IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 121 OF 2023

BETWEEN **JOSEPH ABOURIZK**
Applicant

AND **THE STATE**
Respondent

Counsel : Mr. M. Thangaraj with Mr. M. Naivalu for Applicant
Mr. L.J. Burney for Respondent

Date of Hearing : 30 May 2023
Date of Ruling : 30 May 2023

RULING ON PERMANENT STAY APPLICATION

1. The Applicant through his Counsel Mr. M. Naivalu filed this Application on 26 May 2023 to permanently stay the proceedings of HAC 126 of 2015, a matter already fixed for trial in four days' time on 30 May 2023.

2. The Application is supported by an affidavit deposed to by Mr. Naivalu himself. It is the general practice that no application is allowed to be supported by an affidavit sworn by the applicant's legal practitioner himself. Still, I entertained this application in the interest of justice having considered Section 44 (1) of the Constitution in view that the Applicant has

been incarcerated or remanded for the last eight odd years and that he, being an Australian, all his relatives are supposed to be abroad.

3. In view of the submission by the Counsel for Respondent that this application, being filed just four days before the trial, is another attempt by the Applicant to further delay (delaying tactic) the trial proceeded as scheduled, I had to rush through the affidavit and the documents filed along with it to ensure that the trial takes place unhindered as scheduled. It has to be accepted that in view that the retrial was ordered by the Supreme Court as far back as November last year (2022) and the new trial was fixed by this Court in January this year (2023), the Applicant had ample time to make this application well before the scheduled trial date. Therefore, the State Counsel's claim that this is a delaying tack-tick cannot be ruled out.

4. Be that as it may, I shall address the issues raised by the Applicant in the interest justice because the application concerns the applicant's right to a fair trial.

5. The Applicant complains of what he describes as a 'travesty of justice' in that: he has been incarcerated for the past 8 years and being held back in remand awaiting retrial despite his conviction being quashed by the Supreme Court; despite all five assessors returning an opinion of not guilty, being convicted and sentenced to 14 years imprisonment; having his appeal to the Court of appeal dismissed and sentence being further enhanced to 25 years imprisonment and so on.

6. Mr Naivalu in his affidavit further states that pursuant to an application by the Director of Public Prosecutions (DPP), the Supreme Court on 23 August 2022 ordered a limited retrial by a High Court Judge other than the Judge who heard the case in the first instance, taking into consideration only the trial record without hearing fresh evidence. At the new trial, the High Court Judge was not supposed to refer to the summing up by his predecessor, the opinion of the assessors and the judgement of his predecessor and pass judgment uninfluenced by the views expressed by the Court of Appeal and the Supreme Court and as if he were hearing the matter de novo.

7. That on 9 November 2022, the Supreme Court reviewed its own decision and ordered a full-blown new trial by a High Court Judge other than the Judge who heard and decided the case in the first instance.

8. That on 10 May 2023, an application made by the Applicant for a second review and an interim stay was dismissed by the Acting Chief Justice in view of the recent decision of Muskan Balaggan v State Criminal Petition No. CAV0022 of 2016 which held that there can only be one review pursuant to Article 98(7) of the 2013 Fiji Constitution.

9. Mr Naivalu states that in that the proceedings before the Acting Chief Justice, his senior counsel Mr M. Thangaraj had attempted to show the Court a letter dated 28 April 2023, addressed to the State Counsel, raising a number of enquiries concerning the impending retrial which was objected to by the State Counsel, Mr Burney and the Court had advised that anything to do with the retrial had to be raised at PTC stage and had no place at that level.

10. The Applicant has sent a copy of that letter to the DPP but no response so far has been received from the trial Counsel or the Officer of the DPP. The Applicant has tendered a copy of the said letter dated 28 April 2023 (MN-7) to this Court and claims that it provides the basis for the present Application as none of the issues raised by it have been addressed or resolved at the pre-trial hearings. The Applicant is worried that the rights guaranteed under Articles 14(2)(c), 14(2)(e) and 14(2)(1) of the 2013 Fiji Constitution are likely to be at stake.

11. In Karunaratne v State [2015] FJHC 849; HAM 150.2015 (4 November 2015) Madigan J identifies the permanent stay jurisdiction of the High Court as coming within the Constitutional Redress jurisdiction under Section 44 of the Constitution.

12. Accordingly, if a person considers that any of the provisions of the Bill of Rights Chapter has been or is likely to be contravened to his prejudice, he can apply to the High Court under Section 44(2) of the Constitution for redress. The High Court has the original jurisdiction to hear and determine applications and make such orders and give such directions as it considers appropriate [Section 44(3)].

13. A direction to stay proceedings in the Magistrates Court could in proper circumstances be such an appropriate order. 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 be heard by a judge sitting in the Criminal Division.

14. The Applicant considers that his rights guaranteed under Articles 14(2)(c), 14(2)(e) and 14(2)(1) of the 2013 Fiji Constitution are likely to be contravened at the impending retrial. There is no such section as Section 14(2)(1) found in the Constitution. Under Section 14(2)(c) of the Constitution of course, every person charged with an offence has to be given adequate time and facilities to prepare a defence, including if he or she so requests, a right of access to witness statements; Under Section 14(2) (e) every accused has a right to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence.

15. The Applicant has been given adequate time and facilities to prepare a defence. The retrial was ordered by the Supreme Court way back in November 2022 and the pre-trial conference for the new trial was fixed in January 2023. Despite the direction of the Supreme Court that the High Court Judge shall hear and decide the case expeditiously, the Applicant was given adequate time upon his request to retain the legal counsel of his choice, Mr. Thangaraj from Sydney who is very much conversant with the affairs of his case. The Court and the prosecution were ready to proceed to trial from January 2023 and the delay occurred only because the accused were not ready.

16. As regards the right of access to witness statements, the prosecution indicated that nothing more is to be disclosed to the defence other than the witness statements that were already disclosed to the defence at the first trial. The prosecution appears to argue that as per the first Supreme Court Judgment which quashed the conviction of the Applicant, it was expecting this Court to determine (at the retrial) only on the narrowed-down issue of knowledge and control of the illicit drugs found in the car in which the Applicant was a passenger and therefore it was reasonable for them to assume that the defence has been adequately served with witness statements. It is reasonable for the prosecution to think in that way. The prosecution cannot create new evidence for the new trial because some evidence led in the first trial has been discredited by the Supreme Court.

17. In a pre-trial conference held in April 2023, the Counsel for Applicant for the first time indicated to Court that the defence was expecting to challenge the chain of custody and the analyst report at the new trial. I assume that all the witness statements relevant to the chain of custody and analyst report had already been disclosed to the defence before the first trial. If anything new was required to be disclosed, it was for the defence to make an appropriate application well in advance before the new trial. No such application has so far been made. It is clear that there is no absolute right of access to witness statements under Section 14 (2)(c) of the Constitution. It is only upon the request of the accused that such a right will emanate.

18. As regards the right to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence, I believe, the Counsel for Applicant is misconceived as to the scope of this section. In the letter addressed to the Senior State Counsel dated 28 April 2023, Mr Naivalu asserts that, as a matter of fairness, the accused is entitled to know in advance of trial what evidence on points 1-6 listed on pages 2 and 3 of that letter the ASP Neiko, whose evidence has been discredited by the Supreme Court, would give at the new trial.

19. It is my considered view that the right guaranteed under Section 14(2)(c) of the Constitution does not stretch to that extent. How would a prosecutor know in advance what evidence will be given by a witness he is intending to call at the trial? Of course, the prosecutor can and should give the list of witnesses he/she is intending to call at the trial and the pieces of evidence such as the analyst's report and other exhibits on which the prosecution intends to rely.

20. The Applicant has obtained a court order dated 24 May 2023 for the defence to be given access to inspect the material in the presence of the police and DPP officers. The prosecution has agreed to make the exhibits (the bags and the parcels of drugs) available to the defence for inspection before trial.

21. The Prosecution at pre-trial hearings indicated that Inspector Maciu, the investigating officer, one of the witnesses who had testified at the first trial is no longer available in Fiji as he has immigrated to the United States and that the securing his presence at the trial is difficult and doubtful. As an option, the prosecution offered to take his evidence via Skype and failing of which to tender his transcribed evidence given at the first trial. Mr Burney further submitted that the evidence of Inspector Maciu is not crucial at the retrial given the narrowed-down issues at the new trial.

22. As of today, there is no application before this Court seeking permission to take evidence via Skype and no guarantee from the prosecution that Maciu will be a witness for the prosecution at the retrial. In view of that the Applicant now wishes to raise the issue of non-availability of Maciu as a matter of this application.

23. The defence had in fact argued before the Supreme Court and this Court, that the entirety of the transcribed evidence of the first trial be tendered as evidence in this trial. Their objection is of course to a piecemeal approach.

24. The Supreme Court (25 August 2022) approved the Defence proposal to adopt the entire evidence from the first trial at the new trial. Dep J dissented but approved the piecemeal approach. However, that decision has now been overturned by a different panel of the Supreme Court.

25. The practice of adoption of evidence given by an unavailable witness in a previous judicial proceeding is not uncommon in Commonwealth jurisdiction. For example, the Indian Evidence Act and the Evidence Ordinance of Ceylon (as it then was), codified the rules of evidence of the United Kingdom. Section 33 of the Indian Evidence Act (identical to s 33 of the Evidence Ordinance of Ceylon) reads thus:

> Relevancy of certain evidence for proving, in subsequent proceedings, the truth of facts therein stated:- Evidence given by a witness in a judicial proceeding or before any person autorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case, the Court considers unreasonable :
>
> Provided - that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.
>
> Explanation - A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the Accused within the meaning of this Section."

26. This section lays down as to when the evidence of a witness in a previous judicial proceeding is relevant. It consists of two parts, the main section, and the proviso. The main section lays down the conditions which are required to be satisfied for the previous statement of a witness in a judicial proceeding to be admitted in evidence in the later proceeding.

27. This section has been interpreted and applied by the Supreme Court of India (V.M. Mathew Vs. V.S. Sharma and others (29/08/1995) (http://JUDIS.NIC.IN SUPREME COURT OF INDIA, Sundara Rajali Vs. Gopala Thevan and Another (AIR 1934 Madras 100) and

Brajaballav Ghose and Another Vs. Akhoy Begdi and Others (AIR 1926 Cal. 705) and by the Judicial Committee of the Privy Council in Dal Bahadur Singh's case (Dal Bahadur Singh and others Vs. Bijai Bahadur Singh and Others, (AIR 1930 PC 79).

28. This option is available to Court if the presence of Inspector Maciu cannot be secured at the retrial. No prejudice will be caused to the Applicant by adopting Maciu's previous evidence, which has been subjected to comprehensive cross-examination. The High Court will exercise its discretion not to grant relief in relation to an application if it considers that an adequate alternative remedy is available to the person concerned. [See: Section 44 (4) of the Constitution]

29. Mr Naivalu deposes in his affidavit that the Applicant has been incarcerated for the last 8 years, 3 years of which were spent in solitary confinement in the Maximum-Security Complex at Naboro; that these years within the prison system, particularly those within solitary confinement, Applicant has had an immense impact on his mental and psychological state; that following solitary confinement, he has developed issues with basic communication, recall and comprehension; that these issues became such a concern that he has sought the help of psychologist Lionel Rogers on a bi-weekly basis; that in compounding these pressures, his mental acuity has also been affected by the fact that his only child was born whilst he was in custody and has only seen her on four occasions since; that, in 2020, the Applicant was advised via a letter that his wife had commenced divorce proceedings and wished to cease communications in an effort to move forward with her life. That the Applicant has been in perpetual grief ever since and battles depression daily and he instructs that his mental state is of such fragility that there are times he has trouble remembering even simple things on a daily basis and has come to rely on prompting from staff for each stage of his day.

30. None of these claims of Mr Naivalu are supported by evidence and have no probative value as they constitute hearsay evidence. Mr. Naivalu obviously has no personal knowledge of any of the things deposed to in the affidavit on his client's behalf. Solitary confinement is a form of imprisonment in which an incarcerated person lives in a single cell with little or

contact with other inmates. It is hardly believable that the Applicant who is a foreigner was detained in solitary confinement. There is no medical evidence to substantiate that the Applicant is suffering from such medical condition as claimed by his counsel.

31. As I have said in my Bail Ruling, which refused bail to the Applicant, the Applicant has had access to the counsel of his choice while being in remand. Despite that, he has made no application of this nature until the present one was made. If the Applicant in fact has such medical condition that he is unable to recollect things in the past or any difficulty in giving evidence, the best course for him would be to make an application to have his previous evidence adopted at the new trial. Given the possibility of permitting the prosecution to read Inspector Maciu's previous evidence at the new trial, it is highly likely that an application by the Applicant to the same effect will be allowed in the interest of justice.

Following orders are made:

32. (a). Application for permanent stay of proceedings in HAC 126 of 2015 is refused.
(b). The case No. HAC 126 of 2015 is fixed for trial as scheduled.

Aruna Aluthge
Judge

30 May 2023

Solicitors:

Law Naivalu for Applicant
Office of the Director of Public Prosecutions for Respondent