IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBM 11 of 2014

BETWEEN : **TREVOR MERVYN TAMBLYN**

PLAINTIFF

AND : **DIRECTOR OF PUBLIC PROSECUTION**

FIRST DEFENDANT

AND : **THE ATTORNEY GENERAL OF FIJI**

SECOND DEFENDANT

RULING

INTRODUCTION

1. These are my reasons for the ruling I delivered verbally in court on 20 November 2014.
2. Mr. Trevor Mervyn Tamblyn is alleged to be involved in an illicit drug racket. He is an Australian Citizen and claims to be a retired fisherman. He is currently on remand at the Natabua Prison in Lautoka. Mr. Tamblyn was first brought before the Magistrate Court in Nadi on Friday 04 April 2014 on a charge of IMPORTATION OF CONTROL (sic) CHEMICAL contrary to section 6(a) of the Illicit Drug Control Act of 2004. The Particulars of the Offence alleged as stated in the Charge read:

   IOWANE APISAI DRAIVA and TREVOR MERVYN TAMBLYN between 26th day of March 2014 and 1st day of April 2014 at Nadi in the Western Division, unlawfully imported 584.4 grams of (Pseudo) ephedrine, a control (sic) chemical into Fiji.

3. Resident Magistrate Wickramasekara, on the same day, 04 April 2014, refused bail to both Mr. Tamblyn and Mr. Draiva. He also ordered a Stop Departure Order against both and directed that the case be transferred to the High Court at Lautoka.
4. Under section 198 of the Criminal Procedure Decree 2009, the prosecution is required to file an *Information* at the Lautoka High Court within 21 days of the Order of Transfer at the Court below.

Filing of an information

198. — (1) An information charging an accused person and drawn up in accordance with section 202 shall be filed by the Director of Public Prosecutions or by the Commissioner or Deputy Commissioner of the Fiji Independent Commission Against Corruption with the Chief Registrar of the High Court within 21 days of the order for transfer except that the High Court may grant leave to extend the 21 days. The power of the Director of Public Prosecutions to file information may be delegated by him to a public prosecutor in writing.

(2) In the information, the Director of Public Prosecutions or Commissioner of the Independent Commission Against Corruption may charge the accused person with any offence, either in addition to or in substitution for the offence in respect of which the accused person has been transferred to the High Court for trial.

Service of information

199. — (1) A copy of the information filed under section 198 shall be served on the accused person or his or her lawyer as soon as possible, but at least upon the first appearance of the accused.

(2) The High Court has power to extend the period of service.

LATE FILING

5. The Order for transfer was made by the Learned Magistrate on 04 April 2014. Twenty one days from that date would have fallen on 25 April 2014. That is the date by which the prosecution should have filed an *Information*. The case was first called at the High Court in Lautoka on 14 May 2014. Clearly, at first call, the 21-day-filing-period required under section 198 had lapsed by some three weeks or so.

6. The Court records show that on first call in the High Court, the Office of DPP did seek the leave of the Court to extend the time to file *Information* and *Disclosures*. Mr. Justice De Silva did grant leave then and extended the time to file *Information* by the next call date of 02 June. At that time, the applicant was unrepresented.

7. By 02 June, the prosecution had not filed an *Information*. The prosecution then, sought a further extension of time to file the *Information*. De Silva J again granted leave and extended the time to file an *Information* by the next call date of 23 June.

8. On 21 June, the prosecution filed and served an *Information*. The case was called for mention two days later on 23 June. On that occasion, Ms Barbara Malimali, the principal of Pacific Chambers, appeared in Court for Mr.

Tamblyn. She had noted that the *Information* filed was already out of time as per section 198 of the Criminal Procedure Decree.

9. De Silva J noted Ms Malimali's objections and granted her time to make written submissions which she did. The state was given to file submissions in reply which it also did.

DE SILVA J'S RULING

10. After considering all submissions, De Silva J did give a written ruling on the issue which he pronounced in open court on 11 July 2014. In his ruling, the learned Judge dismissed Ms. Malimali's objections on the late filing of the *Information*.

CONSTITUTIONAL REDRESS

11. On 25 July 2014, Mr. Tamblyn filed an Originating Motion through his lawyers, Pacific Chambers seeking Constitutional Redress. His Notice of Originating Motion seeks the following relief:

(i) A declaration that the State through the Office of the Director of Public Prosecutions breached s.198 of the Criminal Procedure Decree and consequently Mr. Tamblyn's rights as an accused person, which are guaranteed under the Constitution.

(ii) A declaration that the State breached sections 26(1) and 26(2) of the Constitution when it did not give the unrepresented Mr. Tamblyn an opportunity to be heard on whether he knew and/or understood that at the time of his first court appearance in the High Court on 14/05/14, the State was already in breach of the 21 day rule required by law for the Information against him (Tamblyn) to be filed, after an Order for Transfer has been made.

(iii) A declaration that the State breached section 26(3) of the Constitution when it unfairly discriminated against Mr. Tamblyn when it indirectly took advantage of his age and frailty and did not give him an opportunity to be heard on whether he knew and/or understood that at the time of his first court appearance in the High Court on 14/05/14, the State was already in breach of the 21 day rule.

(iv) A declaration that the State breached Section 26(3) of the Constitution when it unfairly discriminated against the Applicant when it took advantage of his race, culture, ethnic or social origin and did not give him an opportunity to be heard on whether he knew and/or understood that at the time of his first court appearance in the High Court on 14/05/14, the State was already in breach of the 21 day rule.

(v) A declaration that the State breached s.195 of the Criminal Procedure Decree and consequently the Applicant's (Mr. Tamblyn) rights as an accused person, which are guaranteed under the Constitution.

(vi) A declaration that the State breached Sections 26(1) and 26(2) of the Constitution when it did not give the unrepresented Applicant an opportunity to be heard on whether he knew and/or understood that at the time of his first court appearance in the High Court on 14/05/14 that the State had already breached the 28 day rule required by law for the Applicant to be produced in the High Court, after an Order for Transfer has been made.

(vii) A declaration that the State breached Section 26(3) of the Constitution when it unfairly discriminated against the Applicant when it indirectly took advantage of his age and frailty and did not give the unrepresented Applicant an opportunity to be heard on whether he knew and/or understood that at the time of his first court appearance in the High Court on 14/05/14 that the State had already breached the 28 day rule required by law for the Applicant to be produced in the High Court, after an Order for Transfer has been made.

(viii) A declaration that the State breached Section 26(3) of the Constitution when it unfairly discriminated against the Applicant when it took advantage of his race, culture, ethnic or social origin and did not give him an opportunity to be heard on whether he knew and/or understood that at the time of his first court appearance in the High Court, the State was already in breach of the 28 day rule required by law for the Applicant to be produced in the High Court, after an Order for Transfer has been made.

(ix) An injunction restraining the First Defendant and Second Defendant, whether by themselves, their subordinate officers, servants or agents or otherwise howsoever, from prosecuting the Applicant.

(x) Such further or other relief as the Court deems just.

AND FURTHER TAKE NOTICE THAT THE GROUNDS of this application for constitutional redress are:

(xi) By the reluctance and/or inability of the State to obey the time limit set by the Criminal Procedure Decree, it affects the Applicant's right to Fair Trial.

(xii) By the reluctance and/or inability of the State to obey the time limit set by the Criminal Procedure Decree, it affects the Applicant's right to know what he has been charged with and the reasons for his continued detention as required by Section 13(1)(g) of the Constitution.

(xiii) By the reluctance and/or inability of the State to obey the time limit set by the Criminal Procedure Decree, it affects the Applicant's right to have the trial begin and conclude without unreasonable delay as required by Section 14(2)(g) of the Constitution.

(xiv) On 14/05/14, the Applicant was unrepresented and his rights were breached by the State and again on 02/06/14 when the case was called the Applicant remained unrepresented and the State continued to breach his constitutionally guaranteed rights and discriminated against him on the basis of his age, race, culture, social origin.

(xv) On 14/05/14, the Applicant was unrepresented and his rights were breached by the State and again on 02/06/14 when the case was called the Applicant remained unrepresented and the State continued to breach his constitutionally guaranteed rights by not explaining to him that they were out of time and how that affected him and his case.

(xvi) The First and Second Defendants are joined as parties to these proceedings under Section 44 of the Constitution of the Republic of the Fiji 2013.

APPLICATION NOW BEFORE THIS COURT

12. What is immediately before me now is a summons to strike out Mr. Tamblyn's Constitutional Redress application. The summons was filed on 15 September 2014 by the Office of the Attorney-General. It seeks to strike out Tamblyn's Originating Motion on the following grounds:

(i) that it discloses no reasonable cause of action.
(ii) that the proceeding is scandalous frivolous and vexatious
(iii) that the proceeding may prejudice, embarrass or delay the fair trial of the proceeding
(iv) that it is an abuse of the court process.

THE LAW ON STRIKING OUT

13. Because the jurisdiction for constitutional redress is a civil jurisdiction, the High Court Rules 1988 apply. Hence, the principles of striking out under Order 18 Rule 18 would apply. This is what the Fiji Court of Appeal ruled in **Singh v Director of Public Prosecutions** [2004] FJCA 37; AAU0037.2003S (16 July 2004)[1].

No Reasonable Cause of Action

14. It is only in exceptional cases where, on the pleaded facts, the plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that the Courts will strike out a pleading on this ground.

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[1] The Court there held:

An application for **constitutional redress** even if it pertains to a criminal matter should be filed in the civil jurisdiction of the High Court. Rule 7 of the High Court (**Constitutional Redress**) Rules 1998 is plain in its terms. The jurisdiction to deal with a **constitutional redress** application is to be in accordance with the practice and procedure of the High Court in relation to civil proceedings. It necessarily follows that the High Court Rules 1988 also apply to such an application. In turn, it necessarily follows that in a proper case (and the Attorney General argues that this was one) the court is empowered to summarily dismiss an application for **constitutional redress** if one of the grounds set out in O.18 r.18 can be satisfied. That rule authorises a summary dismissal of a proceeding where:
a. the proceeding does not disclose a reasonable cause of action.
b. the proceeding is scandalous, frivolous or vexatious.
c. the proceeding may prejudice, embarrass or delay the fair trial of the proceeding ; and
d. the proceeding is otherwise an abuse of the process of the Court.

15. If the facts as pleaded do raise legal questions of importance, or a triable issue of fact on which the rights of the parties depend – the courts will not strike out the claim.

Scandalous, Frivolous & Vexatious

16. The Courts will strike out a pleading as scandalous, frivolous or vexatious if the claim, even if known in law, is factually weak, worthless or futile.

17. The White Book Volume 1 1987 edition at para 18/19/14 states as follows:

> Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v Prythergch (1841) 12 Sim. 363; Rubery v Grant (1872) L. R. 13 Eq. 443). "The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v Albion Assurance Society (1876) 45 L.J.C.P. 663).

18. The test is whether the alleged scandalous matter would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed (per Selbourne L.C. in **Christie v Christie** (1873) L.R. 8 Ch. App 499, p. 503; and see **Cahsin v Craddock** (1877) 3 Ch. D. 376; **Whitney v Moignard** (1890) 24 Q.B.D 630).

19. In **Brooking v Maudslay** (1886) 55 L.T 343, allegations of dishonest conduct against the defendant in a statement of claim were struck out when it became clear at close of pleadings that the plaintiff was seeking no relief on that ground. The allegations thus became immaterial, and were struck out as scandalous and embarrassing. So in an action on marine policies, a paragraph which purported to state what took place at an official inquiry held by the Wreck Commissioners was struck out as an attempt to discredit the plaintiffs and to prejudice the fair trial of the action (**Smith v The British Insurance Co.** [1883] W.N. 232; **Lumb v Beaumont** (1884) 49 L.T. 772).

20. In **Bullen, Leake and Jacobs: Pleadings and Precedents 12th edn at p145**, it is there stated that a pleading or an action is frivolous when it is without substance, is groundless, fanciful, wasting the Court's time, or not capable of reasoned argument. A pleading is vexatious when it is lacking in

bona fides, is hopeless, without foundation, and/or cannot possibly succeed or is oppressive.

Prejudice, Embarrass or Delay Fair Trial

21. A pleading will be struck out on this ground if it is so badly drafted as to be obstructive of any fair trial. The White Book Volume 1 1987 edition at para 18/19/14 states as follows:

> When considering whether a particular passage in a pleading is embarrassing regard must be had to the form of the action. Thus, averments in aggravation of damages may be, and often are, made in actions for tort, but cannot (it is submitted) be properly made in actions for breach of contract except in three cases mentioned by Lord Atkinson in Addis v Gramophone Co. Ltd [1909] A.C. 488, p. 495.

Abuse of Process

22. The Courts will strike out a claim on this ground if its process is being used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes or where its process is being misused. Courts will rarely find that there is an abuse of process unless it concludes that the later proceedings amount to "unjust harassment". In the English case of **Goldsmith v Sperrings Ltd** [1977] 2 All ER 566, Lord Denning said as follows at 574:

> In a civilized society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abuse when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

23. In **Broxton v McClelland** [1995] EMLR 485 at 498 Simon Brown LJ said:

> Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial.

24. In **Cooper v Public Trustee Corporation Ltd** [2004] FJHC 250; HBC0082d.2000s (13 October 2004) – Pathik J said:

> As to what is an abuse of process the following passage from Halsbury's Laws of England 4th Ed. Vol. 37 para 434 is apt:

> An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court.

25. In **Bradford & Bingley Building Society v Seddon** [1999]1 WLR 1482, Auld LJ in a judgment with which Nourse and Ward LJJ concurred said at p.1492:

> As Kerr LJ and Sir David Cairns emphasised in Braggs v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982]2 Lloyd's Rep. 132, 137, 138-139 respectively, the Courts should not attempt to define or categorise fully what may amount to an abuse of process; see also per Stuart-Smith LJ in Ashmore v British Coal Corporation [1992] QB 338, 352. Sir Thomas Bingham MR underlined this in Barrow v Bankside Agency Ltd [1996] 1 WLR 257 stating at page 263 B, that the doctrine should not be circumscribed by unnecessarily restrictive rules since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also per Saville LJ at page 266 D – E.

26. In **Manson v Vought and Others** [1999] BPIR 376, May LJ said at p.388:

> Abuse of process is a concept which defies precise definition in the abstract. In particular cases, the Court has to decide whether there is abuse sufficiently serious to prevent the offending litigant from proceeding.

DISCRETION

27. This application for constitutional redress, if entertained, will ultimately involve a review of the learned judges exercise of his discretionary powers under section 198. I am of the view that the proceedings are an abuse of process as well as being scandalous, frivolous and vexatious.

28. Section 198 does give the judge a wide discretion to extend the time limit to the prosecution to file information. The section states that the Court **"may grant leave to extend the 21 days"**.

29. Whether or not the Court grants leave, and if so, how much time it allows, if at all, is a matter of judicial discretion to be considered in the particular circumstances of each individual case.

30. When a statute grants the court a discretion on any matter, the statute is giving the court some power to make a choice between alternative courses of action. As **De Smith**[2] would say, judicial discretion:

> .....implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem

31. Hawkins[3] defines discretion as:

> the space ... between legal rules in which legal actors may exercise choice.

32. This is one of the reasons why it is hard to question or second-guess the exercise of a judicial discretion. Kay L.J. in **Jenkins v Bushby** (1891) 1 Ch 484 at p 495 illustrates the respect accorded to that choice from a slightly different angle:

> "... the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion."

33. True, courts have over the years developed guidelines and fetters on the exercise of discretion, however, a discretion in one case, though highly persuasive, will not be a precedent in another. In describing the inherent power of the Court to allow or refuse adjournment, Lord Wright in **Evans v. Bartham** (1937) A.C. 473 at 487 said:

> a typical exercise of a purely discretionary power ... could be interfered with only in exceptional cases, yet it may be reviewed by the Court of Appeal.

34. As to when that discretionary power can be interfered with, the oft cited case of **House v The King** (1936) 55 CLR 499[4] is most helpful. In that case, the Australian High Court had to deal on appeal with whether or not a sentencing discretion was properly exercised. The Court held that appealable errors

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[2] SA de Smith and JM Evans (eds), *De Smith's Judicial Review of Administrative Action* (4th ed, 1980) 278.
[3] Keith Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (1992) 11, 11.
[4] Cited by the Fiji Supreme Court in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)

committed in the exercise of a discretion include: acting upon a wrong principle; allowing extraneous or irrelevant matters to guide the discretion; mistaking the facts and failing to take account of a material consideration – but it will not be enough that the appellate court would have exercised the discretion differently.

35. The discretion must involve an error of law which has led to *'an unreasonable or plainly unjust'* result, or has involved a *'substantial wrong'*, before the discretion will be taken to have been improperly exercised by the lower court[5].

CAN THIS COURT QUESTION THROUGH CONSTITUTIONAL REDRESS DE SILVA J's EXERCISE OF JUDICIAL DISCRETION UNDER SECTION 198?

36. I start by reiterating that, although a given judicial discretion gives some power to the Court to make a choice between alternative courses of action, any wrong exercise of that power is reviewable. I also acknowledge as correct the submission by Ms Malimali that the 2013 Constitution imposes upon the Court a duty to interpret laws, including procedural laws, in accordance with the fundamental human rights protected under the constitution as well as those enshrined in international law.

37. Section 3(2) of the Constitution says:

> *Principles of constitutional interpretation*
> 3.—(2) If a law appears to be inconsistent with a provision of this Constitution, the court must adopt a reasonable interpretation of that law that is consistent with the provisions of this Constitution over an interpretation that is inconsistent with this Constitution.

38. Section 7(1)(b) of the Constitution of the Republic of Fiji (2013) states:

> *Interpretation of this Chapter*
> 7.—(1) In addition to complying with section 3, when interpreting and applying this Chapter, a court, tribunal or other authority—
> *(b)* may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter.

39. In **State v Alfaaz** [2012] FJHC 1410, HAC 124.2012 (8 November 2012), a case which was decided before the 2013 Constitution came into existence, Mr. Justice Thurairaja took into consideration the Convention on the Rights

[5] see also Wendy Lacey Judicial Discretion And Human Rights: Expanding the Role of International Law in the Domestic Sphere.

of the Child which Fiji had ratified in 1993 – when considering how to exercise his discretion under section 198.

> 19.The law is clear that the State shall file the information and disclosure within 21 days unless they obtain leave from the High Court.
>
> 20.Obtaining leave is described in many civil matters and criminal cases. When granting leave in criminal cases the Court has to balance between the right of the Accused and the welfare of the society at large.
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> 21.In my view, if the State is seeking for leave it should make a proper and formal application. That application should state the reason for the leave is sought. Copy should be served on the Accused and his Counsel in advance. Once the notice is received the Court can consider and may grant further time to the Prosecution to file information and disclosure.
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> 22.According to Section 198 it is very clear that the legislators were making the prosecuting authorities such as DPP and FICAC to be transparent and accountable, hence they cannot arbitrarily enhance the time to themselves to file information and disclosures.
>
> 23.Considering the present case there are two enlargement of time granted to the Prosecution but the 3rd date was taken by the State without any approval of the Court which is an absolute violation of Section 198 of the Criminal Procedure Decree.
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> 24.The Counsel for the Accused moves discharge of the Accused. In the interest of justice I peruse the particulars of the case available in the court record. I find the virtual complainant is 7 years old school girl had complained to the Police that her uncle, the Accused had sexual intercourse with her. The child was examined by a medical practitioner and found her hymen was not intact. Further there is an eyewitness to corroborate a part of her evidence. Considering the details I can safely presume that there are materials to consider charges against the Accused.
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> 25.While considering the violation of the legal provisions of the Criminal Procedure Decree by the Prosecution I am compelled to consider the interest of the complainant who is a child. Fiji is a signatory of the United Nations Child Rights Charter (CRC) according to the Charter this Court is bound to consider the best interest of the child in its all decisions. According to article 3 the best interest of the child is paramount, hence I am compelled to consider the best interest of the complainant. Accordingly I find discharging the Accused will not be best interest of the child hence I decide not to discharge the Accused on failure of filing information on time.

40. The decision of Thurairaja J in the above case is interesting. Clearly, he considered it relevant in the exercise of the discretion under section 198 to balance between the right of the Accused and the welfare of the society at large. In considering where to strike the balance, Thurairaja J took into account the fact that the complainant was a child of 7 years of age who was allegedly raped by her uncle. Then he considered Fiji's international obligation under the CRC, as well as the seriousness of the nature of the allegations against the accused. In this regard, he considered whether "there

are materials to consider charges against the accused" in the court record which would have come to him from the Magistrates Court.

41. As Lacey (see footnotes) observes:

> In the instances where judges retain specific discretion, their task most often involves weighing up some broader public interest against the interests of the individual.

42. In this case before me, if I were to even begin to consider the issue as to whether or not De Silva J did act on a wrong principle or took into account irrelevant matters or mistook the facts and failed to consider a relevant consideration when called upon to exercise his discretion under section 198, I would be sitting in judgment of the learned Judge's exercise of discretion from the viewpoint of an appellate court. That is not the function of a constitutional redress court.

43. In **Singh v Director of Public Prosecutions** [2004] FJCA 37; AAU0037.2003S (16 July 2004), the Fiji Court of Appeal said (emphasis mine):

> In ***Chokolingo v. Attorney General of Trinidad and Tobago*** [1981] 1 WLR 106 the appellant had been committed to prison for 21 days for contempt. He did not appeal against that committal. Two and half years later, he made an application for constitutional redress seeking a declaration that his committal was unconstitutional and in breach of human rights and fundamental freedoms. This applicant was also unsuccessful in all courts. In dismissing the appeal to the Privy Council Lord Diplock stated at pp.111-2:
>
> > *"Acceptance of applicant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under section 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under section 6(1) is stated to be "without prejudice to any other action with respect to the same matter which is lawfully available." The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter 1 of the Constitution an interpretation which would lead to this result would, in their Lordship's view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine".*

We note that Mr. Shankar cited portion of this passage in his submissions but that he omitted the last sentence which we consider highly relevant to the proper application of s.41(4) and the application of the Constitution as a whole.

In ***Hinds v Attorney General and Another*** [2002] 4 LRC 287 – one of the cases cited by Shameem J. in her ruling – the appellant had been charged with and convicted of arson in a trial where his application for legal representation was refused by the trial judge. The Court of Appeal dismissed his appeal. The appellant then applied for constitutional redress. Section 24 of the Constitution of Barbados contains a provision which is similar to s.41(4). In dismissing the Appellant's application the Privy Council held:

> *"As it is a living document, so must the Constitution be an effective instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional redress does not ordinarily offer an alternative means of challenging a conviction or judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The appellant's complaint was one to be pursued by way of appeal against the conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on s.24."*

44. I am of the view that Lord Diplock's salutary warning against the use of the constitutional redress proceedings to challenge a judicial decision applies equally against the use of the constitutional redress proceedings in this case to challenge the exercise of judicial discretion under section 198 in the particular circumstances of this case before me now.

45. Ms Malimali argues that in exercising that discretion, the learned judge was duty bound to hear the complainant. I agree that on principle, judges have a duty to act fairly and to exercise the discretion judiciously. In this case, the De Silva J did hear out Ms Malimali's submissions as well as the prosecutions. And in a fresh exercise of his discretion, which is available to him, the learned judge declined the submissions of Ms Malimali. If her client is aggrieved by that decision, he should have appealed it.

CONCLUSION

46. The short point is this: the constitutional redress application by Mr. Tamblyn, from where I sit, is an appeal of the learned judge's exercise of his discretion under section 198 of the Criminal Procedure Decree 2009. This is a matter that should have been appealed to the Fiji Court of Appeal.

47. I grant Order in Terms of the Application to strike out the Constitutional Redress application of Mr. Tamblyn. Costs in favour of the State which I summarily assess at eight hundred dollars only.

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Anare Tuilevuka
JUDGE
Lautoka

02 December 2014