MAHENDRA PAL CHAUDHRY v STATE (HAM0034 of 2011)

HIGH COURT — MISCELLANEOUS JURISDICTION

GOUNDAR J

12 September 2011, 25 July 2012

Criminal law — money laundering — false statements — income tax fraud — pre-trial orders — stay of prosecution — abuse of process — adequacy of pleading — disclosure of offence — applicant was former Prime Minister of Fiji — charged with money laundering and income tax fraud — interlocutory application made seeking stay of prosecution or quashing of pleading — whether prosecution amounted to an abuse of process — whether prosecution information actually disclosed an offence — Exchange Control Act ss 3, 4, 26(1)(a), 39(4), s 1 — Income Tax Act ss 3(1), (4), 95(1), 100(1) — Penal Code ss 47, 121(b) — Proceeds of Crime Act ss 69(1), (2)(a), (3)(b), (4).

Mr Mahendra Pal Chaudhry, who was Prime Minister of Fiji during 2001 and 2002, was charged with three counts of breach of the Exchange Control Act, five counts of money laundering and four counts of making false statements in his income tax returns. By way of an interlocutory motion supported by an affidavit, he sought two pre-trial orders. The first was an order for a stay of prosecution on the ground of abuse of process. The second was an order to quash the Information for not disclosing an offence. This decision dealt only with Mr Chaudhry's interlocutory application.

Held –

(1) The circumstances which may give rise to abuse of process may vary in each case. Abuse may arise from the methods used to investigate the offence. It may arise on the allegation that the accused was being prosecuted more than once for what is in effect the same offence. It may arise from misuse of the process of the court to escape statutory time limits.

(2) There was no basis to conclude that Mr Chaudhry would not be prosecuted in future for any offence arising from the donated funds. From the government's point of view, serious allegations surfaced in the public domain against one of their senior cabinet ministers. An appropriate inquiry was therefore commenced.

(3) The Prime Minister never suggested in his correspondences to Mr Chaudhry or to the public at large that he would enforce the findings of the inquiry on the Reserve Bank or the DPP. To do so would have been interfering with the independence of those institutions and contrary to good governance.

(4) A stay could not be a remedy for grievance that Mr Chaudhry had against a private law firm acting in a conflict of interest. In any event, Mr Chaudhry had not been able to establish before the Court that the law firm, Munro Leys acted in conflict of interest at any relevant time.

(5) Mr Chaudhry himself was the Minister of Finance when the allegations against him surfaced. There could not be an abuse of process by the police for electing one lawful procedure when there were other procedures available in the course of criminal investigation to obtain evidence.

(6) Mr Chaudhry was never charged or prosecuted for making false tax return. Nor had he been tried for a charge of making a false tax return. In those circumstances, a plea of double jeopardy was unavailable to him on the basis that he had paid his outstanding taxes without judicial intervention.

(7) The charges of making a false statement in an income tax return under the Penal Code were permanently stayed for an abuse of process arising from the same conduct being time barred under the Income Tax Act. The money laundering charges were quashed on the ground that the Court had no jurisdiction to try those charges.

Appeals allowed in part

Cases referred to

Connelly v Director of Public Prosecutions [1964] 2 All ER 401; *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497; *Hunter v Chief Constable of the West Midlands Police (Birmingham Six case)* [1981] 3 All ER 727; *Moti v R* [2011] HCA 50 (7 December 2011); *R v Brentford Justices, Ex parte Wong* [1981] 1 All ER 884; *R v Derby Crown Court, Ex parte Brooks* (1985) 80 Cr App R 164; *R v Heston-Francois* [1984] 1 All ER 785, cited.

Chu Piu-wing v Attorney-General [1984] HKLR 411; *R v Abu Hamza* [2007] 1 Cr App R 27; *R v Croydon Justices ex parte Dean* [1993] QB 769; *State v Manoj Kumar & anr* HAM0019 of 2003S; *State v Peceli Vuniwa* HAC 31 of 2005; *State v Volivale* Criminal Case No.HAC030(A) of 2005 (2 June 2009); *Toga v State* HAR002.2009; *Vakalalabure v The State* CAV0003 of 2004S, considered.

P. Williams QC with H. Phillips instructed by *Gordon & Chaudhry Lawyers* for the Applicant

C. Grossman QC with E. Yan,g N. Tikoisuva and S. Naidu instructed by *Office of the Director of Public Prosecutions* for the Respondent

[1] Goundar J. The applicant is charged with three counts of breach of the Exchange Control Act, five counts of money laundering and four counts of making false statements in his income tax returns. By way of a motion supported by an affidavit, he seeks two pre-trial orders. The first is an order for a stay of prosecution on the ground of abuse of process. The second is an order to quash the Information for not disclosing an offence.

The Charges

[2] The applicant is charged with the following offences:

FIRST COUNT

Statement of Offence

FAILURE TO SURRENDER FOREIGN CURRENCY: Contrary to s 4 of the Exchange Control Act (Cap.211) and s 1 of Part II of the Fifth Schedule of the Exchange Control Act (Cap.211).

Particulars of Offence/text>

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry, between the 1st day of November 2000 and the 23rd day of July 2010, both dates inclusive, at Suva in the Central Division, being a resident in Fiji entitled to sell foreign currency but not being an authorised dealer however being required by law to offer it for sale to an authorised dealer, retained the sum of $1.5 million Australian dollars for his own use and benefit, without the consent of the Governor of the Reserve Bank of Fiji.

SECOND COUNT

Statement of Offence

DEALING IN FOREIGN CURRENCY OTHERWISE THAN WITH AN AUTHORISED DEALER WITHOUT PERMISSION: Contrary to s 3 of the Exchange Control Act (Cap.211) and s 1 of Part II of the Fifth Schedule of the Exchange Control Act (Cap.211).

Particulars of Offence

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry, between the 1st day of November 2000 and the 23rd day of July 2010, both dates inclusive, at Suva in the Central Division, being a resident in Fiji but not being an authorised

dealier, did lend Australian dollars amounting to a sum of $1.5 million to persons otherwise than an authorised dealer, namely the Financial Institutions in Australia and New Zealand as listed in the Annexure marked "A", without the permission of the Governor of the Reserve Bank of Fiji.

THIRD COUNT

Statement of Offence

FAILURE TO COLLECT DEBTS: contrary to s 26(1)(a) of the Exchange Control Act (Cap.211) and s 1 of Part II of the Fifth Schedule of the Exchange Control Act (Cap.211).

Particulars of Offence

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry, between the 1st day of November 2000 and the 23rd day of July 2010, both dates inclusive, at Suva in the Central, being a resident in Fiji having the right to receive a sum of $1.5 million Australian dollars from the Financial Institutions in Australia and New Zealand as listed in the Annexure marked "A", caused the delay of payment of the said sum, in whole or in part, to himself by authorising the continual re-investment of the said sum together with interest acquired back into the said Financial Institutions without the permission of the Governor of the Reserve Bank of Fiji.

FOURTH COUNT

Statement of Offence

MONEY LAUNDERING: Contrary to s 69(1), (2)(a), (3)(b), and (4) of the Proceeds of Crime Act.

Particulars of Offence

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry, between the 1st day of November 2000 and the 16th day of June 2004, both dates inclusive, at Suva in the Central Division, disposed of money that was proceeds of crime, namely a sum of $1.5 million Australian dollars held in various Financial Institutions in Australia and New Zealand as listed in the Annexure marked "A", and he knows or ought reasonably to know that the money derived directly from some form of unlawful activity.

FIFTH COUNT

Statement of Offence

MONEY LAUNDERING: contrary to s 69(1), (2)(a), (3)(b), and (4) of the Proceeds of Crime Act.

Particulars of Offence

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry, between the 22nd day of February 2001 and the 26th day of February 2001, both dates inclusive, at Suva in the Central Division, disposed of money that was proceeds of crime, namely a sum of $400,000 Australian dollars held in the Commonwealth Bank of Australia Cash Management Call Account Number 2245 1008 8252 into the Commonwealth Managed Investment Fund Balanced Fund Account number 39920061, and he knows or ought reasonably to know that the money derived directly from some form of unlawful activity.

SIXTH COUNT

Statement of Offence

MONEY LAUNDERING: Contrary to s 69(1), (2)(a), (3)(b), and (4) of the Proceeds of Crime Act.

Particulars of Offence

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry, on the 17th day of September 2002, at Suva in the Central Division, disposed of money that was proceeds of crime, namely a sum of $469,000 Australian dollars held in the Commonwealth Bank of Australia Cash Management Call Account Number 2245 1008 8252 into the Perpetual Investment Management Limited Perpetual Monthly Income Fund, and he knows or ought reasonably to know that the money derived directly from some form of unlawful activity.

SEVENTH COUNT

Statement of Offence

MONEY LAUNDERING: Contrary to s 69(1), (2)(a), (3)(b), and (4) of the Proceeds of Crime Act.

Particulars of Offence/text>

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry, on the 19th day of September 2002, at Suva in the Central Division, disposed of money that was proceeds of crime, namely a sum of $378,979.18 Australian dollars held in the Commonwealth Managed Investment Fund Balanced Fund Account Number 39920061 into the Commonwealth Bank of Australia Cash Management Call Account Number 2245 1008 8252, and he knows or ought reasonably to know that the money derived directly from some form of unlawful activity.

EIGHTH COUNT

Statement of Offence

MONEY LAUNDERING: Contrary to s 69(1), (2)(a), (3)(b), and (4) of the Proceeds of Crime Act.

Particulars of Offence

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry, on the 25th day of November 2002, at Suva in the Central Division, engaged, directly or indirectly, in a transaction involving money that was proceeds of crime, namely by making a gift of a sum of $50,000 Australian dollars held in the Commonwealth Bank of Australia Cash Management Call Account Number 2245 1008 8252 to his daughter who was a resident in Australia at the material time, and he knows or ought reasonably to know that the money derived directly from some form of unlawful activity.

NINETH COUNT

Statement of offence

MAKING A FALSE STATEMENT IN AN INCOME TAX RETURN: Contrary to s 121(b) and s 47 of the Penal Code Act (Cap 17).

Particulars of Offence

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry, on the 28th day of May 2002, at Suva in the Central Division, knowingly and wilfully made a statement which was false in a material particular in that he failed to declare that he had received income from investments he held in Australia and New Zealand during the relevant period in his Fiji Islands Revenue and Customs Authority Annual Income Tax Return Form B for the year ending 31st December 2000 made under the Income Tax Act (Cap 201).

TENTH COUNT

Statement of Offence

MAKING A FALSE STATEMENT IN AN INCOME TAX RETURN: Contrary to s 121(b) and s 47 of the Penal Code Act (Cap 17).

Particulars of Offence/text>

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry, on the 29th day of May 2003, at Suva in the Central Division, knowingly and wilfully made a statement which was false in a material particular in that he failed to declare that he had received income from investments he held in Australia and New Zealand during the relevant period in his Fiji Islands Revenue and Customs Authority Annual Income Tax Return Form B for the year ending 31st December 2001 made under the Income Tax Act (Cap.201).

ELEVENTH COUNT

Statement of Offence

MAKING A FALSE STATEMENT IN AN INCOME TAX RETURN: Contrary to s 121(b) and s 47 of the Penal Code Act (Cap 17).

Particulars of Offence

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry on the 11th day of February 2003, at Suva in the Central Division, knowingly and wilfully made a statement which was false in a material particular in that he failed to declare that he had received income from investments he held in Australia and New Zealand during the relevant period in his Fiji Islands Revenue and Customs Authority Annual Income Tax Return Form B for the year ending 31st December 2002 made under the Income Tax Act (Cap.201).

TWELFTH COUNT

Statement of Offence

MAKING A FALSE STATEMENT IN AN INCOME TAX RETURN: Contrary to s 121(b) and s 47 of the Penal Code Act (Cap 17).

Particulars of Offence/text>

MAHENDRA PAL CHAUDHRY s/o Ram Gopal Chaudhry, on the 15th day of March 2004, at Suva in the Central Division, knowingly and wilfully made a statement which was false in a material particular in that he failed to declare that he had received income from investments he held in Australia and New Zealand during the relevant period in his Fiji Islands Revenue and Customs Authority Annual Income Tax Return Form B for the year ending 31st December 2003 made under the Income Tax Act (Cap.201).

Factual Background

[3] In his affidavit, the applicant does not dispute the basic facts upon which the charges have been founded. In 1999, the applicant was elected the Prime Minister of Fiji. In 2000, he was held hostage for 56 days by George Speight and extremists who staged a coup at the Parliament complex. After his release, the applicant went to Australia for medical treatment for injuries sustained during the captivity. Despite a pronouncement by the court that the coup was unlawful, the applicant did not return to power. Subsequently, fresh elections took place in 2001. Laisenia Qarase became the new Prime Minister of Fiji. The applicant remained a member of the Parliament.

[4] The applicant says that after the political upheaval in 2000, the Australian government offered him and his immediate family members, permanent residency visas. It appears that the applicant did not take on the Australian residency offer. After his medical treatment in Australia, he went to India. While

in India, he received donations from certain individuals and institutions. The applicant has annexed to his affidavit a reference dated 12 October 2004 from an institution called Delhi Study Group, which gives some insight of the original source of the funds the applicant received. The reference reads:

> "This is to confirm that funds were collected in New Delhi and other parts of India, including NRI's (Non-Resident Indians) to assist Hon'ble Mahendra Pal Chaudhry, Former Prime Minister of Fiji in 2000-2002.
>
> The funds were intended to solely assist Hon'ble Chaudhry and his family members to establish residence in another country following the political upheaval in Fiji in May 2000, in which his life and those of his family members were threatened by terrorist elements in Fiji.
>
> Hon Chaudhry is very popular and is held in high regard by the people of India. It was the wish to the people of India to provide Hon'ble Chaudhry financial and physical security at a time when he was bravely defending the democratic and human rights of his people. The funds collect were sent to Hon'ble Chaudhry through assistance provided by the government of India between 2000 and 2002."

[5] The donated funds were deposited into the personal bank account held by the applicant in Australia. In paragraph 33 of his affidavit, the applicant states:

> "As these funds from India had no connection with Fiji and were for a specific purpose and that was for my personal use and benefit, I retained them in Australia and paid non-resident withholding tax and also did not declare them in Fiji as I believed that it was not income and not declarable as such."

[6] By 2004, the Fiji Islands Revenue & Customs Authority (FIRCA) got involved. FIRCA wrote to the applicant's accountant inquiring about the source of the funds in the Australian bank account. The applicant says after consulting his accountant, he decided to disclose the income generated as interests from the funds and pay taxes in Fiji. The applicant amended his tax returns and paid his outstanding taxes to FIRCA. FIRCA elected not to initiate any proceedings against the applicant after he complied with Fiji's tax laws.

[7] In 2005, the issue of the applicant's Australian funds was raised in the Fijian Parliament by the then Prime Minister, Laisenia Qarase. The parliamentary proceedings have no relevance to the current applications, except that the controversy regarding the source of those funds was never resolved.

[8] After the military coup in 2006, the applicant returned to the political arena as the Minister of Finance in the interim government of Fiji. The applicant says, what followed after his ministerial appointment, was a trial by media. The applicant says he later found out that a former editor of the Fiji Sun obtained his confidential tax details from FIRCA and released it to Victor Lal, a former Fiji journalist residing overseas. Victor Lal published those details in anti-government websites.

[9] After months of media speculation, on 23 February 2008, the Fiji Times named the applicant to be the Minister involved in the tax probe. The applicant further says that he has sued the Fiji Times for defamation in respect of those publications. In the defamation proceedings, the Fiji Times is being represented by the law firm, Munro Leys. The same law firm was also an adviser to the Reserve Bank of Fiji. The applicant says a senior partner of the law firm rendered an opinion to the Reserve Bank of Fiji stating that the applicant has breached the Exchange Control Act by retaining the donated funds in Australia. The applicant

believes that the legal practitioner concerned proffered his opinion to the Reserve Bank without declaring his interest in acting for the Fiji Times in the defamation proceedings brought by the applicant.

[10] On 24 February 2008, the applicant wrote to the Prime Minister, Voreqe Bainimarama expressing concerns about the publication of his private tax affairs by the local media organizations. On 28 February 2008, the Prime Minister replied to the applicant as follows:

"Dear Minister

Thank you for your 24th February, 2008 letter giving me the opportunity to take any necessary steps to clear the air in respect of the allegations made against you regarding your personal financial affairs.

The RFMF has written to me today stating that a decisive and transparent process must be undertaken in respect of the allegations against you to mitigate the political and subsequent negative security impact.

In the interest of transparency and good governance, this matter requires an immediate and effective response from the Government. I have, therefore decided to act by setting up an independent inquiry made up of primary non-locals. However, I want to make it clear that at this point there is no acceptance on our part that you have committed any offence or impropriety. You are entitled to every presumption of innocence.

I propose the following options in resepct of the inquiry:

Option 1

(a) As agreed you go on leave;

(b) You allow an independent team made up of primarily non-locals appointed by me to access your tax files with FIRCA;

(c) The independent team has specific terms of reference primarily to establish whether all legal requirements were met when FIRCA discharged its duties;

(d) The independent team is mobilized by 3rd March and completes its inquiry by 8th March.

(e) The findings of the inquiry vis-à-vis the terms of reference is made public.

Option 2

(1) As agreed, you go on leave;

(2) In the event you disagree to give access to your files to an independent team, I will recommend to His Excellency the President to establish a Commission under the Commission of Inquiry Act ('Inquiry');

(3) The Inquiry will have specific terms of reference primarily to establish whether all legal requirements were met when FIRCA discharged its duties;

(4) The Inquiry is mobilized by 3rd March and is tasked to complete its Inquiry by 8th March;

(5) The Inquiry presents its findings to the President and the findings are subsequently made public.

I wish to reiterate that this exercise is essential to demonstrate my Government's adherence to transparency and good governance and to once and for all bring this matter to a close, which I am sure you would agree, is in the best interest of all.

In closing, I want to recognize how personally painful the current allegations must be for you. I recognize that you have played a major role in the development of Fiji, this being a cause to which you have dedicated your life.

I look forward to your response by tomorrow morning.

Yours sincerely

JV Bainimarama

Prime Minister"

[11] On 29 February 2008, the applicant advised the Prime Minister in writing that he opted to go with Option 1. A committee was set up to conduct an inquiry on paper. The Government appointed an Australian corporate lawyer, an Australian accountant and a former Fijian politician as members. The terms of reference for the inquiry were:

> 1. To establish whether the tax assessment by FIRCA in respect of Mahendra Pal Chaudhry between 2000 and 2006 was carried out in accordance with the Income Tax Act and any other relevant tax laws of Fiji;
> 2. To establish whether there were any breaches of the Exchange Control Act by Mahendra Pal Chaudhry between 2000 and 2006 in relation to the tax assessment carried out by FIRCA as set out in paragraph (1).

[12] On 10 March 2008, the findings of the inquiry were published in a 14-page report. In summary, the inquiry could not establish any breach of the laws by the applicant in relation to the donated funds he received from India and retained in Australia.

[13] On 11 March 2008, the Attorney General gave a press statement in which he highlighted the findings of the inquiry.

[14] On 12 March 2008, the Prime Minister officially informed the applicant of the findings of the inquiry. In his letter, the Prime Minister wrote:

> "Given the findings of the Team, this matter is now no longer an issue as far as I and the Government are concerned."

[15] The applicant resumed his ministerial duties, after the inquiry was concluded.

[16] It appears that while the Government had accepted the findings of the inquiry, the Reserve Bank of Fiji was not satisfied with the matter. In 2009, the Reserve Bank of Fiji obtained two separate legal opinions from two Australian barristers. Both barristers expressed opinions that the applicant breached the Exchange Control Act (Fiji) by retaining the donated funds in Australia.

[17] On 23 October 2009, the Reserve Bank of Fiji notified the applicant in writing that he has breached the provisions of the Exchange Control Act by retaining the donated funds in Australia. The Reserve Bank further notified the applicant to have the funds remitted to Fiji within 30 days or face legal proceedings.

[18] On 18 November 2009, the applicant responded in writing by asking the Reserve Bank to supply him in detail the circumstances giving rise to the breaches of the Exchange Control Act. It appears that the matter was referred to the police for criminal investigations, after the Reserve Bank received the applicant's respond.

[19] On 23 July 2010, the Director of Public Prosecutions filed the current criminal charges against the applicant.

Discretion to stay proceedings

[20] The power to stay a prosecution by a superior court is derived from the English common law. In *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401 at 406 Lord Reid said 'hellip;there must always be a residual discretion to prevent anything which savours of abuse of process.' The bounds of that discretion were later laid down by Lord Salmon in *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497 at 527-528:

> "hellip; a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene."

[21] Similar views were expressed on the ambit of the discretion to stay a prosecution by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police (Birmingham Six case)* [1981] 3 All ER 727 at 729:

> "hellip; this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

[22] The circumstances which may give rise to abuse of process may vary in each case. Abuse may arise from the methods used to investigate the offence *(R v Heston-Francois* [1984] 1 All ER 785). It may arise on the allegation that the accused is being prosecuted more than once for what is in effect the same offence (*Connelly v DPP,* supra). It may arise from misuse of the process of the court to escape statutory time limits (*R v Brentford Justices; Ex parte Wong* [1981] 1 All ER 884). A more common circumstance is prejudice arising from delay in prosecution *(R v Derby Crown Court, ex parte Brooks* (1985) 80 Cr App Rep 164.)

[23] More recently, in *Moti v R* [2011] HCA 50 (7 December 2011) the High Court of Australia summarized the governing principles at paragraph 10:

> "Both submissions were advanced under the rubric of "abuse of process" and sought to engage the well-established rule that in both civil and criminal proceedings "Australian superior courts have inherent jurisdiction to stay proceedings which are an abuse of process." As four members of this Court said in Batistatos v Roads and Traffic Authority (NSW) "what amounts to abuse of court process is insusceptible of a formulation comprising closed categories." In Ridgeway v The Queen, Gaudron J stated that the power extended to proceedings that are "instituted for an improper purpose", "seriously and unfairly burdensome, prejudicial or damaging" and "productive of serious and unjustified trouble and harassment." In Williams v Spautz the plurality distinguished between "abuse of process in the sense of proceedings instituted and maintained for an improper purpose" and "abuse of process that precluded a fair trial." In Rogers v The Queen, McHugh J concluded that, although the categories of abuse of process are not closed, many such cases can be identified as falling into one of three categories: "(1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute."

[24] These principles must be borne in mind before the exceptional step of staying a prosecution is taken.

Promise not to prosecute

[25] The first circumstance that the applicant relies upon to establish abuse of process is that the Prime Minister and the Attorney General publicly endorsed the findings of an independent inquiry and cleared him of any culpability in respect of the donated funds.

[26] An accused is entitled to a stay of prosecution if he is being prosecuted after a promise has been made to him that no prosecution will be brought against him (*R v Croydon Justices; Ex parte Dean* [1993] QB 769).

[27] In the Hong Kong case of *Chu Piu-wing v Attorney-General* [1984] HKLR 411, McMullin VP said at 417-418:

> "We think there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain."

[28] In *R v Abu Hamza* [2007] 1 Cr App R 27, the English Court of Appeal considered the issue of abuse of process on the basis of breach of an undertaking not to prosecute. The Court said at paragraph 50:

> "hellip; circumstances can exist where it will be an abuse of process to prosecute a man for conduct in respect of which he has been given an assurance that no prosecution will be brought. It is by no means easy to define a test for those circumstances other than to say that they must be such as to render the proposed prosecution an affront to justice."

[28] The Court went on to say that:

> "Only in rare circumstances will it be offensive to justice to give effect to [the public interest that those who are reasonably suspected of criminal conduct should be brought to trial]. Such circumstances can arise if the police, who are carrying out a criminal investigation, give an unequivocal assurance that a suspect will not be prosecuted and the suspect, in reliance on that undertaking, acts to his detriment"

[30] In *State v Peceli Vuniwa* HAC 31 of 2005 the accused was charged with treason with others. One of the overt acts alleged in the treason charge was that the accused incited murder of a police officer. Before the commencement of trial, the accused pleaded guilty to lesser charges of wrongful confinement and abduction as part of a plea bargain with the Director of Public Prosecutions that the serious charge of treason will be dropped and that he would be absolved of criminal responsibility for all other coup-related matters pending or in the future. After the accused had served his sentence for the lesser offences, the DPP charged him with murder of the police officer that formed part of the overt act for treason. Shameem J, after reviewing the English cases on prosecutorial abuse of the process, summarized the principles as follows:

> "In summary the principles in relation to this limb of the inherent jurisdiction to stay proceedings for abuse of the process can be summarized by asking the following questions:
>
> 1. Did the prosecution make an undertaking to the accused and/or his counsel that a charge would not be instituted or proceeded with?
> 2. Did the accused accept that undertaking?
> 3. What was the lapse of time between the undertaking and the revocation?
> 4. Was there in fact a revocation?
> 5. Was the accused prejudiced by the change in the prosecution's position?
> 6. Has the accused shown, on a balance of probabilities that the prosecution is an abuse of the court's process because it is a breach of an undertaking?
> 7. Is the abuse so unfair and wrong that the prosecution should not be allowed to proceed?"

[31] These authorities suggest that it is not likely to constitute an abuse of process with a prosecution unless there has been:

> (a) an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted; and

(b) the defendant has acted on the representation to his detriment.

[32] The charges against the applicant have been brought by the DPP. On the facts of this case, there is no explicit bargain between the DPP and the applicant in relation to the donated funds he received. The applicant's contention is that the Prime Minister's statement "this matter is now no longer an issue as far as I and the Government are concerned" constitutes a representation that he is absolved from any prosecution in the future in relation to the donated funds.

[33] Even if this Court gives a generous interpretation to the Prime Minister's statement, there is no basis to conclude that the statement could give rise to a reasonable belief that the applicant would not be prosecuted in future for any offence arising from the donated funds. From the government's point of view, serious allegations surfaced in the public domain against one of their senior cabinet ministers. The Prime Minister decided, and quite rightly so, to set an inquiry team to investigate the allegations. The applicant was asked to step down from his ministerial portfolio pending the inquiry as a matter of transparency and good governance. After the inquiry was conducted and the findings published, the applicant was re-instated to his ministerial portfolio. So the statement made to the applicant by the Prime Minister after the inquiry, was part of the bargain that the applicant would retain his ministerial portfolio, if the inquiry team cleared him of any breach of Fiji's laws in relation to the donated funds. There is no doubt that that bargain was kept by the Prime Minister after the findings of the inquiry were published.

[34] But the Prime Minister never suggested in his correspondences to the applicant or to the public at large that he would enforce the findings of the inquiry on the Reserve Bank or the DPP. To do so would have been interfering with the independence of these institutions and contrary to good governance.

Reliance on legal opinions to investigate and charge

[35] The second circumstance relied upon by the applicant is framed as follows: "legal opinions of Messrs Kos QC and Smith prejudiced against Applicant and misused by prosecution."

[36] Counsel for the applicant submits that these legal opinions cannot amount to evidence of guilt against the applicant. Counsel contends that abuse of process arose when the DPP applied for production and inspections of documents in possession of FIRCA in relation to the funds held by the applicant in Australia by annexing these opinions to the affidavit of ASP Puran Lal. Counsel further submits that these legal opinions were tainted by involvement of the law firm, Munro Leys acting in conflict of interest in advising the Reserve Bank that the applicant is in breach of the Exchange Control Act.

[37] There is no suggestion that the prosecution relies on the legal opinions to prove the charges against the applicant. If such a position is taken by the prosecution at trial, then the applicant has a right to object and the Court will have to rule on the admissibility. At this stage, it is not the function of this Court to decide on the merits of the charges. The merits of the charges can only be determined at trial, after the Court has heard evidence led by the prosecution. Of course, the applicant also has a right to lead evidence, but he is not obliged to prove anything. The burden of proof remains on the prosecution throughout the trial.

[38] In my judgment, the mere annexing of the legal opinions to ASP Lal's affidavit in a pre-charge application is not an abuse of the process. The documents that were obtained from FIRCA by ASP Lal could have been obtained by the Commissioner of Police, without an order from the Court. By making an application to the Court, the police investigation of the matter was made transparent and subject to judicial accountability. Furthermore, it is not unlawful for the agents of the State to rely on legal opinions to investigate an alleged crime or to charge an accused for an alleged crime.

[39] Stay cannot be a remedy for grievance that the applicant has against a private law firm acting in a conflict of interest. In any event, the applicant has not been able to establish before this Court that the law firm, Munro Leys acted in conflict of interest in advising the Reserve Bank that he has breached the Exchange Control Act by retaining the donated funds in Australia.

Search of law firm

[40] The third circumstance relied upon by the applicant is a search of the law office of the applicant's son, Rajendra Chaudhry. The applicant contends that the search was unlawful because the warrant was issued by a Justice of Peace and not by a Magistrate as required by the Exchange Control Act.

[41] It is clear from the current charges that the criminal investigations were not confined to the potential breaches of the Exchange Control Act, and therefore, the police was not restricted to the provisions of that Act only during their investigations. So it was not unlawful for the police to conduct a search on a warrant issued by a Justice of Peace. In any event, nothing incriminating against the applicant was seized from Rajendra Chaudhry's law office. In fact, the applicant accepts that nothing was seized as a result of the search.

Procedure for search under the Exchange Control Act

[42] The fourth circumstance relied upon by the applicant is framed as follows: "The significance of the lack of Ministerial consent in respect of the taking of enforcement actions in respect of alleged breaches of the Exchange Control Act." The applicant contends that the State has failed to produce any evidence the Minister of Finance had given authority to the police to apply for a search warrant against him, as required by s 39(4) of the Exchange Control Act.

[43] This submission assumes that the criminal investigation against the applicant was confined to the potential breaches of the Exchange Control Act, and therefore, the powers of search and seizure were restricted to that Act. The documents pertaining to the donated funds were obtained from FIRCA by the police, after the DPP applied for and was granted an order by this Court under the Proceeds of Crime Act. Apart from the alleged exchange control breaches, the applicant is also charged under the Penal Code and the Proceeds of Crime Act.

[44] It must be borne in mind that the applicant himself was the Minister of Finance when the allegations against him surfaced. There cannot be an abuse of process by the police electing one lawful procedure when there are other procedures available in the course of criminal investigation, to obtain evidence. Once the documents were obtained under the Proceeds of Crime Act, there was no need to invoke the provisions of the Exchange Control Act in relation to search and seizure. To do so would have been a fruitless exercise.

Statutory time bar

[45] The fifth circumstance is that the State endeavouring to defeat statutory time bar. This circumstance is confined to the charges of making a false statement in tax returns. The applicant contends that the bringing of charges of false statement under the Penal Code is a blatant endeavour by the prosecution to avoid the statute bar under the Income Tax Act and is in itself an abuse of process.

[46] In *Vakalalabure v The State* CAV0003 of 2004S, the Supreme Court, after considering cases from England, Australia and New Zealand on the effect of time bar on prosecution, summarized the principles as follows:

> "These decisions are applicable where the conduct could be prosecuted under different sections of the same Act but the time limit for a prosecution under one s has expired. They establish the following propositions relevant to this case:
>
> (1) The effect of such an Act is that the same conduct cannot be prosecuted under another section to avoid the time bar.
>
> (2) A prosecution can be brought under a different section for independent conduct which was not merely part of the conduct which constituted the time barred offence.
>
> (3) The appropriate charge depends on the predominant facts of the case.
>
> (4) In those cases the indecent assaults, or acts of indecency charged, were the acts of unlawful sexual intercourse, or attempted unlawful sexual intercourse, and the former could not be proved without proving the latter."

[47] At paragraph 34, the Supreme Court said:

> "This analysis suggests that the objection sustained in Regina v J and Saraswati v The Queen should not depend on the offences being created by the same statute, although the objection will be easier to sustain where that is the case."

[48] Making a false tax return is an offence under the Income Tax Act (s. 95(1). The offence is punishable with a fine or 6 months imprisonment. Sections 3(1) and (4) gives the Commissioner of Inland Revenue the discretion to prosecute under the Income Tax Act. s 100(1) provides that any prosecution under the Act may be instituted within 3 years after the final determination of the amount of tax covered by the assessment.

[49] The particulars alleged in the charges of making a false statement are that the applicant knowingly and wilfully made a statement which was false in a material particular in that he failed to declare that he had received income from investments held in Australia and New Zealand.

[50] There is no doubt that the conduct alleged in the current charges could also have been prosecuted under the Income Tax Act. The final assessment on the tax to be paid on the income generated from the donated funds was made by FIRCA in 2004. The applicant fully complied with FIRCA's assessment and paid his outstanding taxes. The Commissioner of Inland Revenue in his discretion elected not to prosecute the applicant. There is no suggestion that the applicant in 2004 was in a position of influence to deflect any prosecution against him. After 2007, the offence of making a false tax return under the Income Tax Act was time barred. So by the time the applicant was charged in July 2010, he could not be prosecuted for making a false tax return under the Income Tax Act.

[51] It is clear that the charges of making a false statement under the Penal Code is based on the same facts that constitute an offence of making a false return under the Income Tax Act. Prove of the former requires prove of the latter.

[52] The maximum penalty for making a false statement under the Penal Code is 2 years imprisonment. So it is not only that the applicant is charged with an offence based on a time barred conduct, he is now exposed to a more serious

punishment under the Penal Code. In these circumstances, it is manifestly unfair and is in itself an abuse of the process to charge the applicant for making a false statement under the Penal Code and to expose him to a more serious punishment, when the same conduct attracting a lesser punishment under the Income Tax Act is time barred.

[53] In relation to the tax return charges, the applicant advanced further submissions that double jeopardy attached to those charges, after he paid his outstanding taxes in 2004. Double jeopardy can only arise if an accused is charged with an offence which is either the same, or is substantially the same, as one in respect of which he has been acquitted (Connelly v DPP). The applicant was never charged or prosecuted for making false tax return. Nor has he been tried of a charge of making false tax return. In these circumstances, a plea of double jeopardy is unavailable to the applicant on the basis that he has paid his outstanding taxes without judicial intervention.

Jurisdiction to try money laundering charges

[54] The applicant's final objection concerns the money laundering charges. It is the applicant's contention that there is no jurisdiction to try him for money laundering because at the time the offences were allegedly committed, the definition of property under the Proceeds of Crime Act was not extended to properties overseas.

[55] Section 69(3)(b) of the Proceeds of Crime Act defines money laundering as follows:

> "A person shall be taken to engage in money laundering if, and only if:
>
> (b) the person receives, possesses, conceals, uses, disposes of or brings into Fiji any money, or other property, that are proceeds of crime;
>
> and the person knows, or ought reasonably to know, that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity."

[56] The unlawful conduct alleged in the charges is that the applicant disposed of money that was proceeds of crime. Section 69(3)(b) of the Act describes the unlawful conduct as "disposes of or brings into Fiji any money, or other property, that are proceeds of crime".

[57] The charges allege that the monies were disposed of in Australia and New Zealand while section 69(3)(b) clearly confines the unlawful conduct of disposal of money or other property to Fiji. In other words, the act of disposal must occur in Fiji and not abroad, if the money laundering charges are to be sustained. But the applicant's contention goes further than this. All money laundering charges pre-dates the amendment to the definition of the word 'property' following a decision by Shameem J in *State v Manoj Kumar & anr* HAM0019 of 2003S, in which her Ladyship declined to grant a restraining order in respect to alleged tainted monies held in a bank account in New Zealand because the original definition of property under the Act was restricted to property located in Fiji. The Act was amended, and since 1 September 2005, the definition of property included property abroad. The question now is whether the amended definition has a retrospective operation?

[58] In earlier cases such as *State v Volivale* Criminal Case No.HAC030(A) of 2005 (2 June 2009) and *Toga v State* HAR002.2009, this Court considered the principles governing retrospective operation of penal statutes.

[59] In State v Volivale, the Court said at paragraph 10:

> "It has been a long standing principle in common law that statutes dealing with jurisdiction and procedure are, if they relate to the inflictions of penalties, strictly construed. Compliance with procedural provisions will be stringently exacted from those proceedings against the person liable to be sentenced *(R v Jones, exp. Daunton* [1963] 1 WLR 270, *R v Clarkson* [1961] 1 WLR 348).
>
> If there is any ambiguity or doubt it will, as usual, be resolved in the favour of the accused *(R v Bullock* [1964] 1 QB 481."

[60] In Toga v The State, the Court said at paragraph 10:

> "The fundamental principle is that an amendment to a criminal statute should not be given a retrospective operation, unless there is clear legislative intention to do so, and that the amendment is favourable to the accused."

[61] If the applicant was charged before 1 September 2005, he could have relied on the original definition of property to advance his jurisdictional objection. In that regard the amendment is not favourable but is prejudicial to the applicant. Further, the Parliament did not intend to make the amendment retrospective. The amendment came into effect in 2005, and the intention of the Parliament is, to give jurisdiction to the courts in Fiji over properties abroad, which did not exist previously. The courts in Fiji does not have jurisdiction over money laundering offences allegedly committed before 1 September 2005, in relation to properties abroad. In my judgment, the money laundering charges are null and void for want of jurisdiction.

Result

[62] The charges of making a false statement in an income tax return under the Penal Code (counts 9-12) are permanently stayed for an abuse of process arising from the same conduct being time barred under the Income Tax Act.

[63] The money laundering charges (counts 4-8) are quashed on the ground that the Court has no jurisdiction to try those charges.

[64] No abuse of process has been established in relation to the charges under the Exchange Control Act.

[65] The trial will proceed on counts 1-3 only.

[66] The applications are allowed to this extent.

Appeals allowed in part.

Alex de Costa
Solicitor