

In the High Court of Fiji
At Suva
Civil Jurisdiction

Judicial Review No. HBJ 01 of 2022

State v Director Public Prosecutions and Attorney General of Fiji
Respondents

Ex-Parte Avinash Amit Nand
Applicant

Counsel: Mr. A. K. Singh for the Applicant
Ms. M. F. Faktaufon with Mr. V. Ram for the Respondents
Date of Ruling: 7 September, 2023

Ruling

1. This is an application for leave to apply for judicial review. The applicant had filed the following complaint in the Nausori Magistrates Court. On 15th April, 2020, when he was standing in his compound, Sonal Kumar, his neighbor slapped him on his head from his porch. His brother Prashant Chandra joined the scuffle. The applicant states that the DPP,(the first respondent) on 27th October, 2021, asked his solicitors for his file and took over the private prosecution in Nausori Magistrate Court. On 16th November, 2021, the DPP withdrew the charges and consented for all the accused to be acquitted. He complains that the decision of the DPP to take over the prosecution in Nausori Magistrate Court, withdraw the charges and consenting to all the accused to be acquitted was unfair and not made in good faith.

2. The DPP acted in breach of section 117(11) of the Constitution. His decision breached the principles of natural justice as:
 - (a) he *“failed to give reasons as why (he) took over the prosecution when (his) ...legal officer was an accused person”*.
 - (b) he did *“not let the Magistrate Court to decide on the matter”*.
 - (c) he did *“not allow the accused person to be heard before taking over the Prosecution”*.
 - (d) he *“failed to give or provide notice of all adverse documents or finding to me before pronouncing the decision...”*

3. The applicant seeks:
 - (a) An order for certiorari to remove the decisions of the DPP on 27 October, 2021 and 16th November, 2021.
 - (b) A declaration that the decision to take over the case in the Magistrates Court against Sonal Kumar, Prashant Roneel Chandra, Shashi Lata and Purwashi Prashna Kumar was biased.
 - (c) A declaration that the decision to withdraw criminal charges against Sonal Kumar, Prashant Roneel Chandra, Shashi Lata and Purwashi Prashna Kumar *“and have them acquitted thereafter were wrong in law, breach of the Constitution ... and abuse of process especially when Purwashi Prashna Kumar was and is a legal officer with the Respondent”*.
 - (d) A declaration that the failure by the DPP to give reasons for taking over the private prosecution against Purwashi Prashna Kumar was a breach of the principle of natural justice.
 - (e) A declaration that the DPP breached the rights of the applicant by failing to give them the right to be heard, notice of any unfavourable finding that he took into consideration or failed to take into consideration the evidence in favour of the applicant.
 - (f) A declaration that the DPP failed in his independent legal duties when it failed to direct Police investigation against his staff, Purwashi Prashna Kumar.

- (g) An Order under Or 53, r 8 directing the DPP to serve on the applicant a list of documents in his possession, custody or power relating to any matter in these proceedings and to file an affidavit verifying a list and serve a copy on the applicant.
 - (h) An Order for costs and damages.
4. The grounds upon which the reliefs are sought are as follows:
- a) The DPP failed to give or provide notice of all adverse documents or finding to the applicant before pronouncing the decision.
 - b) The illegality alleged by the applicant is that instead of entering a *nolle prosequi*, the DPP withdrew the charges and consented for his staff and her other family members be acquitted without a proper trial, in breach of the Constitution.
 - c) The action was biased and the DPP failed to given the application the right to be heard.
 - d) The DPP breached sections 117(11) of the Constitution and 52(2) of the Criminal Procedure Code Act.
 - e) The DPP breached his independent duties when it failed to properly assess the matter where the applicant was charged due to a brawl in his private land.
5. The notice of opposition filed by the respondents states that the DPP is empowered to take over and discontinue criminal proceedings instituted by another person at any stage before judgment is delivered, in terms of section 117(8)(b) and (c) of the Constitution.

The determination

6. The applicant seeks to review the decisions made by the DPP to take over his private prosecution and withdraw the charges.
7. The respondent states that he made the decisions in terms of sections 117(8) of the Constitution and 52(2) of the Criminal Procedure Act.

8. Section 117(8)(10) of the Constitution provides that:

The Director of Public Prosecutions may:

- a) *institute and conduct criminal proceedings;*
- b) ***take over criminal proceedings that have been instituted by another person or authority (except proceedings instituted by the Fiji Independent Commission Against Corruption);***
- c) ***discontinue at any stage before judgment is delivered, criminal proceedings instituted or conducted by the Director of Public Prosecutions or another person or authority (except proceedings instituted or conducted by the Fiji Independent Commission Against Corruption); and***
- d) *intervene in proceedings that raise a question of public interest that may affect the conduct of criminal proceedings or criminal investigations.....*

10) *In the exercise of the powers conferred under this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority, except by a court of law or as otherwise prescribed by this Constitution or written law.” (emphasis added)*

9. In my view, section 117(8)(b) empowers the DPP to take over criminal proceedings instituted by a person and sub-section (c) to discontinue such proceedings before judgment is delivered.

10. Section 52(2) titled “Powers of the public prosecutors” states:

If any private person instructs a lawyer to prosecute a criminal case the Director of Public Prosecutions may direct that a public prosecutor conduct the prosecution, and the lawyer privately instructed shall act in the matter under the direction of the public prosecutor. (emphasis added)

11. Section 52(2) empowers the DPP to direct that a public prosecutor conduct the prosecution in a case where a private person had instructed a lawyer to prosecute a criminal case.

12. With respect to *Withdrawal of (a) complaint*”, section 169 of the Criminal Procedure Act. provides:

1. *The prosecutor, may with consent of the court, withdraw a complaint at any time before a final order is made.*
2. *On any withdrawal under subsection (1) –*
 - (a) *Where the withdrawal is made after the accused person is called upon to make his or her defence, the court shall acquit the accused;*
 - (b) *Where the withdrawal is made before the accused person is called upon to make his or her defence, the court shall make one of the following orders –*
 - (i) *An order acquitting the accused;*
 - (ii) *An order discharging the accused; or*
 - (iii) *Any other order permitted under this Act which the court considers appropriate. (emphasis added)*

13. It has been held that the decision of the DPP on such matters can only be challenged by judicial review in very limited, rare and exceptional circumstances.

14. In *Matalulu & Anor v Director of Public Prosecutions*, [2003] 4 LRC 712 at pags 735 to 736, the judgment of the Supreme Court declared:

It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.

... It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

1. *In excess of the DPP's constitutional or statutory grants of power- such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)).*
2. *When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion- if the DPP were to act upon a political instruction the decision could be amenable to review.*
3. *In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.*
4. *In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.*

There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.” (emphasis added, underlining mine)

15. Lord Carswell in *Marshall v Direction of Public Prosecutions* [2007] UKPCC 4 at pg 565 said:

*The position and functions of the DPP are such that judicial review of his decisions though available in principle, is highly exceptional remedy' ... Where policy considerations come into the decision. It is particularly difficult of a court to review it, since it may depend on a range of factors on which the responsible prosecutor is best equipped to reach a sound conclusion. These facts were well expressed in the judgment of the Supreme Court of Fiji in *Matalulu v DPP* [2003] 4 LRC 712 at 735 – 736, which was cited with approval by the Board in *Mohit v DPP of Mauritius* [2006] UKPC 20, [2006] 5 LRC 234. (emphasis added)*

His Lordship reserved the view whether the DPP would be required to give reasons in that case. The DPP had decided not to bring a prosecution where a man was shot by police officers.

16. In *R v Director of Public Prosecutions* [2014] 2 WLR 190 at 193 it was stated that:

... the court examining the decision not to prosecute is not vested with broad jurisdiction to exercise its judgment and second guess the Director's decision and direct reconsideration of the decision simply because the court itself would have reached a different conclusion. The remedy [of judicial review] is carefully circumscribed. In the decided cases different epithets have been applied to highlight how sparingly this jurisdiction should be exercised. The remedy is "highly exceptional", "rare in the extreme", and "very rare indeed". (emphasis is added, underlining mine)

17. It is contended that the DPP breached the applicant's right to natural justice. The applicant was not given reasons for taking over the prosecution and withdrawing the complaint.

18. In my view, the DPP is not required to inform or give reasons to a party.

19. As the Supreme Court of Bermuda in *Police Constable GA v The Director of Public Prosecutions & Ors*, [2021] SC (Bda) 58 Civ stated in the following passage as cited by Kumar CJ in *Malani v Director of Public Prosecutions*, [2021] FJHC 235; HBJ 02.2021 (10 September, 2021):

...there is no requirement in the Constitutional provisions that the victim of the alleged crime must be consulted or informed before arriving at the decision not to prosecute. As the decision in Matalulu approved by the Privy Council in Jeewan Mohit, makes clear "nor is it easy to conceive situations in which such decisions would be reviewable for want of natural justice." (emphasis added)

20. The applicant also alleges bias on the part of the DPP when he made the decision in favour of his own staff.
21. On the allegations of bias, I would cite *Young v Frederick* [2013] 2 LRC 179. The Eastern Caribbean Court of Appeal stated:

*The decided cases show when challenges may be made to the decisions of the DPP. Such a challenge will succeed where one can show by evidence bad faith, fraud, corruption or dishonesty and the like (see *Matalulu v DPP*...). **The granting of relief against the decision of the DPP not to prosecute is an exceptional remedy. Mere grounds for suspicion will not suffice. All of the cases say that.**" (emphasis added)*

22. In my view, the DPP has not acted in excess of his constitutional and statutory authority. The applicant has not established that the DPP acted in bad faith.
23. I find that there is no arguable case on breach of natural justice or excess of jurisdiction or no jurisdiction for which leave to judicial review should be granted.
24. **Orders**
- a) The application for leave to apply for judicial review is declined.
 - b) The application shall pay the respondents costs summarily assessed in a sum of \$1500.00.



A. L. B. Brito-Mutunayagam

A. L. B. Brito-Mutunayagam
JUDGE
7th September, 2023