

3. The application for recusal, by its very nature, is personal to the judge concerned and therefore, it is entirely a matter for Justice Madigan to decide whether he should hear the Applicant's case or not. Therefore, I do not intend to rule on the application for recusal. I leave it in the hands of Justice Madigan to decide.
4. When this matter was first called on 30th November, 2017, the State was given time to file their response till 5th December, 2017. After filing State's response 7 days' period was given to Mr. Khan to file his reply and the matter was fixed for hearing on 13th December, 2017. An affidavit (of three pages) in reply was filed on 12th December, 2017. When the matter was called on 13th December, Mr. R. Kumar informed Court that his Principal Mr. Iqbal Khan had suddenly left the country and requested another hearing date on 18th December during legal vacation. Since I had made all arrangements to leave the country on 15th December 2017 for legal vacation, I advised Mr. Kumar to make his submission before my departure because the application for vacation of trial had to be decided expeditiously. Mr. Kumar was not ready to make any submission and insisted that matter be postponed till his Principal Mr. Khan returns on 18th December, 2017.
5. The Court refused the application for postponement because the affidavits did not involve any complex legal issues and also I had already indicated to Mr. Khan (when he requested 7 days to reply) that the vacation application had to be decided before I leave the country for legal vacation. I then fixed the matter for Ruling on 14th December, 2017.
6. Having considered the affidavits filed by the Applicants and State, I proceed to pronounce my Ruling on the application for vacation of trial as follows.

Background

7. It is appropriate to explain briefly the sequence of events that took place in the case HAC 52 of 2014.
8. In HAC 52 of 20014, the Applicants are charged with one count of Murder contrary to Section 237 of the Crimes Act, 2009.
9. According to the Information, the alleged incident took place on 14th April 2014. The Applicants had been taken into custody on 16th day of April, 2014, by the Nadi Police regarding an enquiry into an alleged assault of one Vasu Dewan

Naidu who is the deceased in that case. Applicants were later charged with Murder.

10. After numerous adjournments, the matter was set down for hearing from 3rd July to 4th August, 2017 before Justice Rajasinghe.
11. Prior to the hearing date, Justice Rajasinghe was transferred to Suva and the matter was assigned to Justice Sunil Sharma for hearing.
12. On the 4th day of May, 2017 this matter was called before Justice Sharma who advised all the Counsel that His Lordship won't be able to hear this case since the 4th accused was known to His Lordship when he had done some work in His Lordship's residence. His Lordship recused himself from the case and adjourned the matter to 9th May, 2017, for mention in Court 1.
13. On 9th of May, 2017, this matter was called in Court 1. Justice Aluthge advised all the Counsel that the trial diary of Court 1 is fully booked until February, 2018 and that trial cannot be taken up as scheduled (from 3rd July to 4th August, 2017), and adjourned the matter to 23rd June, 2017 for mention to fix a new hearing date.
14. On 23rd June, 2017, the matter was called before Justice Madigan. Justice Madigan adjourned to 13th October, 2017 for mention to fix a hearing date.
15. On 13th October, 2017, the matter was called before Justice Sharma at 9.30 a.m. as Justice Aluthge was on leave. Justice Sharma indicated that the hearing will be taken up on 15th January, 2018. At this stage, Mr R. Kumar who was appearing on behalf of Mr. Iqbal Khan indicated that 15th January, 2018 was not available for hearing for his principal and made an application that the matter be stood down till 2.00 p.m. so that his principal could be heard in regards to his availability.
16. When the matter was called at 2.00 p.m. before Justice Sharma, Mr Iqbal Khan appeared and advised the Court that 15th January, 2018 was not suitable to him and strongly objected to the date suggested by Court. Mr. Khan also informed Court that Justice Aluthge had advised him that this matter would be fixed for trial after April 2018 which would be suitable to all Counsel and requested for a date in April or thereafter.
17. The State Counsel informed that the State is ready to proceed to trial on 15th January, 2018.

18. Having heard all the Counsel, Justice Sharma made the following Order:

"I have heard the Counsel for the Accused, indicate their unavailability to attend to this trial if the matter proceeds on 15th January, 2018. This is a 2014 matter which is yet to be heard. The State is ready to proceed, their witnesses are available. The Court has made itself available to hear this matter by allocating a date. Counsel have more than enough time from today till the date of the trial to organize themselves. This trial will begin on 15th January, 2018 as scheduled for 2 weeks. Bail is extended for all the Accused persons".

19. Justice Sharma also informed the Counsel that the case will be heard by Justice Madigan. At this stage, Mr. Khan stated that Justice Madigan should not hear the case and indicated that he will be making an application for recusal within 28 days. The Court ordered to file a formal recusal application within 28 days from 13th October, 2017.

Discussion

20. It appears that the Affidavit filed in support of Notice of Motion of the 1st and 2nd Applicants, through their Counsel Mr. Iqbal Khan, does not portray a completely accurate picture as to what transpired in Court despite the original Court Record being made available to the Counsel for his personal perusal.
21. At paragraphs 13 and 14 of the said affidavit it is stated that on the 13th of October, 2017, this matter was called before Justice Aluthge and that certain directions were given. However, on that particular day I was on leave and Justice Sunil Sharma was the judge who presided over the matter.
22. Paragraph 10 and 11 also carry an inaccurate statement. Paragraph 10 states that '*Justice Aluthge advised all the Counsel that the Trial date would be assigned after April 2018 and all the Counsels agreed that suitable dates would be after April 2018*'.
23. Paragraph 11 states: '*we are informed by our Counsel that after Justice Aluthge indicated that the trial dates would be assigned after April 2018 our Counsel had made commitments during the month of January, 2018*'.
24. It appears that it is on this same premise that Mr. Iqbal Khan had made his submissions before Justice Sharma on 13th October, 2017 to convince his Lordship that Justice Aluthge had indicated to the Counsel that the case will be heard after April, 2018. I reproduce below the transcript prepared by my secretary as she

listened contemporaneously to the recording of proceedings on 13th October, 2017:

- Mr. Khan: Okay the date is possible to us because of the learned Judge's directions that in April we are taking the trial. He said this case will be heard sometimes after April so...*
- Crt: April oh yes, Justice Aluthge?*
- Mr Khan: Yes sir.*
- Crt: April next year?*
- Mr Khan: Yes sir.*
- Crt: Oh I see.*
- Mr Khan: So myself, Mr Raza we all agreed so no problem my Lord. You mention today so that today we come and get a date in April after April, he said After April.*
- Crt: Okay let me note it down.*
- Mr Khan: Yes sir.*
- Crt: Had indicated.*
- Mr Khan: Yes sir and all the counsel agreed. Mr Sam also, I appear for Mr Sam.*
- Crt: That this matter will be heard in April.*
- Mr Khan: After April.*
- Crt: Oh, after April.*
- Mr Khan: Yes, because he had given a date in April, he said after April.*
- Crt: After April.*
- Mr Khan: Yes.*
- Crt: Which was suitable to all counsel?*
- Mr Khan: All parties agreed with respect sir. We agreed this to be conducted in April the date suitable to Court and ourselves. So we are warned to keep a diary free.*

25. As a matter of transparency, I reproduce below what I had stated in Court on 9th May, 2017 (as per the transcribed version and Court Record)
This is what the record states;

'This matter has been transferred from court No. 2

My trial diary is full until February, 2017. Trial cannot be taken up as scheduled. Mention to be fixed for trial on 23. 06.2017'.

26. Thanks to latest technology, I was able to recuperate what I had uttered from the bench (in addition to what I had recorded in the minutes):

Crt: According to the Judge's Diary, my diary is full till February next year.

Mr Khan: Yes we are in the same boat my Lord.

Crt: The thing is, this is a Murder case.

Mr Sharma: Yes my Lord.

SC: 2014 matter my Lord.

Crt: Anyway I will give a mention date, I'll discuss this matter in the Court Case Management Meeting to see whether we can expedite and take up the trial on an earlier possible date. When it's fixed for trial?

Mr Khan: July.

Mr Raza: For one month my Lord.

Crt: (to clerk) What are the cases that we have fixed for July, so we can send those cases to Judge Sharma.

Will see. I will give a short mention date, but are you free during that time.

Mr Khan: Yes, all of us are free.

Crt: No, no. this July.

Mr Raza: I am ready. We are ready. The date that was given 03rd July sir and that is set for one month and because of that I have other cases that are set in Suva Court sir, so with respect I will be finding it actually difficult to have a hearing date this year sir. That's my difficulty and I appreciate.

Clrk: 23rd June.

Crt: 23rd June for mention.

Mr Sharma: My Lord this day is to check if available.

Crt: Yes.

27. Nowhere is it stated that the Court had given a direction to the effect that the trial will be taken up after April 2018 or advised the Counsel that the trial date would be assigned after April 2018. There is also no evidence of an agreement between Counsel and Court that this trial will be conducted after April 2018 and that Counsel were warned to keep their diaries free although Mr. Khan had so advised Justice Sharma on 13th October, 2017.
28. In quite contrast to what the Applicants and their Counsel have submitted, the Court had clearly indicated to the Counsel on 9th of May, 2017, (vide paragraph 14 above) that a short mention date is given **to discuss this matter in the Court Case Management Meeting to see whether the court can expedite and take up the trial on an earlier possible date.** The Court even checked the availability of Counsel to take up the hearing in 2017 however, Mr. Raza expressed his difficulty.
29. Affidavits filed by Applicants and Mr. Hemant Kumar state that, despite vigorous objections, Justice Sharma imposed the hearing on all Counsel to start from 15th January, 2018 for 2 weeks. Affidavit filed by the 1st and 2nd Applicants further states that *'we are upset with the double standard that has been exercised by Justice Sharma when on his own volition recused himself when all the Counsels were ready for hearing and then he later imposed trial date to 15th January, 2018 despite the fact all the Counsels vigorously objected and advised the Court that the dates were not suitable to all the Counsel'*
30. The affidavit filed in reply by the 1st and 2nd Applicants further states [para 6(e)] *'That the Honourable Justice Sunil Sharma discloses that he could not take up this matter as he was known to one of the accused persons and therefore the Honourable Justice Sunil Sharma had recused himself from any proceedings of this case. In light of the above, the Honourable Justice Sunil Sharma was pre-mature in setting a trial date which is in breach of his judicial duties'*.
31. Since a serious allegation has been made against a judicial officer it is my duty to explain the circumstances, under which the hearing was fixed by Justice Sharma for 15th January, 2018.
32. When this matter was transferred to Court 1, a short mention date was given to discuss this matter in the colloquium for Court Case Management to see whether the Court can expedite and take up the trial on an earlier possible date. In the Case Management Colloquium, this matter was discussed and the Chief Justice

was also informed of the difficulty of having an early hearing date in 2017 due to unavailability of available dates in my diary. In the meantime, the aggrieved parties had also complained to the DPP's office about inordinate delay in resolution of this case and injustice thereby caused as a result of fading memory of aging witnesses and of possible interference with some of State witnesses who are related to the Accused.

33. As a damage control exercise, the Chief Justice decided to allow the application of the Case Management Colloquium to assign Justice Madigan to hear the case at the earliest possible date convenient to Justice Madigan. The earliest possible date given by Justice Madigan was 15th January 2018. Accordingly, all logistical groundwork including booking of air tickets and hotel was laid to facilitate smooth hearing of this trial on 15th January 2018.
34. It is on this backdrop, that Justice Sharma, on 13th October 2017, has fixed the hearing for 15th January 2018. In my absence, Justice Sharma was the only judge available on that date in the Criminal Division. His Lordship was only supposed to fix the hearing date already decided by the Colloquium of Case Management. His Lordship has clearly given compelling reasons as to why he was assigning a date suitable to Court.
35. The case flow and trial management is entirely a matter for Court. However, every decision in the process of case management should be crafted in the interest of justice, without jeopardizing the right to a fair trial of the accused. There can be no doubt that the input of the counsel and their trial diary are important factors in the decision making process. However, interest of justice must come first and is foremost.
36. Therefore, the Court should look at factors that concern interest of justice; the reasons advanced by the Applicants in support of their application for vacation of trial and the prejudice if any that would be caused to the Applicants if the application is not allowed.
37. This case is the oldest Murder case of this nature in the Lautoka High Court pending for nearly 5 years. Four accused are charged with Murder and a serious charge is hanging over the accused. The Court must ensure that right to a speedy trial is guaranteed to the accused specially, in a context where the Court, to a certain degree, has also been responsible for 'systemic delay'.

38. 10 witnesses for trial within trail and 21 witnesses for trial proper are listed in the list of witnesses.
39. The State Counsel from the DPP's office in her affidavit deposes that some of State witnesses are old and sickly and will not survive too long. Applicants concede that one witness was aged 73 years and 2 other witnesses were in the age group of 50-51 by the time they had given statements (in 2014). By Fijian standards, they are old and their losing memory is a factor to be reckoned with.
40. The Affidavit of the State Counsel further states that some of the witnesses are closely related to the accused persons hence more the delay, the more difficult it will be for the Respondent to get these witnesses to give evidence in court. Applicants have neither denied nor admitted that accused are closely related to some of the witnesses of the prosecution. It can be assumed that the relevant statement in the affidavit filed by the State is true.
41. It is Court's responsibility to ensure a speedy trial and to avoid any interference with witnesses due to the delay. It is in the interest of justice that this trial is disposed of at the earliest possible time.

Reasons given by Counsel for non-availability to attend to this trial

42. In their joint affidavit, 1st and 2nd Applicants states at paragraph 26:

"We are unable to find a criminal lawyer in the Western Division who is able to conduct our trial and even if we able to find someone we want our Mr. Iqbal Khan to defend us as we are facing a very serious charge.

43. At paragraph 28, they further states;

"I am informed by our counsel that he had made arrangements to spend time with family members who live in Australia and had made arrangements including hotel bookings and air travel tickets were already purchased prior to this dates be(ing) assigned and on understanding that this matter would be heard after April, 2018 as indicated by Justice Aluthge"

44. Reasons advanced by the 1st and 2nd Applicants for their Counsel's unavailability are not compelling. The trial date was assigned way back on 13th October, 2017. Applicants were aware that Mr. Khan would be away from country in January,

2018 and he would not be available to defend them in trial. The Applicants have been given approximately 3 months to retain another Counsel if Mr Khan is not available to attend to the hearing from 15th January, 2018.

45. Although an accused is entitled to the right to a legal counsel under the Constitution, he / she is not privileged to demand the counsel of his/her own choice if the lawyer of choice is unable to represent the accused in court on the dates assigned by the court for compelling reasons.
46. The Court on 13th October 2017 informed the Counsel that the case will be heard by Justice Madigan. Upon hearing this, Mr. Khan has indicated that Justice Madigan should not hear this case because he (not his clients) is in a conflict of interest situation *vis a vis* Justice Madigan. Mr. Khan was given 28 days to file a formal application. However, the Notice of Motion was filed on 23rd November, 2017.
47. 1st and 2nd Applicants in their affidavit have set out the grounds in detail for recusal. I am not going to deal with those grounds. However, the affidavit shows that 1st and 2nd Applicants were aware that Mr. Khan had a difficulty to defend them in a trial conducted before Justice Madigan. In such a situation, the Applicants should have sought the assistance of another counsel instead of shopping for a forum suitable to their counsel.
48. The Court is unable to accept the assertion that Applicants are unable to find a criminal lawyer in the Western Division who is able to conduct their trial.
49. In *Balaggan v State* [2016] FJSC 47; CAV0022.2016 (4 November 2016), the Supreme Court observed:

“The courts in Fiji have accepted and recognized the right to counsel in cases involving serious charges. However, it is important to state that the right to counsel is not an absolute right.
50. In *Chand v State* [2008] FJCA 95; AAU0056.2006 (14 April 2008) [decided under repealed Constitution] the Court of Appeal observed:

‘The right to legal representation is provided under section 28(1)(d) of the Constitution. The right is a qualified right, to be balanced with the right to trial without delay and the general interests of justice’.(emphasis added)

51. The supplementary affidavit filed by Mr. Hemnt Kumar, the Chief Legal Executive of Messrs.' Mehboob Raza & Associates, gives following reasons for unavailability of Mr. Raza, the Counsel for 3rd Applicant:

(a). *From the 22nd to the 26th January, our firm will be engaged in a criminal Fraud trial in Suva Magistrate's Court.This case is 8 years old which requires to be heard as soon as possible. The hearing date in this matter was hearing (sic) on the 25th day of September, 2017 by the chief Magistrate.*

(b) *On the 20th February, our Mr. Raza's personal matter is listed for hearing on the interlocutory matters. In this case, we have engaged an overseas Counsel and we anticipate the overseas counsel to arrive in Fiji two weeks before the hearing dates for preparation. ...The hearing date in this matter was fixed on the 28th day of September, 2017 by Hon, Justice Kamal Kumar....*

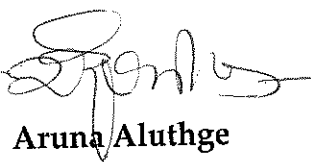
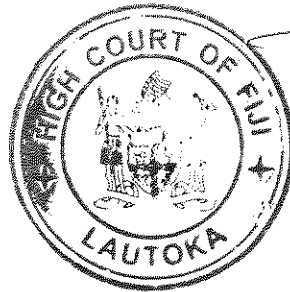
52. The reasons advanced on behalf of the 3rd Applicant are also not compelling. Murder is a serious crime compared to a financial crime in the nature of Money Laundering. General Public will be concerned that a serious charge of this nature (Murder) has not been resolved for nearly 5 years. It is my considered view that the High Court matters should take precedence over Magistrates Court matters and in this instance for obvious reasons.

53. This Murder trial was originally fixed for one month. According to the Court Record, this matter is now fixed only for two weeks with the agreement of the Counsel from both sides. Only two accused are challenging their respective caution interviews. Given the number of witnesses listed for prosecution, trial within trial can be concluded within 2-3 days and trial will probably take 5- 6 days. Mr. Raza's personal matter is listed for hearing on 20th February, 2018. Mr. Raza will have ample time to instruct the overseas counsel and prepare for his personal case well in advance.

54. This Court has always accommodated counsel for their legitimate and just demands and even vacated some trials in exceptional situations. The Reasons advanced by the Applicants in this instance to vacate the trial are not compelling and outweigh the primary consideration of this Court, the interest of justice.

Applicants have been given ample time and opportunity to defend the charge leveled against them and retain a counsel. No prejudice will be caused to the Applicants by not allowing this application as they have been informed well in advance that trial is fixed from 15th January, 2018.

55. For reasons given, the application to vacate the trial fixed for 15th January, 2018, in respect of criminal case HAC 52 of 2014 is refused.
56. Application for recusal is fixed for hearing on 15th January, 2018, at 9.30 before Justice Madigan. State Counsel and Counsel for Applicants are allowed to file their written submissions if any on Recusal Application in the Registry within seven days from today.



Aruna Aluthge

Judge

AT LAUTOKA

14th December, 2017

Counsel: Office of the Director of Public Prosecution for Prosecution
Messrs. Iqbal Khan & Associates for the Accused