she should disclose to him the entire statement to prepare his defence.

10. THAT in the statement of Pita D Varomusu (Police Officer, Crime Scene Investigating Unit), it is stated that he had on two occasions taken swabs of the deceased and also took a swab of a wine glass.

    [A copy of the said statement of Pita D Varomusu is attached and marked as Annexure BRD 3].

11. THAT in the year 2023, the Learned State Counsel asked for 30 days' time to serve the DNA Report. However, the State Counsel now in carriage of the matter has stated that she is not relying on the DNA Report. The Applicant submits that he has the right to be disclosed with the DNA Report to prepare his defence and also to get a fair trial.

12. THAT the Applicant's Constitutional Rights, as guaranteed under Section 14 (2) (c) of the Constitution, have been breached by the non-disclosure of the aforesaid disclosures.

13. THAT if the matter proceeds for hearing, the Applicant will not get a fair trial as guaranteed under Section 15 (1) of the Constitution.

[7] Although, the Notice of Motion and Affidavit seeks orders in the nature of Constitutional Redress in accordance with Section 44 of the Constitution, in addition to a permanent stay of proceedings, the Learned Counsel for Applicant conceded that Constitutional Redress was a separate cause of action. As such, this application will only be confined to the issue of permanent stay of proceedings.

The Affidavit in Opposition filed by Acting Detective Inspector Netava Yalayala

[8] Acting Detective Inspector Netava Yalayala has filed an Affidavit in Opposition to this application for permanent stay. Therein, inter-alia, he deposes as follows:

1. That he is employed as a Police Officer for over 11 years and now stationed at the Criminal Investigation Department, Lautoka Police Station. He submits that he is the Investigating Officer in respect of this case.

2. In his capacity as an Investigating Officer, he has both obtained and caused the obtaining of Police statements of witnesses. He also received all documentary evidence during the course of the investigation. He had placed a statement and the documentary evidence, including the record of interview of the Applicant into the Police Docket as and when they were made or received.

3. The Officer confirms that as Investigating Officer in this case he had obtained the statements of the three civilian witnesses Ratu Sefanaia, Delai Batiki and Petero Mataca.

4. As the Investigating Officer, his key role is in sourcing, gathering and presenting of relevant evidence.

5. He further deposes that the aforesaid three statements recorded never formed part of the investigation (Police Docket). After careful analysis of the contents of the statements it was decided that the said three statements were not relevant to the case in issue. Therefore, the statements were not disclosed to any of the parties and were later destroyed to avoid ambiguity.

6. When reading the statements it was obvious that the three witnesses had not seen nor heard anything pertaining to the main issue in this case. This is also reflected and confirmed in the Police statement made by him on 12 February 2024.

7. The Officer submits that the documents that are not relevant to the State's investigation can be discarded or destroyed as they do not cause any prejudice to any of the parties.

8. That in fairness to the Applicant, the State undertakes to make available the three witnesses during the trial of this case. If the defence so wish they could call the said witnesses as defence witnesses.

9. Inspector Yalayala confirms that buccal swabs were taken from the deceased and from the alleged crime scene during the course of the investigations in this case. However, there were no corresponding swabs uplifted from the Applicant. The Officer deposes that the Applicant had refused to give his buccal swab during the investigations.

[9] The Applicant filed an Affidavit in Reply to the aforesaid Affidavit in Opposition filed by Acting Detective Inspector Netava Yalayala.

The Hearing

[10] This application was taken up for hearing before me on 12 September 2024. Both Counsel for the Applicant and the State were heard. The Counsel for the Applicant also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

Legal Provisions

[11] 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...."*

[12] 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:*
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> *(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,*
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> *(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."*

[13] 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."*
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> .....
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> *"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."*

[14] 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:*
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> *"(1) Circumstances are such that a fair trial of the proceedings cannot be had; or*
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> *(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."*

[15] 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."*

[16] 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).

[17] 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 ;
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> > *"....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".*
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> "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:
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> > *"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..."*
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> "In the same judgment the term "*abuse of process*" received additional treatment by the High Court as it was held:
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> > *"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".*

[18] 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.**

[19] 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. "*

[20] 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."*

[21] 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)*).

Analysis

[22] It is trite law 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. One of the grounds on which a stay of proceedings maybe granted is where a fair trial cannot be held or ensured.

[23] Section 15 (1) of the Constitution provides that: *"Every person charged with an offence has the right to a fair trial before a court of law."*

[24] The primary grievance of the Applicant is that he has not been disclosed with the statements recorded by the Police of three civilian witnesses Ratu Sefanaia, Delai Batiki and Petero Mataca, during the course of investigations into this case. He submits that he is entitled to have these statements disclosed to him so as to prepare for his defence. His contention is that a non-disclosure of the said statements tantamount to a breach of his rights guaranteed under Section 15 of the Constitution.

[25] Furthermore, the Applicant contends that in terms of the provisions of Section 14 (2) (c) of the Constitution he is *to be given adequate time and facilities to prepare a defence, including if he or she request, a right of access to witness statements.*

[26] The Investigating Officer, Acting Detective Inspector Netava Yalayala, has explained the reasons why the said three statements have not been disclosed to the Applicant by the State. He confirms that the aforesaid three statements were recorded during the course of investigations into this case. However, after a careful analysis of the contents of the statements it was decided that the said three statements were not

relevant to the case, since it was obvious that the three witnesses had not seen nor heard anything pertaining to the main issue in this case. Therefore, it was decided that the statements were not to be disclosed to any of the parties. Subsequently the said three statements had been destroyed to avoid ambiguity.

[27] It is the opinion of this Court that the prosecution is at liberty to decide what evidence it would be relying on to establish its case. Therefore, the prosecution is at liberty to disclose to Court and to the Accused (Applicant) the material it deems to be relevant to the case.

[28] However, it is also the opinion of this Court that the prosecution should refrain from arbitrarily destroying or disposing of Police statements recorded during the course of investigations, even if the prosecution deems that the said statements were not relevant to the case.

[29] That said, having duly considered the applicable legal principles enunciated in the above judgments, relating to the circumstances in which a stay of proceedings may be granted, I am firmly of the view that the non-availability of the three statements is not a fit and proper ground to justify a stay of proceedings in this case.

[30] Since the said three statements are not available, the State has undertaken to make available the three witnesses during the course of the trial of this case. If the defence so wish they could call the said witnesses as defence witnesses. This is a suitable alternative remedy that would safeguard the interests of the Applicant and ensure a fair trial.

[31] The second ground on which a stay of proceedings is canvassed is on the basis that no DNA Report has been disclosed to the Applicant, although the State had originally submitted that they were relying on the DNA Report.

[32] In respect of this issue as well the Investigating Officer, Acting Detective Inspector Netava Yalayala, has explained the reasons why no DNA Report has been disclosed to the Applicant by the State. He has deposed in his Affidavit that buccal swabs were taken from the deceased and from the alleged crime scene during the course of the investigations in this case. However, there were no corresponding swabs uplifted from

the Applicant. The Officer states that the Applicant had refused to give his buccal swab during the investigations. The Applicant has categorically denies this position.

[33] It is clear from the above, that although swabs were taken from the deceased and from the alleged crime scene during the course of the investigations, they were not sent for DNA analysis, since no corresponding swabs were uplifted from the Applicant. Therefore, it is manifest that no DNA Report is available. It is not possible for the prosecution to make available a document which they do not have in their possession.

[34] For the aforesaid reasons, I am of the opinion that this application seeking a permanent stay of the proceedings is without merit.

Conclusion

[35] Accordingly, this application for a permanent stay of criminal proceedings in Lautoka High Court Criminal Case No: HAC 107 of 2022 is dismissed.

[36] I make no order for costs.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LAUTOKA
Dated this 25th Day of September 2024

Solicitors for the Applicant : **Anil Prasad Lawyers, Barristers & Solicitors, Lautoka.**
Solicitors for the Respondent : **Office of the Director of Public Prosecutions, Lautoka.**