

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU0070 & ABU 71 of 2022
(Suva High Court HBC 202 of 2022)

BETWEEN : **RICHARD KRISHNAN NAIDU** *Appellant*

AND : **THE ATTORNEY-GENERAL OF FIJI** *Respondent*

Coram : (Dr) Almeida Guneratne, P

Counsel : Mr J. Apted for the Appellant
Ms G. Fatima for the Respondent

Initial date of Hearing : 4th November, 2022

Written submissions on behalf of both parties filed on: 4th November, 2022

Date of final Hearing : 7th November, 2022
(oral submissions)

Date of Ruling : 9th November, 2022

RULING

Brief factual background to the dispute

[1] The High Court granted leave to the Respondent to issue committal proceedings against the Appellant for alleged contempt of Court.

- [2] The Appellant filed summons seeking to set aside the said grant of leave to issue committal proceedings and when the matter came up before the Court subsequently sought (a) an oral hearing; (b) sought to cross-examine the Respondent and (c) moved to have a Senior Counsel appear for him.
- [3] The Court directed parties to file written submissions and consequently dismissed the applications made by the Appellant referred to in paragraph [2] above which became the subject of two decisions.
- [4] The Appellant sought leave to appeal the said two decisions which were refused.
- [5] The Appellant has filed this renewed application seeking leave to appeal and stay of committal proceedings pending appeal.
- [6] Having directed both Counsel to file written submissions the matter was taken for oral submissions on the 7th of November.
- [7] At the outset, I wish to say that I gave my mind to the authorities (precedents) referred to by both counsel, in relation to the criteria in
(a) granting (or not) a leave to appeal application and
(b) allowing (or not) a stay of proceedings.

The Grounds of Appeal urged

- [8] As many as 30 grounds have been urged. In fact, Mr Apted corrected me in saying that there were 40 grounds.
- [9] I do not intend to address the said grounds specifically but shall crystallise the same into the broad issues that were argued on. For the purposes of this Ruling I shall classify them as (a) the principal issues and (b) the adjunct issues.

The gist of the submissions made by Mr. Apted on behalf of the Applicant (Mr. Naidu) on the principal issues

- [10] Mr Apted submitted, following upon his written submissions, (by reference to the impugned orders/decisions made by His Lordship , the learned High Court Judge) that,
- (a) his client’s right to retain a Counsel of his choice to appear for him was denied to him;
 - (b) his client’s right to remain silent combined with the presumption of innocence, by reason of the fact that, he has “*been cast in the capacity of “an accused” in committal proceedings*”) was affected, which the learned High Court Judge failed to properly address
 - (c) lastly, Mr Apted submitted that, in the background of those circumstances, his client was entitled to get a favourable order from Court by subjecting the Respondent to cross-examination in consequence of his client being exposed to committal proceedings.

The essence of the submissions made by Ms. Fatima on behalf of the Respondent

[11] In her quick fire response to Mr. Apted, Ms. Fatima submitted as follows:-

- (a) what was the main issue before the High Court? It was “*the post in question*” (the alleged contempt).
- (b) Whether or not, the said “*post in question*” amounted to contempt, was not the Respondent (the Attorney General) justified in initiating the committal proceedings?
- (c) It is only after trial that a determination would follow whether in fact “*the said post*” amounted to contempt as envisaged in Order 52 of the High Court Act.

[12] Ms Fatima submitted further that, the Appellant was seeking to avoid committal proceedings initiated by the Attorney-General (the Respondent), which was in the interest

of the concept of the “*majesty of the Court,*” in which regard therefore, the committal proceedings must be allowed to proceed.

Assessment of the rival submissions on the issues which I have classified as the principal issues

1. The right to retain a counsel of his (the Appellant’s) choice

[13] The trial before the High Court (committal proceedings) is still on foot. Thus, that right is still open to the Appellant to defend the committal proceedings at the said trial.

2. The right of the Appellant to remain silent combined with the presumption of innocence, which Mr Apted submitted, the learned High Court Judge failed to properly address

[14] I do not think the learned Judge had a statutory or common law duty to address that issue at a stage where the trial on the committal proceedings had not even commenced. That right being no doubt a constitutional right, it would be open for the Appellant to exercise the same at the trial on the committal proceedings.

3. Could it be said that, the Appellant had a right to subject the Respondent to cross-examination?

[15] Mr. Apted, in his endeavor to substantiate submission relied on one of my Rulings where I had held that a contemnor cannot be regarded as a compellable witness and be subjected to cross-examination. (*vide*: **Rosy Reddy v. Yanktesh Permal Reddy & Others**; ABU 77/2020, 20 August, 2021).

[16] By the same token and as a matter of jurisprudential principle I hold the view that, an alleged contemnor also cannot be regarded as a compellable witness to take the stand and give evidence as to an alleged contempt (of Court in this instance).

[17] Should the Respondent opt not to take the witness stand, his allegation of contempt would stand or fall on the evidence (oral and affidavit) led through other witnesses.

[18] But, all that must await the proper trial on the committal proceedings which are on foot.

[19] For the aforesaid reasons, I am in agreement with Ms. Fatima's submissions which I have summarized in paragraphs [11] and [12] above. Apart from that, I took into consideration the case of **In the Matter of Mahendra Pal Chaudhry** [High Court, 1998, 7 April] which was referred to me by Ms. Fatima.

Re: The adjunct issues raised on behalf of the Appellant (referred to at paragraph [9] [b] of this Ruling

The High Court Judge saying that, under Order 52 of the High Court Act, there need not be a prima facie finding on contempt

[20] In that regard, (Mr. Apted submitted), that was a fundamental error on the part of the High Court Judge. Ms. Fatima's submission that, the "*alleged contempt*" satisfied the elements of Order 52 appeared to me as in fact and law supporting indirectly Mr. Apted's aforesaid argument.

[21] For that reason, I am inclined to grant leave to appeal on that issue in the public interest for the full Court to express its views.

Re: The matter of the application for a stay of the Committal proceedings

[22] To begin with, the committal proceedings are pending before a Court of competent jurisdiction (the High Court). I could not see any basis to grant "*a stay*" against such a Court from exercising its jurisdiction.

[23] Perhaps, I could rest my decision solely on that ground in refusing “*stay*” but I go further in saying that:-

(a) as the Applicant himself says the committal proceedings are on the basis of an “*alleged contempt*”

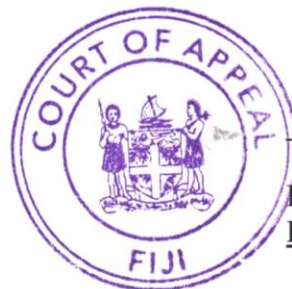
(b) that matter is listed for trial and it is only after conclusion of the trial, should the High Court find the “*alleged contempt*” to have been proved that, the Applicant’s reputation and/or interests would become affected.

[24] For the aforesaid reasons, I hold that, there is no legal basis and/or reason in law to grant “*a stay*” of the High Court proceedings.

[25] Accordingly, I proceed to make my orders as follows.

Orders

1. *Leave to appeal is granted on the ground as articulated in paragraphs [20] and [21] of this Ruling.*
2. *Application to stay proceedings in the High Court is refused.*
3. *I make no order as to costs.*



Idet Guneratne

HON JUSTICE ALMEIDA GUNERATNE
PRESIDENT, COURT OF APPEAL