IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

Criminal Miscellaneous Matters Nos.

HAM 236 of 2013 and HAM 239 of 2013

BETWEEN : MAHENDRA PAL CHAUDHRY

Applicant

AND : STATE

Respondent

BEFORE : HON. MR. JUSTICE PAUL MADIGAN

Counsel : Mr. G. Reynolds S.C for the Applicant
Mr. C. Grossman Q.C., S.C with Ms. E. Yang and
Mr. M. Korovou for the Respondent

Dates of hearing : 25 February, 2014
Date of Ruling : 6 March, 2014

RULING

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1. The applicant by way of Notice of Motion and Affidavit (dated 15 October 2013) filed a notice of motion (HAM 236 of 2013) moving the Court to make the following orders:

(i) that the information dated 3 October 2013 be dismissed (sic) pursuant to section 290 (1)(e) of the Criminal Procedure Decree 2009 on grounds of invalidity and of failing to disclose an offence at law; and/or alternatively;

(ii) that the informations (sic) as filed against the applicant be struck out and dismissed pursuant to section 290(1)(f) of the Criminal Procedure Decree 2009 as such indictment against him is in breach of his fundamental rights under the Constitution of Fiji as currently in force.

(iii) that all pending interlocutory applications and orders against the applicant be dismissed; and

(iv) Costs.

2. In the matter HAM 239 of 2013, an application by way of a notice of motion dated 16th October 2013 together with accompanying affidavit makes application:

(i) that the information dated 3 October 20th be quashed on the ground that there was no nexus between funds alleged to be held overseas and Fiji Islands balance of payments.

(ii) that the applicant has had no notice of the alleged offences, and that the applicant does not fall within the class of persons referred to in section 36(a-e) of the Fifth Schedule of the Exchange Control Act.

(iii) that the Exchange Control Act provisions do not apply to the applicant and that there is no requirement under law for the applicant to sell any foreign currency.

(iv) that the indictment cannot be amended to create an offence.

3. At the hearing of this application learned counsel for the applicant did not seek to rely on the affidavits and materials filed with the two distinct notices of motion but sought to make submissions orally on reasons why the information should be quashed. There was no objection from the State to this course of action. Mr. Reynolds Q.C. then proferred three major grounds why the three charges should be struck out or quashed. Those three grounds are:

A. Jurisdiction (in that there was no consent to the prosecution).
B. The charges are not apposite to the underlying facts.
C. The charges are bad for duplicity and multiple ambiguity.

4. Counsel for the applicant made no submissions whatsoever on breach of constitutional rights as prayed in HAM 236 of 2013, nor did he seek costs not surprisingly given that it was his own application. Nor did counsel seek to move the Court for a declaration that his client was not one of a class of persons referred to in section 36 of the Fifth Schedule. He stressed that he would confine his argument to the three issues afore-mentioned only and to none other.

5. The applicant was originally charged with twelve offences by information dated 30th July 2010 signed by Acting Director of Public Prosecutions, Mr. Aca Rayawa. Included in these offences were five counts of money laundering and four counts of making a false

statement in an income tax return. These money laundering and false statement counts were subsequently permanently stayed and quashed respectively by Goundar J. in a ruling of 25 July 2012 (HAM 034 of 2011) leaving three counts of breach of the Exchange Control Act. These were separately charged in an Amended information dated the 3rd October 2013 and signed by the then and present Director of Public Prosecutions ("D.P.P."), Mr. Christopher Pryde.

6. These three charges under the Exchange Control Act, Cap 211 ("E.C.A") read as follows;

"

First Count

Statement of Offence

Failure to surrender foreign currency : Contrary to section 4 of the Exchange Control Act, Cap 211 and section 1 of Part II of the Fifth Schedule of the Exchange Control Act, Cap 211.

Particulars of Offence

Mahendra Pal Chaudhry in between the 1st day of November 2000 and the 23rd day of July 2010, 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 $1,500,000.00 ($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 section 3 of the Exchange Control Act, Cap 211 and section 1 of Part II of the Fifth Schedule of the Exchange Control Act, Cap 211.

Particulars of Offence

Mahendra Pal Chaudhry in between the 1st day of November 2000 and the 23rd day of July 2010, at Suva in the Central Division being a resident in Fiji but not being an authorised dealer, did lend the sum of $1,500,000.00 ($1.5 million) Australian Dollars to persons otherwise than an authorised dealer, namely the Financial Institutions in Australia and New Zealand as listed in 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 section 26(1)(a) of the Exchange Control Act, Cap 211 and section 1 of the Part II of the Fifth Schedule of the Exchange Control Act Cap 211. "

Particulars of Offence

Mahendra Pal Chaudhry in between the 1st day of November 2000 and 23rd day of July 2010, at Suva in the Central Division being a resident in Fiji having the right to receive a sum of $1,500,000.00 ($1.5 million) Australian Dollars from the Financial Institutions in Australia and New Zealand as listed in 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 consent of the Governor of the Reserve Bank of Fiji. "

7. The annexure "A" referred to lists 2 banks and 3 investment companies in New Zealand and Australia.

8. These counts are those that the applicant seeks to have quashed by his representations pursuant to the notices of motion is so much as relied on.

JURISDICTION

9. In his submissions on jurisdiction and more specifically on the lack of consent to the launching of his prosecution, the applicant has over time adopted several various positions. The original submissions were that written consent is necessary and there is no such written consent (as submitted in the applicant's written submissions of 1st November 2013, and repeated in the written submissions in reply, 20 December 2013). However, at the beginning of his oral submissions, Mr. Reynolds for the applicant in resiling from that original position submitted that the prosecution had to demonstrate that the original charge was instituted by or with the consent of the D.P.P. or an appropriate officer and that had not been established. In support of his submission he referred the Court to the Australian case of **Gilmore** [1980] Federal Law Reports 36. This was a case where a prosecution under the Trade Practices Act 1974 the Minister was required to consent in writing to the prosecution. Although the Minister had actually consented to the prosecution, alternative charges were laid where the consent had not been given. The Court there found, not surprisingly, that as the Minister had not consented to the prosecution for the offences alleged, the Court had no jurisdiction to entertain the proceedings and the information would be dismissed. The authority is not helpful to the consideration of jurisdiction or consent in the instant case; it is a decision from a single judge in the General Division of the Australian Federal Court in Brisbane stating the obvious.

10. Section 2(1) OF Part II of the Fifth Schedule to the Exchange Control Act reads:

> *"2(1) No proceedings for an offence punishable under this part shall be instituted except by or with the consent of the Director of Public Prosecutions or appropriate officer."*

11. Obviously the wording of this sanction clause provides for consent through two different avenues: with consent of the Director of Public Prosecutions (which would presumably be done by a separate written consent or endorsement on the information itself) or instituted by the Director of Public Prosecutions. It is this latter avenue that the respondent is now relying on by submitting that the original information as later amended was signed by the D.P.P. and was by the information instituting the proceedings.

12. Mr. Reynolds then shifted his stance to concede that if the officer signing the original information (who was in fact a Mr. Aca Rayawa, Acting Director of Public Prosecutions) on the 30th July 2010 was validly appointed, then "this would suffice". By making that unexpected concession before me, Mr. Reynolds now in hindsight had something further in contemplation. At the end of oral submissions, Mr Reynolds sought the consent of the Court to file an additional written submission on this point. With leave of the Court he did so; that submission reading as follows:

> "*1. The* defendant's *legal advisers have been informed that Mr. Aca Rayawa was admitted as a legal practitioner in about 2004, 2005.*
>
> *2. Mr. Rayawa therefore did not have the requisite 10 years of experience as a lawyer (as required by s.15 of the Administration of Justice Decree and s.20)2) of the State*

Service Decree) and therefore was ineligible for appointment as D.P.P. on 31 December 2009.

3. In these circumstances any consent purportedly given by Mr. Rayawa to Mr. Chaudhry's prosecution was invalid. "

13. Apart from an extremely hopeful leap of logic from assertion no.1 to assertion no.3, information gleaned by the "defendants legal advisers" is hardly evidence before the Court. Nor did counsel for the respondent have an opportunity then to answer these submissions. Nevertheless in order to deal with this submission to prevent it being raised again before the Court, I invited both parties to make further written submissions on the matter.

14. An identical application was made in respect of the D.P.P. in **Peniasi Kunatuba** HAM 66 of 2006, where Shameem J. held that the Latin maxim *"Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium"* (usually shortened to *"omnia praesumuntur")* is applicable. What that means is that until the contrary is proved, a man (or woman) who acts in an official capacity, is presumed to have been duly and properly appointed and has properly discharged his or her official duties. It is a principle that has been applied in England as recently as 1977.

15. Counsel for the applicant would say of course that he can prove that the acting D.P.P. was not validly appointed and that this doctrine does not apply. Shameem J. suggested in her ruling that determination of the validity of an appointment is a matter for the civil courts and as a result:

"the criminal courts must be cautious in venturing into fields which are within the jurisdiction properly of the civil courts – a failure to exercise such caution could lead to ancillary inquiries being launched during a criminal trial about the validity of the

appointments of police officers, prosecutors and holders of statutory bodies with powers to prosecute."

"In this case I hold that the presumption of validity applies, to Mr. Naigulevu's position as D.P.P. and therefore to the information and the sanction."

16. There is authority however to develop the legitimacy of an invalid appointee even further. It is referred to as the doctrine of *"De facto appointment."* In the New Zealand case of **In re Aldridge** (Court of Appeal 1893) a Mr. Edwards appointed as a Judge had tried and sentenced a prisoner when it was discovered that he (Mr. Edwards) had been invalidly appointed. The question arose therefore as to the validity of his conviction and sentence of the prisoner. Prendergest C.J. said *"if the presiding Judge was a Judge de facto, as I think he was, the validity of the conviction and sentence cannot be called in question in this proceeding."* Richmond, J. referred to an American case **State v. Carrol** 9 American Report 409 and cited with approval the definition of the doctrine given in that case where it was said; *"an officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties are exercised - first without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be."*

17. In **Coppard** *v.* **Customs and Excise Commissioners** [2003] EWCA Civ 511 the Court of Appeal examined the doctrine in respect of a Judge who had not been properly authorised to sit in the Technology and Construction Court. In defining the legal principle, Sedley L.J said *"the central requirement for the operation of the doctrine is that*

the person exercising the office must have been reputed to hold it" and later in giving approval to the words of Wade & Foresyth *"Administrative Law" (*8ed 2000) p.291.

> *"There is a long standing doctrine that collateral challenge is not to be allowed, where there is some unknown flaw in the appointment or authority of some officer or Judge. The acts of the officer or Judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all."*

18. Byrne J.A. applied the doctrine in an attack on his own validity in the case of **Bainimarama & others** v. **Heffernan** ABU 0034 of 2007. He said:

> *"I do not know, nor could I have known that there is any irregularity in my appointment. I was appointed by the President on the recommendation of the Judicial Services Commission. Whether the Judicial Services Commission was properly constituted and subsequent procedures were regular or not are beyond the scope of issues calling for decision in this action."*

19. And so with Mr. Aca Rayawa, he was appointed by letter of the President dated 31 December 2009 (this Court having seen a copy of the appointment letter produced.) There is nothing to suggest that Mr. Rayawa knew that he was not eligible to be appointed as an acting Director of Public Prosecutions. He was appointed to the office, he acted in the office; all appropriate persons regarded him as and accepted him as the Acting Director of Public Prosecutions and he therefore became the de facto acting Director of Public Prosecutions whether he was eligible to be appointed or not. As the defacto officer all acts that he performed in office, all informations and other documents that he signed, all administrative decisions that he might have made were validly performed by him in the office of

Acting Director of Public Prosecutions whether his appointment was valid or not.

20. His signing of the original information dated 30 July 2010 instituted the proceedings against the applicant, thereby satisfying the terms of s.2(1) of the Part II of the Fifth Schedule to the Exchange Control Act.

21. The applicant's submissions on jurisdiction do not succeed.

Part II of this Application

22. As a second limb of Counsel's attack on the information, he submits that section 4 and 26 of the Exchange Control Act, sections which the applicant has been charged with, cannot apply to the facts as relied upon by the Prosecution and they are therefore bad law and should be quashed.

23. It must be stated that this argument as it was developed by Counsel appeared to cover the same ground that was advanced previously before Goundar J. and this Court, and neither application succeeded. There is no reason why the Court should entertain this part of counsel's submissions except out of fairness to his client and therefore for the last time the Court considers counsel's submissions.

24. Mr. Reynolds submits that the charges (4 and 26) relate to activities with relation to overseas accounts and the sections must be construed as being applicable solely to activities within Fiji. He submits that section 4 only applies to situations where the relevant currency is in Fiji. The section means, he submits, that if a person in Fiji has foreign currency with him he must sell it to an authorised dealer. In support of this argument counsel seeks to rely on an artificial and narrow construction of s.4 by submitting for example that where no mention is made in the section of extra territoriality it

must be construed generally within the jurisdiction and that any penal statute cannot be construed restrictively to the prejudice of the accused. He presses his point by again submitting (as in the two earlier applications) that there is no *"nexus"* between the monies held in Australia and Fiji or Fijian currency. He advances the proposition that were section 4 to be held to apply to currency held in foreign bank accounts, then all persons in Fiji, resident or tourist, with foreign bank accounts would be caught by the section and liable to prosecution. He prays in aid of this argument the dicta of the Supreme Court in **Reddy's Enterprises Ltd** [1996] FJSC which dealt with an amount in pounds sterling. He extends his argument to the construction of s.3 and s.26 of the Exchange Control Act. He prayed in aid examples of other jurisdictions and the impact there of exchange control legislation.

25. The Exchange Control Act was introduced in 1952 in Fiji in an attempt to regulate and conserve foreign exchange. It was modelled on similar legislation passed after the second world war in the U.K. In the case of **Reddy's Enterprises** (supra) a case relied upon by the applicant, the Supreme court said :

> *"the central issue in the appeal is the effect of the Exchange Control Act on this transaction. It is a comprehensive statute aimed at the protection of Fiji's reserves of gold and foreign currency and is modelled on the United Kingdom Exchange Control Act of 1947 which was repealed in 1987. It prohibits a wide range of transactions involving dealings by Fijian residents in gold, foreign currency and securities without the permission of the Minister."*
>
> and later when discussing section 4 of the Act and referring in particular to subsection 6, the Court said:
>
> *"This section is clearly aimed at achieving the transfer of gold and foreign currency held by a Fijian resident to Fiji through the*

commercial banking system by means of compulsory offers of sale."

26. Although the **Reddy** case is distinguishable in that it concerned the nature of the currency in question the principles made clear in the quotes above are that without doubt, the purpose of the legislation is to compel citizens or residents holding monies abroad to repatriate those funds to Fiji and bring the currency into the banking system by the requirements of section 4.

27. No matter how the applicant may regard his funds in Australia and no matter what their provenance the fact is that they represent foreign exchange held by a Fijian resident and as such they are caught by the terms of the Act.

28. Mr. Reynold's Q.C submissions are well researched, novel and ingenious but unfortunately they are misconceived. The funds being abroad, the legislation creates the *"nexus"* , and this limb of the applicant's argument has no merit.

Ambiguity and Duplicity

29. The applicant's third oral ground for quashing the information is on the grounds that each of these counts is duplicitous and contains multiple ambiguous charges. He submits that each count in the amended information relates to a ten year period and each count relates to the same AUD$1,500,000. The annexure attached to the information lists "multiple" financial institutions. Counsel points out various parts of the charges which he considers to be duplicitous claiming that each of the transactions referred to is an offence in itself and the counts create a difficulty for his client to understand the charge or to even enter a plea. He complains of the difficulties that the trial Judge would have in summing up to the assessors, a

difficulty for the Judge in *"characterising"* each of the transactions. From there Counsel extends his submissions to a complaint that despite requests, the applicant has not been given sufficient particulars of the counts alleged in order that he may detail each transaction, identify the recipient and *"characterise"* it. He calls the counts an "omnibus" form of allegation.

30. Counsel is correct in his submission that were the count to be duplicitous, it would be bad in law. The rule, often stated is that no one count of the information should charge the accused with having committed two or more separate offences. Rules of form of the information are codified by Division 2 of Part VII of the Criminal Procedure Decree 2009. Section 58 of the Decree reads:

> *"s.58 — every charge or information shall contain*
>
> *(a) A statement of the specific offence or offences with which the accused person is charged; and*
>
> *(b) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged."*

31. The part of the Decree then sets out the form of the information relating to property, description of persons, description of documents until a provision stating the "general rule as to description" which reads:

> *"s.66. subject to any other provisions of this Division, it shall be sufficient to describe any place, time, thing, matter, act or omission to which it is necessary to refer in any charge or information in —*
>
> *(a) Ordinary language; and*

(b) In such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to."

32. As a final point on the rules of form of information, the Court would refer to the provisions of section 70(1) of the Decree which makes statutory provision for a "*general deficiency"* in cases of theft, fraud, corruption or abuse of office. Although the section does not specifically refer to offences under the Exchange Control Act, it is applicable by way of correlation of meaning to offences charging multiple offending. The section reads:

"s.70(1) — when a person is charged with any offence involving theft, fraud, corruption or abuse of office and the evidence points to many separate acts involving money, property or other advantage, it shall be sufficient to specify a gross amount and the dates between which the total of the gross amount was taken or accepted."

33. This *"general deficiency"* as an exception to the common law rule against duplicity has been discussed by the House of Lords in **D.P.P. v. Merriman** [1973] AC 584 where the question was asked *"are the acts so closely related as to form part of a single activity and are therefore properly charged in a single count?"*

34. Lord Morris of Borth-y-Guest said (p 593 A) *"it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act."*

35. Lord Diplock said (p 607 C) *"The rule against duplicity ……..has always been applied in a practical, rather than in a strictly analytical way for the purpose of determining what constituted one offence. When a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of*

their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction a criminal enterprise, it was the practice as early as the eighteenth century to charge them in a single count of an indictment."

36. The authors of the authoritative work **"Blackstone's Criminal Practice (2011)"** state: *"if the particulars of a count can sensibly be interpreted as alleging a single activity, it will not be bad for duplicity, even if a number of distinct criminal acts are implied."*

37. The three offences in this information are single offences, laid pursuant to three distinct offences in the Act. S.3 a failure to surrender foreign currency; section 4 dealing in foreign currency without permission and section 26 a failure to collect debts. In particularising each of those offences, the State has made reference to five different financial institutions who they allege were holding or dealing with the funds on the instructions of the applicant. That each count is but one offence is quite clear and the transactions that the applicant would have as individual and discrete offences are but evidentiary examples of transactions going to the proof of each offence.

38. It is clearly the intention of parliament to create one offence for each situation and that one offence embraces the commission of numerous offences which themselves, if the details were known could be individually chargeable.

39. This Court finds that the information is not bad for duplicity since it charges but three distinct offences during a specified period comprised of evidentiary examples of commission of the offence. (see **Masood Asif** 82 Cr. App R 123).

40. During the hearing it became apparent that both parties were in dispute over the question of provision of particulars of the counts to

the defence. The applicant referred to a letter written by former solicitors to the applicant as late as 14 February 2014 to the office of the D.P.P. asking for further and better particulars. A reply dated 17 February stated that particulars for each charge had already been provided and that in any event the matters requested were *"issues for trial"*.

41. Whilst it is not for this Court and on this application to make findings and directions on disclosure, it must be shown that sufficient particulars have been provided to the accused to enable him to defend the case adequately.

42. S.58 of the Criminal Procedure Decree states :

> *"s.58 — every charge or information shall contain –*
> *(a) A statement of the specific offence or offences with which the accused person is charged; and*
> *(b) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged."*

43. The prosecution submit that the particulars already provided are sufficient and that the request by the defence is unwarranted.

44. Clearly the operative words on s.58 are *"as are necessary — giving reasonable explanation"* and the provision of particulars is not to be regarded as to provide a complete itemisation of the prosecution case.

45. The counts in the information identify the three offences which the applicant has allegedly breached the Exchange Control Act. The particulars in the charges are given only to provide reasonable information as to the nature of the respective charges and as to the principal examples that the prosecution will be inviting the assessors and Court to make the inference that the accused was so in breach.

46. At a pre-trial conference held at the end of the hearing of the written application and before this ruling was effected, the State made undertakings to provide further particulars and details of the evidence sought to be relied upon, a situation that seemed to have allayed the concerns of the applicant.

47. For the reasons given, the applications in HAM 236 of 2013 and HAM 239 of 2013 are refused and the trial will proceed as listed on 31st March next.

P.K. Madigan

Judge

At Suva

6 March 2014