

IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION

Criminal Miscellaneous No. HAM150 of 2015.

JAGATH KARUNARATNE

Applicant

v

STATE

Respondent

Counsel: Mr. A. Ravindra Singh for the Applicant
Mr. L. Fotofili for State.

Dates of hearing: 30 September and 30 October 2015

Date of Ruling: 4 November 2015

RULING

- [1] By way of Notice of Motion and accompanying Affidavit, the Applicant applies first for permanent stay of proceedings against him in the Magistrates Court at Suva and alternatively for

Constitutional Redress with the remedy being permanent stay of those proceedings.

[2] He claims that the charge he faces below is defective and not a charge known to Fiji Law.

[3] The charge he faces said to be contrary to sections 66(1)(i) and 67(a)(i) of the Crimes Decree 2009 reads:

“Jagath Kurunaratne [and another] together with others between the 1st day of August 2011 and the 27th day of August 2011 did an act (sic) namely the spray painting of words in different places between Nausori and Suva with the seditious intention of bringing into hatred or contempt or to excite disaffection against the Government of Fiji as by law established “

[5] Mr Ravindra-Singh submits that although there was a functioning government in Fiji in the years 2009 to 2013 which he chooses to call an “interim Government” and although it was the government of the day accepted as legitimate by all branches of society, it was not “established by law”, which are the words (and an element of the charge, he says) contained in the section of the Decree and in the charge which he faces. He submits that the 1997 constitution having been abrogated and the 2013 Constitution not then enacted, the interim Government was not established by law. As a result he submits, no person could be said to be acting seditiously to a “government established by law”.

[6] Before considering whether a stay of proceedings and/or relief by way of Constitutional redress is appropriate, it must be first stated that the substantive claim would appear to be misconceived. Apart from seeming to rely on the false premise

that only a Government being in place under an extant Constitution can be lawful, he also appears to be of the view that “established by law” means **a law** or legislation that legitimizes the particular Government in place; a misconception that would preclude the law of prescription, acquiescence or even the appointment of a government by a Head of State who is legally in office or in office by way of *omnia praesumunter*.

- [7] The application being in two parts, counsel for the State submits that it should be struck out and the two applications be made separately. This Court agrees that it could be construed as a two part application, but it would seem that the real application is for constitutional redress with a stay of proceedings being the redress. No matter what the application represents, this Court will determine the application on those two limbs to save time and resources in pre-empting further similar applications on the same point.
- [8] Much has been submitted by both counsel of the powers of this Court to determine whether there should be a stay of proceedings in the lower Court and whether it is appropriate for the Criminal Division of the High Court to entertain an application for constitutional redress.
- [9] There can be no doubt that this Court has very wide statutory and constitutional powers as well as inherent and ancillary jurisdictional powers to stay any proceedings in a Court below. The case law in Fiji is well settled.

Stay of Proceedings

- [10] 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.

- [11] 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.
- [12] 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 alternative avenues of redress and this court refuses to do so.
- [13] The application for stay on the grounds of abuse of charge is dismissed.

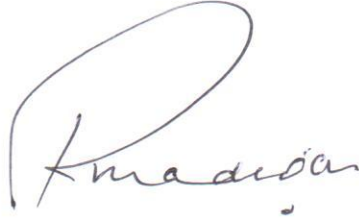
Constitutional Redress

- [14] The Constitution (2013) by section 44 provides for the right to apply for redress to a party who considers the Bill of Rights to have been contravened to his prejudice. That right is to be exercised by the High Court which has the original jurisdiction to hear and determine applications and to make such orders and give such directions as it considers appropriate (section

44(3)). A direction to stay proceedings in the Magistrates Court could in proper circumstances be such an appropriate order.

- [15] An application for constitutional redress is an application to the court in its civil jurisdiction, however, any application touching on matters of criminal procedure can and normally will be heard by a judge sitting in the criminal division.
- [16] It is of seminal importance to note however the provisions of section 44 (4) of the Constitution where it is provided:
- “The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.”*
- [17] This section codifies the decisions of the Privy Council in ***Chokolingo v A G of Trinidad and Tobago*** [1981]1 All ER244 and more recently in ***Tapper v DPP*** [2013]1Cr.App.R Part II, p134. . In these decisions, the Board stressed that precedence must be given to “parallel and collateral remedies” which might be available to an applicant for constitutional redress.
- [18] Quite clearly the applicant’s collateral and parallel remedies (herein) can be found in a submission of no case to answer in his trial and if unsuccessful there by an appeal to the Court of Appeal.

[19] The application for constitutional redress by staying proceedings below is also dismissed.



P.K. Madigan
Judge



At Suva
4 November, 2015