

3. In CF 644, the Applicant is charged with 1 count of Aggravated Robbery, contrary to Section 311 (1) (b) of the Crimes Act, 2009.
4. In CF 645/17, the Applicant is charged with 1 count of Aggravated Robbery, contrary to Section 311 (1) (b) of the Crimes Act, 2009.
5. All the three matters were to be called on the 6th December, 2017 to fix a hearing date.
6. The Applicant was on trial in Suva High Court in criminal case No. HAC 243 of 2014 from 19th- 26th April, 2017. Just before the judgment was delivered, the Applicant, on the 27th April, 2017, absconded and failed to appear in court. He was convicted *in absentia* and sentenced on the 28th April, 2017, to 15 years' imprisonment with a non- parole period of 14 years.
7. The Applicant was subsequently arrested by police on the 24th May, 2017 and was charged for the escape and other offences mentioned above. The arrest was made after the sentence was passed in case No. HAC 243 of 2014 mentioned above.
8. According to the affidavit filed by the Respondent, the Applicant was running away after a burglary in the Nippon's Building when he was arrested.
9. The Respondent submits that, upon being charged for escape, the Applicant was being investigated for a number of cases and the Applicant had to be detained in police custody for more than 48 hours for those investigations.
10. Under these circumstances, the police on the 26th May, 2017, made an *ex-parte* application to the Nadi Magistrates Court for extension of detention period of the Applicant in police custody.
11. The said application was granted by the learned Magistrate allowing the Applicant to be kept in police custody for further 7 days and then produced in Court.

Law

12. At common law, the High Court has a general and inherent power to protect its processes from abuse. In Takiveikata v State [2008] FJHC 315; HAM 039.2008 (12 November 2008), it was stated at paragraph 19:

"It is common ground that the High Court of Fiji, being a superior Court of record, has an inherent jurisdiction to stay proceedings which are determined by the Court to be an abuse of the process of the Court. Generally speaking, the circumstances in which this Court might consider the imposition of a stay of proceedings are:

(1) circumstances are such that a fair trial of the proceedings cannot be had; or

(2) there has been conduct established on the part of the executive which is so wrong that it would be an affront to the conscience of the Court to allow proceedings brought against that background to proceed.

13. The inherent right of the High Court will be exercised only in exceptional circumstances to prevent abuse of process of courts, and the courts may stay proceedings in order to do so (Johnson v State [2010] FJHC 356; HAM177.2010 (23 August 2010) Connolly v DPP (1964) AC 1254). The circumstances in which abuse of process may arise are varied. In R v Derby Crown Court, exp Brooks [1984] 80 Cr. App. R. 164, Sir Roger Ormrod identified two circumstances in which abuse of process may arise:

".... It may be an abuse of processes if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the prosecution of or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused or to genuine difficulty in effecting service."

Grounds of Application

14. The Applicant makes this application on following two grounds:
 - (i) Prosecutorial misconduct
 - (ii) Abuse of process

Analysis

Abuse of Process and Prosecutorial Misconduct

15. The Applicant claims that the order obtained by the police to detain him for 7 days in police custody was a violation of his right guaranteed under Section 13 (1) (f), (g) (h) (i) and section 14 (2) of the Constitution of the Republic of Fiji and an abuse of process / misconduct on the part of the Prosecutor. He further claims that the Magistrates had no powers to make such a detention order hence all investigations conducted and evidence obtained during that period are tainted and therefore the substantive matter should be stayed.
16. It is obvious that an application seeking redress for alleged constitutional rights violations should be filed in the High Court invoking the civil jurisdiction. Proceeding in a criminal case cannot be stayed in a Constitutional Redress matter.
17. In order to stay the proceedings in a criminal case, the Court has to be satisfied that the prosecution have manipulated or misused the process of the court so as to deprive the Applicant of a protection provided by law or to take unfair advantage of a technicality in such a way that a fair trial of the proceedings cannot be had; or there has been conduct established on the part of the executive which is so wrong that it would be an affront to the conscience of the Court to allow proceedings brought against that background to proceed.

18. In view of decision of *State v Dhamendra* [2016] FJHC 386; HAM58.2016 (10 May 2016) the application before the Magistrates Court by the police for extension of time of detention in police custody and making the same without the Applicant being produced in court were wrong and misconceived.
19. The question however is whether in the circumstances of this case those irregularities can be castigated as police manipulations or misuse of the process of the court so as to deprive the Applicant of a protection provided by law in such a way that a fair trial of the proceedings cannot be had.
20. The Applicant was at the time the impugned application was made an escaped prisoner after being found guilty and sentenced for a case of Aggravated Robbery from Suva High Court. His liberty had already been taken away as a result of a judicial process and his right to be at liberty was not therefore an issue.
21. The police had brought the matter before a court of law and made an attempt to subject Applicant's detention to judicial scrutiny although he was not produced in court.
22. The Applicant has not refuted the fact that he was arrested as an escaped prisoner in a 'hot pursuit' while running away after a burglary in the Nippon's Building. Therefore, the Applicant knew why he was arrested and being detained.
23. The application before the Magistrates Court in no way shows an ill-intention or bad faith on the part of police. The Applicant agrees that he was being investigated for a number of criminal cases and added to that responsibility was the sentence passed by the Suva High Court *in absentia* that was to be activated. It is quite obvious that impending investigations could not have been concluded in 48 hours. Under these circumstances, the impugned application made by police before the magistrate cannot be said to aim at depriving the Applicant of the protection provided by law or to take unfair advantage of a technicality. If the facts that were before the magistrate were brought to the notice of the High Court, there is a high likelihood of similar orders being granted to police to

conclude investigations. Therefore it was rather a procedural mishap and not an abuse of process.

24. The Applicant's right to fair trial is not affected in any way. The evidence which was collected against the Applicant during the extended detention period will be presented in a court of law and will be tested for admissibility, relevance and weight. The Applicant's right to raise all these issues before the trial court is still available to him. If a confession had been recorded during the extended detention period, the Applicant has the every right to challenge the admissibility of the same in a *voir dire* proceeding. If the trial court finds that the alleged violations of his Constitutional Rights are prejudicial to his defence or his right to a fair trial, it is at liberty to exclude the same.
25. Unlawful detention is not a valid ground to stay proceedings in a criminal case especially when the Applicant has his Constitutional Right to challenge the evidence in court during the course of the trial. *The correct forum to challenge the admissibility of evidence on the ground of an alleged breach of the Constitution is the trial court. [Dutt v Commissioner of Fiji Police Force [2018] FJHC 70; HBM28.2017 (14 February 2918)].*
26. The court's jurisdiction to order stay proceedings now has to be decided on the basis whether a fair trial is possible. *Archbold 2018*, at 4.77 [page 417 – 418] states as follows:

"A stay will not be granted where the trial process is itself equipped to deal with the matters complained of: R (Ebrahim) v. Feltham Magistrates' Court; Mouat v DPP [2001] 2 Cr. App. R. 23, DC, post and Att.-Gen's Reference (No 1 of 1990) [1992] Q.B. 630, 95 Cr. App. R. 296, CA, adopting the point made in R. v Heston –Francois [1984] Q.B 278, 78 Cr. App. R. 209, CA, in which it was held that the Court's jurisdiction to order a stay does not include an obligation upon the judge to hold a pre-trial enquiry into allegations such as improper obtaining of evidence, tampering with evidence or seizure of the defendant's documents prepared for his defence. Such conduct is not ordinarily an abuse of the Court's process. It is conduct which falls to be dealt with at the trial itself by judicial control on admissibility of evidence, the judicial power to direct a verdict of not guilty (usually at the close of prosecution's case),

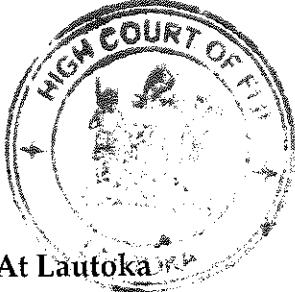
*or by the jury taking account of it in evaluating the evidence before them.
(emphasis added)*


27. In this case, there is no evidence of prosecutorial misconduct or abuse of process as claimed by the Applicant so as to halt the proceedings in the Magistrates Court.
28. The Applicant has the burden to prove on a balance of probability that there are some serious prejudices that will cause an unfair trial. The Applicant has failed to show or prove on the balance of probabilities that he will be prejudiced in his defence or that he will not get a fair trial. Just saying that he will be prejudiced is not sufficient. Even though the application was made before the wrong tribunal for extension of his detention period in police custody; the Applicant has failed to prove that it will cause prejudice to him and he will not get a fair trial.
29. The burden to prove the offences beyond reasonable doubt remains on the Prosecution based on admissible and relevant evidence. Whatever evidence the Prosecution will be presenting against the Applicant will be scrutinized by the court like any other case. If the evidence was obtained unfairly, the court will not allow it or not give any weight to it.
30. High Court is not inclined to stay proceedings at the magistracy when alternative remedies are available to the Applicant. Where the breach could be remedied by an appropriate remedy without recourse to stay of proceedings, court will not stay proceedings unless the hearing would be unfair or it would be unfair to try the accused at all.

Conclusion

31. Inherent power of this Court to stay a Prosecution will be exercised only in exceptional cases and this is not an exceptional case.

32. The application for permanent stay of proceedings in criminal cases CF 643/17, CF 644/17 and CF 645/17, pending in the Nadi Magistrates Court has no merits and therefore dismissed.




Aruna Aluthge
Judge

At Lautoka
15th June, 2018

Solicitors: Applicant in Person
Office of the Director of Public Prosecution for Respondent