

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**MISCELLANEOUS CASE NO: HAM 90 of 2022**

**AJAY KUMAR**

**V**

**STATE**

**Counsel** : Mr. Aman Ravindra Singh for the Applicant  
Mr. Taitusi Tuenuku for the State

**Hearing** : 7 July 2022

**Ruling** : 28 July 2022

**RULING**

- [1] This is an application made by the Applicant pursuant to Section 15 (1) of the Constitution of the Republic of Fiji 2013 (“Constitution”). Section 15 (1) of the Constitution states: *“Every person charged with an offence has the right to a fair trial before a court of law.”*
- [2] The Applicant is the accused in Lautoka High Court Case No. HAC 116/2021. 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 Applicant has pleaded not guilty to the charge. The deceased was the Applicant’s de-facto wife.

[3] This application was filed in Court on 20 May 2022, by way of a Notice of Motion seeking the following orders from Court:

- (1) That I be allowed to exercise my legal rights to refuse submitting my buccal sample for the purposes of DNA analysis;
- (2) That the swabs and samples taken from the crime scene, items belonging to the victims and other evidence are tainted, contaminated and unreliable;
- (3) That the DNA test and evidence submitted by the Prosecution against me be excluded from trial;
- (4) That my Right to a Fair Trial be protected as provided for under Section 15 (1) of the Constitution; and
- (5) Any other orders that the Court may deem just in the circumstances of this case to facilitate the aforementioned orders sought.

[4] The Notice of Motion was supported by an Affidavit deposed to by the Applicant. Therein the Applicant *inter alia* states as follows:

- (1) That he has been informed and asked by the Police to submit to a DNA test and that the Police need his buccal sample for the purposes of the DNA analysis.
- (2) That he has been advised and believes that it is his choice to either submit or refuse to submit his buccal sample to the Police for the purposes of DNA analysis.
- (3) That he is exercising his choice and his legal right to refuse supplying his buccal sample for the purposes of DNA analysis.
- (4) That he is advised and believes that there are proper standard procedures to be followed when taking swabs and uplifting DNA samples from a crime scene, from a deceased person or a dead body.

- (5) That he is advised and believes that proper standard procedures nor protocols were followed by the Police when swabs were obtained from the crime scene, from items belonging to the victim and from other evidence.
- (6) That he is advised and believes that the DNA report submitted by the Prosecution confirms his position that there are mixed DNA findings from the DNA analysis.
- (7) That he is advised and believes that these mixed DNA findings further confirms his concern that the entire process of obtaining swabs and the test is not safe nor reliable and that the whole DNA sample obtained by the Police is tainted.
- (8) That he is advised and believes that once DNA samples are tainted, the entire DNA analysis becomes contaminated and unreliable.
- (9) That he is advised and believes that contaminated and unreliable evidence cannot be used in the gathering of evidence against an accused person and for the purposes of trial.
- (10) That he is advised and believes that any tainted, contaminated and unreliable evidence used against an accused person is dangerous and not in the interest of justice.
- (11) That he is advised and believes that the whole DNA evidence that the Prosecution is relying on has been contaminated and that he wishes to challenge the DNA sample currently with the Police.
- (12) That he is advised and believes that it is a violation of his Right to a Fair Trial if unreliable and contaminated evidence is admitted against him.
- (13) That he is advised and believes that his Right to a Fair Trial will be breached if he consents to the supply of his buccal sample for the purposes of DNA analysis.

[5] An Affidavit in Response was filed by Detective Sergeant 4943 Netava, a Police Officer based at the CID Department of the Lautoka Police Station. He is the Investigating Officer in the substantive matter- Lautoka High Court Case No. HAC 116/2021.

[6] Detective Sergeant 4943 Netava *inter-alia* deposes as follows:

- (1) That there is an application already filed before this Court by the State bearing Miscellaneous Case No. HAM 65 of 2022. In the said application the State is seeking a lawful order under Section 11 (3) of the Constitution for the Applicant to submit a buccal sample for purposes of DNA analysis.
- (2) That the legal choice and rights referred to by the Applicant in his Affidavit are already the subject of the State's application in HAM 65 of 2022.
- (3) That this application is an abuse of process as the same issues as taken up in this application will have to be decided by Court in HAM 65 of 2022.
- (4) That the orders that the Applicant seeks in this application are the same orders that the Court will make if the State's application is refused in HAM 65 of 2022.
- (5) That the integrity of DNA procedures and protocols are trial issues and is not to be determined at this stage of the proceedings.
- (6) Therefore, that this application is frivolous and misconceived and an abuse of process.
- (7) That for the said reasons this Court should dismiss the said application.

[7] This matter was taken up for hearing before me on 7 July 2022. At the outset, the Learned Counsel for the State submitted to Court that this application should be dismissed as it is an abuse of process. He relied on the contents of the Affidavit in Response filed by Detective Sergeant 4943 Netava and also on the pleadings filed in Miscellaneous Case No. HAM 65 of 2022.

[8] During the hearing both counsel for the Applicant and the Respondent were heard. Court also heard Mr. Iqbal Khan, Counsel who appears for the Applicant in the Miscellaneous Case No. HAM 65 of 2022. The Applicant also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

#### **Miscellaneous Case No. HAM 65 of 2022**

[9] This was an application filed by the State for Scientific Procedure pursuant to Section 11 (3) of the Constitution in HAC 116 of 2021. The application was filed on 11 April 2022 by way of a Notice of Motion, which was supported by an Affidavit deposed to by Detective Sergeant 4943 Netava. Ajay Kumar, the Applicant in the instant application was named as a Respondent in the said application.

[10] On 22 April 2022, the Applicant (Respondent in HAM 65 of 2022) filed a Reply in response to the Affidavit filed by Detective Sergeant 4943 Netava. In the said Affidavit the Applicant states that he is exercising his rights to refuse to provide his bodily sample for the purposes of DNA testing under the Constitution. He has further stated that since he has already been charged for the alleged offence of Murder that the State ought to have obtained evidence before charging him rather than charging him and then looking for further evidence.

[11] The Applicant has further submitted that the DNA testing by the State would violate his constitutional right of freedom from scientific procedure and that the State further compelling him to undergo DNA testing after he has been charged may infringe his rights against self-incrimination.

#### **Legal Provisions and Analysis**

[12] Section 11 of the Constitution is titled, Freedom from Cruel and Degrading Treatment. The Section is reproduced below:

*(1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately*

*severe treatment or punishment.*

*(2) Every person has the right to security of the person, which includes the right to be free from any form of violence from any source, at home, school, work or in any other place.*

***(3) Every person has the right to freedom from scientific or medical treatment or procedures without an order of the court or without his or her informed consent, or if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian. [Emphasis is mine].***

- [13] This application was filed by the Applicant on 20 May 2022. The application has been filed pursuant to Section 15 (1) of the Constitution, which provides that *“Every person charged with an offence has the right to a fair trial before a court of law.”*
- [14] As per the Notice of Motion filed, the Applicant seeks an order from Court for him to be permitted to exercise his legal rights to refuse submitting his buccal sample for the purposes of DNA analysis. Further he seeks orders for the DNA evidence submitted by the Prosecution against him to be excluded from his trial, on the basis that the said evidence is tainted, contaminated and unreliable.
- [15] However, prior to this application being filed by the Applicant, the State has filed an application in terms of Section 11 (3) of the Constitution (HAM 65 of 2022), seeking an order of Court to obtain the bodily sample of the Applicant in Criminal Case No. HAC 116 of 2021. The said application was filed by the State on 11 April 2022, which was over a month prior to the instant application being filed.
- [16] By way of his Affidavit filed on 22 April 2022, the Applicant has opposed the application made by the State. The primary grounds of opposition is that DNA testing by the State would violate his constitutional right of freedom from scientific procedure and that the State further compelling him to undergo DNA testing after he has been charged would infringe his rights against self-incrimination.

[17] I find that all the reliefs sought by the Applicant in the instant application have already been addressed in the Affidavit in Opposition filed by the Applicant in HAM 65 of 2022 and in the Written Submissions filed by the Applicant's Learned Counsel in the said matter. Those matters could be further advanced during the hearing of HAM 65 of 2022.

[18] Therefore, I agree with the State that this application filed by the Applicant is an abuse of process. The reliefs sought in the said application are superfluous and can be addressed when HAM 65 of 2022 is taken up for hearing.

[19] Therefore, taking into consideration all the above facts and circumstances, I am of the opinion that this application is without merit.

[20] Accordingly, the Notice of Motion filed by the Applicant is dismissed.



  
Riyaz Hamza  
JUDGE  
HIGH COURT OF FIJI

AT LAUTOKA

Dated this 28<sup>th</sup> Day of July 2022

**Solicitors for the Applicant** : Aman Ravindra-Singh Lawyers, Lautoka.  
**Solicitors for the Respondent** : Office of the Director of Public Prosecutions, Lautoka.