

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CIVIL JURISDICTION**

**JUDICIAL REVIEW NO. HBJ 01 of 2023**

**IN THE MATTER** of an application by **AMRIT SEN** and **SHUMEDHA** for Judicial Review under Order 53 of the High Court Rules 1988

And

**IN THE MATTER** of Decisions purported to be made by the **DIRECTOR OF PUBLIC PROSECUTIONS** on or about 7 January 2021

**BETWEEN** : **AMRIT SEN** of Walievu, Labasa, Lawyer and  
**SHUMENDRA CHANDRA** of Lajonia, Labasa.

**APPLICANTS**

**AND** : **DIRECTOR OF PUBLIC PROSECUTIONS**  
**THE ATTORNEY-GENERAL OF FIJI**

**RESPONDENTS**

**Coram** : **Banuve, J**

**Counsels** : **Mr S. Valenitabua for the Applicant**  
**Ms C. Mangru with Ms Drova, J for the Respondents**

**Date of Hearing** : **18<sup>th</sup> November 2024**

**Date of Ruling** : **03<sup>rd</sup> December 2024**

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# RULING

## (Application for Leave to Apply for Judicial Review)

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### 1. INTRODUCTION

1. On 10<sup>th</sup> March 2023 the Applicants, Amrit Sen and Shumedha Chandra through its then counsel, A.K Singh Law, filed an Application for Leave to Apply for Judicial Review of the decision of the Director of Public Prosecutions dated 13<sup>th</sup> December 2022 pursuant to Order 53 of the High Court Rules 1988;
  - (a) to take over the private prosecution being Case No 1 of 2022 in the Labasa Magistrates Court against Nitesh Chandra, Chote Lal and Jawahir Lal from the Applicant and had them discharged without a fair trial;
  - (b) Failed to consider the principles of Natural Justice,
  - (c) Failed to give reason for its decision.
  - (d) Failed to assess the evidence properly and independently against the Applicant
2. A Notice of Opposition was filed by the Respondents on 5<sup>th</sup> April 2023.
3. A Notice of Change of Solicitors was filed by Redwood Law on behalf of the Applicants on 18<sup>th</sup> November 2024.
4. Written submissions were filed by the Applicants in Court on 18<sup>th</sup> November 2024 in support of their Application for Leave to Apply for Judicial Review and the Respondents filed their submissions in Court also on 18<sup>th</sup> November 2024.
5. The Court found both submissions helpful in its deliberation.
6. The recommendation of the Law Commission of the United Kingdom<sup>1</sup> that an application for judicial review must be made in two stages has been adopted and applied in Fiji. It is first necessary to apply for and obtain , leave to move for judicial review, and only if and to the extent that such leave is granted will the court proceed to hear the substantive application for judicial review (r.3(1)). The applicant for leave must;

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<sup>1</sup> Paragraph 53/14/54 the **Supreme Court Practice 1999, Volume 1**

- (a) have a “sufficient interest”;
- (b) have a case sufficiently arguable to merit investigation in a substantive hearing;  
and
- (c) must apply for leave promptly

**7. Need to specify relief sought**

- a. The relief sought should be related to the measure that is challenged and should reflect the aim that the judicial review application is designed to fulfill

**8. Need to specify grounds on which relief sought**

The notice must set out the grounds for relief. In order to obtain judicial review the applicant must establish one or more of the substantive heads of judicial review, such as abuse of discretion, error of law, or breach of procedural requirements. The applicants should state the essential issues of fact or law which demonstrate that the head of review is applicable and that the public body has acted unlawfully in some way

**2. APPLICATION FOR LEAVE**

**9. Sufficient Interest.**

In most instances, *as in this case*, the issue of sufficient interest is not deemed contentious as at the leave stage the only question is whether a sufficient interest or *locus standi* as a preliminary issue has been established (*R. Commissioners of Inland Revenue, ex.p National Federation of Self Employed and Small Businesses Ltd* [1982] A.C 617)

**10. Arguable Case**

The applicants must demonstrate that there is an arguable case that *a ground for seeking judicial review exists*.<sup>2</sup> The English Court of Appeal has indicated that leave should be granted where a point exists which merits investigation on a full *inter partes* basis, with all the relevant evidence and arguments on the law.<sup>3</sup> Conversely, if

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<sup>2</sup> A judicial review is not an appeal.

<sup>3</sup> *R v Secretary of State for Home Department, ex p. Rukshanda Begum* [1999] COD 107

the applicant cannot demonstrate an arguable case that a ground for review exists, leave will be refused.<sup>4</sup>

11. Section 117(1), (3),(8) and (10) of the Constitution provides;

- (1) *The office of the Director of Public Prosecutions established under the State Services Decree 2009 continues in existence.*
- (2) ....
- (3) *The Director of Public Prosecutions shall be appointed by the President on the recommendation of the Judicial Services Commission following consultation by the Judicial Services Commission with the Attorney-General.*  
.....

(8) *The Director of Public Prosecutions may-*

- (a) *institute and conduct criminal proceedings;*
- (b) *take over criminal proceedings that may have been instituted by another person or authority (except proceedings instituted by the Fiji Independent Commission against Corruption)*
- (c) *discontinue, at any stage before judgement 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*
- (9) .....
- (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 a written law.*

12. An application to judicially review the decision of the Director of Public Prosecutions is not novel in this jurisdiction, with the leading authority being *Matalulu & Anor v DPP* [2003] 4 LRC 712 , a ruling of the Supreme Court which has

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<sup>4</sup> Lewis **JUDICIAL REMEDIES IN PUBLIC LAW**, London, Sweet & Maxwell, 1992 at p 230

been disseminated in the Commonwealth<sup>5</sup>. Both parties to these proceedings are aware of the import of the *Matalulu* decision to the supervisory jurisprudence of this jurisdiction.

13. The Applicant summarizes the key principles from *Matalulu* in its submissions<sup>6</sup>;
  - (i) Independence of Prosecutorial Function
  - (ii) The DPP's decision to prosecute, not prosecute are generally discretionary and protected from interference by other branches of government.
  - (iii) The principle ensures the independence of the prosecutorial authority of the Executive Branch of Government.
  
14. The Supreme Court in *Matalulu* established that the independent prosecutorial decisions of the Director of Public Prosecutions may be sparingly reviewed, in the following rare and exceptional circumstances;
  - (i) **If the DPP acted beyond his constitutional and statutory powers;**
  - (ii) **If the DPP acted under the directions and control of another person or authority and failed to exercise his independent discretion;**
  - (iii) **If the DPP acted in bad faith; or**
  - (iv) **Where the DPP has fettered his discretion by a bad policy.**
  
15. Certain cautionary statements were made by the Supreme Court in *Matalulu*, on the exceptional nature of the review of prosecutorial decisions.
  
16. It is sufficient, 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 to 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.<sup>7</sup>

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<sup>5</sup> *Marshall v DPP* [2007] 4 LRC 557(PC); *R(F) v DPP* [2014] 2 WLR 190; *Young v Frederick* [2013] 2 LRC 179

<sup>6</sup> Paragraph 4.2.1 **Submissions on Application for Leave to Apply for Judicial Review on Behalf of the Applicants**

<sup>7</sup> p 28

17. There may be other circumstances, not precisely covered by the above,<sup>8</sup> 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.*<sup>9</sup>
18. The appropriate forum for determining the correctness of the prosecutor's view is the court in which the prosecution is commenced.<sup>10</sup>

### 3. ANALYSIS

19. The Supreme Court in *Matalulu*, in allowing a limited right of review of prosecutorial discretion, had specifically qualified its finding with cautionary statements on the polycentric<sup>11</sup> character of official decision making, encompassing policy and public interest consideration, (not susceptible to judicial review), making it difficult for the Court to assess such cases on merit.
20. On prosecutorial discretion, the normal grounds of review; *improper purpose not amounting to bad faith, irrelevant/relevant considerations, exercise of power (unreasonably) and want of natural justice*, were unlikely to be vindicated because of the width of the consideration, to which the DPP may properly have regard to, in making the decision to institute or discontinue proceedings.
21. The Applicant has not heeded the cautionary statements issued by the Supreme Court in *Matalulu*, when formulating the grounds on which leave for judicial review the decision of the Director of Public Prosecutions of 13<sup>th</sup> July 2022, to take over the private prosecution of Case No 1 of 2022, in the Labasa Magistrates Court, are sought. The grounds for review preferred are;

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<sup>8</sup> Ibid at 4

<sup>9</sup> p 29

<sup>10</sup> Also note Justice Shameem's comment in *Nata v State* [2004] FJHC 181.. " **Lastly, the ultimate check on the decision to prosecute and to lay charges is the trial court. If the DPP charges an accused person on the basis of insufficient evidence or where the accused was not for instance, morally blameworthy, the courts can provide the ultimate safeguard for the accused in the acquittal or discharge without conviction**"

<sup>11</sup> Having more than one centre

- (i) Bias**
- (ii) Illegality**
- (iii) Acted unreasonably, irrationally or arbitrarily**
- (iv) Acted in breach of the rules of Natural J**

22. In considering the application for leave, it is necessary that established principles of judicial review, be applied. Of note, is the requirement that an application for leave must be supported by an affidavit stating the facts relied on.<sup>12</sup>

23. On a perusal of the facts deposed by Amrit Sen and filed on 10<sup>th</sup> March 2023, several issues are noted;

(i) The facts deposed are those pertaining to an incident which occurred on 5<sup>th</sup> June 2022 at Nasikasika, Macuata in which the Applicant purportedly had an altercation with 3 individuals, Jawahir Lal, Chote Lal and Nitesh Sharma.

(ii) The Applicant, Sen had initiated a private prosecution against these individuals in Case No 1 of 2022 in the Labasa Magistrates Court which the DPP has then taken over and discontinued by filing a *nolle prosequi* on 13<sup>th</sup> December 2022.

(iii) Sen had provided all material in his custody and he deposes that the failure of the DPP to properly consider the material made available to him, makes his decision reviewable.

24. In *Matalulu*, the Supreme Court established that it is possible to in rare and exceptional instances, to review prosecutorial discretion ,where the DPP has demonstrably;

- (i) acted beyond his constitutional and statutory powers;**
- (ii) acted under the direction and control of another person;**
- (iii) acted in bad faith;**
- (iv) fettered his discretion by bad policy**

25. In this regard judicial review practice requires (O.53, r.3(2)), an application for leave to review prosecutorial discretion, must be supported by an affidavit stating the

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<sup>12</sup> O.53. r.3 (2))

facts relied on by the Applicant(s), to establish the rare and exceptional circumstances that may warrant the grant of leave.

26. In particular, the facts deposed in the affidavit must be geared to supporting one or more of the exceptional circumstances outlined in *Matalulu* where a review of prosecutorial discretion may be warranted.

**4. Has the Applicant complied with the requirements of *Matalulu* and O.53, r.3(2)?**

27. Rather than frame the grounds of review in accord with the *rare* and *exceptional* circumstances outlined in *Matalulu*, the Applicants relies on traditional review grounds which the Court had cautioned are unlikely to be vindicated given the width of the prosecutorial discretion exercised by the DPP. In written submissions the Applicants summarize the grounds on which leave for judicial review is sought<sup>13</sup>;

**(i) Bias**

DPP was *discourteous* in ignoring the complaint of the Applicants as ‘victims’ in their request for an explanation as to why a *nolle prosequi* was filed.

**(ii) Illegality**

DPP *misinterpreted* his powers and that of his office, under the 2013 Constitution, especially when such powers to intervene are subject to judicial review by the Court and especially, when that power to *nolle* the private prosecution were done for the wrong purpose or with ulterior motive.

DPP *failed to take into account relevant considerations* (the alleged actions of Nitesh Sharma, Chote Lal and Jawahir Lal)

**(iii) Acting unreasonably, irrationally or arbitrarily**

The decision of the DPP to intervene only to issue *nolle prosequi* in the absence of evidence justifying such action is so *unreasonable* that no reasonable DPP acting lawfully could do it

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<sup>13</sup> Paragraph 5.4.1 **Submissions on Application for Leave to Apply for Judicial Review on behalf of the Applicants**



(iv) **Breach of Natural Justice**

The Applicants voice, as victims, *were not heard* by the Police leading to the termination of police investigations.

28. The Applicant, in making these submissions, premised wholly on a subjective version of events, overlooks the restrictive and exceptional nature that a review of prosecutorial discretion must entail, as pointed out in *Matalulu*. Unless there is clear evidence that the DPP has demonstrably acted in the manner identified in *Matalulu*, the Court is unlikely to be able to realistically assess the application for leave for judicial review, *on merit*, given the width of the prosecutorial discretion exercisable by the DPP.
29. In contrast, the Applicants grounds of challenge are wholly premised on a subjective version of events that took place in Nasikasika, Macuata on 5<sup>th</sup> June 2022.
30. The Supreme Court in *Matalulu* had expressly described the polycentric nature of prosecutorial discretion (encompassing wide policy and public interest issues) and raising caution against the very practice the Applicants adopts in this instance in challenging the decision of the DPP on a wholly subjective version of events which the DPP itself had deposed, as insufficient to warrant the laying and prosecution of charges in an affidavit filed on 14<sup>th</sup> June 2023.
31. The Applicant has also not fully complied with the requirement of O.53, r.3(2), in that rather than setting out in the Affidavit in Support the **facts** in full, that its Application for Leave for Judicial Review is premised on, it expects the Court to draw **inferences** from a subjective narration about the adverse conduct of the DPP.<sup>14</sup>
32. In contrast, the Acting DPP, in his Affidavit in Response filed on 14<sup>th</sup> June 2023, has clearly set out that that he had received the material which the Applicants relied on to initiate the private prosecution and reviewed them in accordance with DPP's *Prosecution Code 2003* and advices rendered internally and concluded that there was insufficient evidence to prosecute, which meant that a properly directed court in

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<sup>14</sup> Chote Lal & Co seem to have granted prosecutorial immunity to testify and be State witnesses in the prosecution against the Applicant. If not, then the Court can make that inference from the acts and omissions of the Police and the state for that matter (paragraph 5.4 .1 (v), p 23 –**Submissions on Application for Leave to Apply for Judicial Review on behalf of the Applicants.**

accord with the law was unlikely to convict the accused persons and based on this sanction a *nolle prosequi* was entered and filed in Court on 13<sup>th</sup> December 2022.<sup>15</sup>

33. The DPP has clearly taken into account also the version of events preferred by the Applicants and concluded that it was insufficient to lead to a successful prosecution, when reviewed internally and taking into account the DPP's Prosecution Code. There can therefore be no basis for the Applicant to challenge the decision of the DPP given the width of the prosecutorial discretion clarified by the Supreme Court in *Matalulu*.

## 5. Preliminary Finding

34. The Court finds that the Applicants have not made out an arguable case that a ground for seeking judicial review exists on the rare and exceptional basis, identified in *Matalulu*, to merit further investigation on an *inter parte* basis, on the following grounds;

- (i) In clear disregard of the cautionary approach advocated in *Matalulu*, the Applicant seeks to limit the exercise of prosecutorial discretion to a subjective version of events that transpired on 5<sup>th</sup> June 2022, an approach which could not possibly be aligned with the Supreme Court directive on the polycentric nature of prosecutorial discretion. Consequently, there is nothing of objective evidentiary value available to the Court to make an assessment on merit that an arguable case warranting further investigation has been made out.
- (ii) Based on a subjective version of events the Applicant expects the Court to have been satisfied that it has made out an arguable case warranting the grant of leave for judicial review based on *inferences* the Court ought make about the DPP's conduct. This is a position, not only contrary to judicial review practice, but which the caution rendered by the Supreme Court in *Matalulu* aptly applies, that *inferences* could not possibly vindicate a challenge against prosecutorial discretion, given its width

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<sup>15</sup> In *Malani v DPP & AG-JR 2/21* this Court stated that in the *Criminal Procedure Act 2009*, the *Prosecution Code* and in *Osborne v Worksafe New Zealand* [2018] 1 NZLR 444 and *Marshall v DPP* [2007] 4 LRC 557 (Privy Council), the DPP must be satisfied that-

- (i) **There is sufficient evidence and it is in the public interest to prosecute;**
- (ii) **There is reasonable prospect of conviction bearing in mind the reliability of the evidence and the likely defence case.**
- (iii) **There is credible evidence which is capable of belief upon which the Court properly directed in accordance with law is more likely than not, to convict the accused of the charge alleged.**

## 6. Further Finding

35. The Court notes that the Applicants counsel had sought leave also to judicially review the decision of the Director of Public Prosecutions of 7<sup>th</sup> January 2021, in *Malani v DPP & AG*-Judicial Review No HBJ 02 of 2021 that no charges would be laid against the then Attorney-General in relation to his alleged involvement in bombing incidents in 1987.
36. In *Malani* counsel had raised several grounds of challenge against the decision of the DPP, to which the Court had fully endorsed the approach outlined by the Supreme Court in *Matalulu*, on the limited instances in which the exercise of prosecutorial discretion by the DPP could be subjected to review.
37. In *Malani* the Court accepted that the grounds of review preferred by the Applicant, and pursued by counsel against the exercise of prosecutorial discretion, which it could determine were ;
- (a) The DPP acted *illegally* as he did not have the authority to terminate criminal proceedings against the Attorney-General;
  - (b) The Applicant was *denied the right to be heard* on the decision by the DPP to terminate the investigations against the Attorney-General;
  - (c) The DPP was *biased* in his decision to terminate the proceedings against the Attorney-General.
38. The Court notes that the similarity in the grounds of challenge preferred in *Malani*, to those preferred in the current case, are not coincidental because counsel for the Applicant in that case was the same as in the current matter.
39. In *Malani* the High refused to grant leave to review the prosecutorial discretion exercised by the DPP that no charges would be laid against the then AG for events in which he was allegedly involved in 1987, on the basis that the Applicant had not made out an arguable case on the limited basis outlined in *Matalulu & Anor v DPP* [2003] 4 LRC 712.
40. The Court in *Malani* refused leave to judicially review the decision of the DPP on the following basis;

## 1. Illegality

Prior to instituting criminal proceedings the DPP must be satisfied and sure that:-

- (i) There is sufficient evidence and it is in the public interest to prosecute;
- (ii) There is reasonable prospect of conviction bearing in mind the reliability of the evidence and likely defence case;
- (iii) There is credible evidence which is capable of belief which the Court properly directed in accordance with law is more likely than not, to convict the accused of the charge alleged

41. Based on a press release issued by the DPP on 7 January 2021 indicating that in his opinion there was insufficient credible evidence to support criminal charges against the AG, the Court found that the DPP was fully conversant with the tests laid down in the Codes and in *Osborne v Worksafe New Zealand* [2018] 1 NZLR 444 and *Marshall v DPP* [2007] 4 LRC 557, and held;

*“The Court has no hesitation in holding the DPP acted within the powers conferred upon him by s 117(8)(a) of the Constitution, s54 of CPA and the Prosecution Code (in particular Code 4.1) and as such acted legally”*

## 2. Breach of Natural Justice

The primary ground for review sought in *Malani* against the exercise of prosecutorial discretion was that the DPP had made the decision that no charges would be laid against the AG without first informing the Applicant, as complainant.

In holding that this ground had no merit and was misconceived, the High Court drew support from other Commonwealth jurisdictions like Bermuda<sup>16</sup> and New Zealand<sup>17</sup> and on the absence in the Fiji Constitution of a provision that the victim of alleged crime must be consulted or informed before the decision not to prosecute was made.

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<sup>16</sup> *Police Constable GA v The Director of Public Prosecutions & Ors* [2021] SC (Bda) 58 Civ, which in itself had relied on *Matalulu*

<sup>17</sup> *Osborne v Worksafe New Zealand* [2018] 1 NZLR 444

### 3. Bias

The allegation of bias was premised on the past association of the DPP with the then AG as a former Solicitor-General. Relying on common law authority the High Court indicated that it was for the Applicant to show clear evidence that there is a real possibility or a danger that the decision of the DPP to not lay charges against the Attorney-General was influenced by his association with the Attorney-General.

The High Court held that the Applicant had failed to produce any evidence to prove that the DPP was biased in coming to a decision to not institute criminal proceedings against the Attorney-General and the claim for bias was based on mere assertions, suspicion and speculation.

42. In *Malani* the Court ordered that the Amended Application for Judicial Review of the DPP's decision of 7<sup>th</sup> January 2021, filed on 6<sup>th</sup> May 2021 and 16<sup>th</sup> August 2021 be dismissed and struck out.
43. It is noted that the *Malani* decision has not been appealed, (or has not been overturned), and the fact that it has not been reviewed raises the query as to the motive of the Applicants counsel in seeking leave to judicially review the prosecutorial discretion of the DPP, on substantially similar grounds of review that he had raised unsuccessfully, in *Malani*. The Court, will not, on a judicial review application act as a "court of appeal" from the body concerned.<sup>18</sup>
44. This Court, is bound however by the issue of *judicial comity* to follow the decision in *Malani v DPP & AG*-Judicial Review No 2 of 2021, a decision of another judge of first instance in refusing leave to judicially review the decision of the DPP, in this instance, of 13<sup>th</sup> December 2022 to take over private prosecution of Case No 1 of 2022 and discharging the persons charged without trial .
45. Modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another first instance [of coordinate jurisdiction] unless he is convinced that the judgement was wrong.<sup>19</sup>

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<sup>18</sup> Paragraph 53/14/19-The Supreme Court Practice 1999, Vol 1

<sup>19</sup> Halsbury, 4<sup>th</sup> ed, vol 26, para 580

46. In the Court's respectful view, the position taken by the late Chief Justice in *Malani* was correct on the traditional grounds of review preferred there and here when applied to the facts of the current case serve to have the Application for Leave for Judicial Review also dismissed and struck out with costs.

### ORDERS

The Court orders that:-

- (1) The Application for Leave to Judicially Review the Director Public Prosecution's decision of 13<sup>th</sup> December 2022 filed on 10<sup>th</sup> March 2023 be dismissed and struck out.
- (2) Applicants to pay the Director of Public Prosecutions, cost of this proceeding assessed in the sum of \$3,000.00 within 21 days from the date of this Ruling



*Savenaca Banuve*  
Savenaca Banuve  
Judge

At Suva  
03<sup>rd</sup> December 2024