**IN THE HIGH COURT OF FIJI**
**AT SUVA**
**CRIMINAL MISCELLANEOUS JURISDICTION**

**MISCELLANEOUS CASE NO: HAM 204 of 2017**

**GANESH CHAND**

**V**

**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)**

**Counsel** : Mr. Devanesh Sharma for the Applicant
Mr. Rashmi Aslam with Mr. Joseph Work for the Respondent

**Hearing** : 21 May 2018

**Written Reasons** : 5 July 2018

# WRITTEN REASONS

## Introduction

[1] This is an application made by the Applicant for a permanent stay of criminal proceedings. The Applicant is the accused in Suva High Court Criminal Case No: HAC 166/2015.

[2] In the Information filed by the Fiji Independent Commission against Corruption ("FICAC") in the substantive matter, the Applicant is charged for Abuse of Office, contrary to Section 139 of the Crimes Act No. 44 of 2009 (Crimes Act) as follows:

**FIRST COUNT**

***Statement of Offence***

**ABUSE OF OFFICE:** Contrary to Section 139 of the Crimes Act of 2009.

***Particulars of Offence***

**GANESH CHAND** between the 14th day of November 2012 and the 4th day of July 2013, at Suva in the Central Division, whilst being employed in the public service as the Vice Chancellor of the Fiji National University, in abuse of the authority of his office, did an arbitrary act for the purpose of gain, namely approved payments amounting to FJ$213,905.05 for overseas medical treatment for the Minister of Education and the Chairman of the Fiji National University Council, Mr. Filipe Bole, from the Fiji National University funds, without the approval of the Fiji National University Council, which was prejudicial to the rights of the said Fiji National University and the Council.

[3] The Applicant pleaded not guilty to the charge, and the matter is fixed for trial from 16 July 2018-27 July 2018.

[4] By way of Notice of Motion, filed on 10 November 2017, the Applicant seeks the following order from this Court:

> "That this case be struck out or permanently stayed on the basis that the Court has no jurisdiction to hear the matter pursuant to section 173(4)(d) of the 2013 Constitution, in that the Accused only acted in paying for the Minister for Education, Mr. Filipe Bole's hospital expenses at the Mercy Ascot Hospital in New Zealand on the basis of directions given to the Accused as a Vice Chancellor of Fiji National University, such Authority being dated 2 November."

[5] The Notice of Motion is supported by an Affidavit deposed to by the Applicant. Therein, the Applicant, inter-alia, deposes as follows:

1. That on 18 May 2017 his Solicitors wrote to FICAC asking to withdraw the proceedings on the basis that further prosecution of these proceeding is contrary to Section 173(4) (d) of the 2013 Constitution.

2. He believes that the Court has no jurisdiction to hear this case pursuant to the said provisions.

3. The basis upon which this Application is said to have been made is that Mr. Filipe Bole was the Minister for Education as at 2012 and he was also a Chancellor of Fiji National University and as a Minister and Chancellor of the University Mr. Bole was authorized to give directions to him as a subordinate and the Vice Chancellor of the said University.

4. On 14 November 2012, the Applicant submits that he was directed by Mr. Bole to pay his hospital expenses at Mercy Ascot Hospital in New Zealand.

5. The Applicant had acted on the directions given by the Minister for Education and implemented his decision and directions by asking his subordinates at Fiji National University to make the said payments.

6. That since he acted on a ministerial directive pursuant to an enactment that was passed between 6 December 2006 and 14 December 2014, the Applicant believes that no Court has the jurisdiction to prosecute him for acting pursuant to such directive.

7. Therefore, the Applicant moves that the charges against him be struck out and the matter be permanently stayed forthwith.

**[6]** On 29 January 2018, Milika Cakacaka, Commission Officer at FICAC, filed an Affidavit in Opposition to this application.

**[7]** On 6 March 2018, the Applicant filed an Affidavit in Response to the aforesaid Affidavit in Opposition.

**[8]** This application was taken up for hearing on 21 May 2018. Both Counsel for the Applicant and the Respondent were heard. The parties also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[9] This matter was fixed for Ruling on 25 June 2018. On that day, Court ruled that this application for a permanent stay is dismissed. I informed counsel that written reasons for the said ruling would be provided by me later.

**Legal Provisions and Analysis**

[10] Stay of proceedings in a criminal trial is a legal remedy which has its origins in the common law jurisdiction as an extension of the inherent power of the Court to control its proceedings and thereby ensuring a fair trial to both the prosecution and the defence. Its common law origins can be traced back to the case of ***Connelly v. Director of Public Prosecutions*** [1964] AC 1254 at 1301, where Lord Morris stated:

> *"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of process and to defeat any attempted thwarting of its process...."*

[11] The term *"abuse of process"* used in this judgment has been further elaborated on by subsequent authorities to define and identify two specific types of abuse of process. In ***R v. Derby Crown Court, exp Brooks*** [1984] 80 Cr. App. R. 164, Sir Roger Ormrod said:

> *"The power to stop a prosecution arises only when it is an abuse of the process of the court. 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."*

**[12]** It is accepted law in Fiji that the High Court has the inherent jurisdiction to stay proceedings following common law tradition. In ***State v. Waisale Rokotuiwai*** [1998] FJHC 196; HAC 09d of 1995S (21 August 1998); Justice D.B. Pain held as follows;

> *"It is submitted that this Court has inherent power to make any order to prevent an abuse of its process and this includes an order for permanent stay. That power will be exercised to protect the accused from oppression and prejudice but its scope is not limited to those considerations. The Court has a duty to secure a fair trial for an accused. Allied to this is a need to protect the integrity and reputation of the judicial system and administration of justice. Infringement of these requirements are proper considerations for the Court in deciding whether a trial should be terminated."*
>
> .....
>
> *"I accept that this Court has inherent jurisdiction to prevent abuse of its process in criminal proceedings. Concurrent with that is a duty (confirmed in the Constitution) to ensure that an accused receives a fair trial. This is made abundantly clear in the cases cited by counsel. The ultimate sanction is the discretion invested in the Court to grant a permanent stay. However, such a stay "should only be employed in exceptional circumstances". (Attorney-General's Reference (No.1) of 1990 [1992] Q.B. 630, endorsed by the Privy Council in* ***George Tan Soon Gin v. Judge Cameron & Anor*** *[1992] 2 AC 205."*

**[13]** This position was further reiterated in ***Ratu Inoke Takiveikata and 9 others v. State*** [2008] FJHC 315; HAM 39 of 2008 (12 November 2008); where Justice Andrew Bruce held that;

> *"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."*

**[14]** It was further held in this case that the burden of proof in such instances is on the Applicant and the standard of proof which must be attained is proof to the civil standard (on a balance of probabilities).

> *"Before a stay of proceedings could be considered, there must be a factual basis for that consideration. It is common ground that the accused bear the burden of proof of establishing the facts which might justify the intervention of this court by way of stay proceedings. It is also common ground that the standard of proof which must be attained is proof to the civil standard. The facts must be established by evidence which is admissible under the law."*

**[15]** This position was followed by Justice Priyantha Fernando in the cases of ***Bavoro v. State*** [2011] FJHC 235; HAM 236 of 2010 (27 April 2011); and ***Salauca v. State*** [2012] FJHC 959; HAM 6 of 2012 (20 March 2012).

**[16]** In the case of ***Ganesh Chand v. FICAC;*** HAM 65 of 2016 (16 December 2016) (Unreported); His Lordship Justice Achala Wengappuli made reference to the following cases from New Zealand and Australia, which dealt with stay of proceedings and the doctrine of abuse of process as follows:

> "In ***Moevao v. Department of Labour*** [1980] 1 NZLR 464, the New Zealand Court of Appeal offered a further clarification to the applicability of the doctrine of abuse of process at p. 470 ;
>
> > *"....it cannot be too much emphasised that the inherent power to stay a prosecution stems from the need of the Court to prevent its own process from being abused. Therefore any exercise of the power must be approached with caution. It must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the Court is itself being wrongly made use of".*

"In the neighbouring Australian jurisdiction, another dimension was added to the considerations that are to be taken into account, when granting a stay of proceedings with the pronouncement of the judgment in ***Jago v. The District Court of New South Wales*** [1989] 168 CLR 23 (12 October 1989). The High Court of Australia held:

> *"To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences..."*

"In the same judgment the term "*abuse of process*" received additional treatment by the High Court as it was held:

> *"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amount to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process".*

**[17]** It was held by Justice Fernando in the case of ***Tuisolia & Another v. Director of Public Prosecutions*** [2010] FJHC 254; HAM 125 of 2010; HAC 19 of 2010 (19 July 2010); that an example of a circumstance where the process of a criminal trial will be incapable of serving the purpose it is intended to serve would be where the proceedings are such that "*they can clearly be seen to be foredoomed to fail*" following ***Walton v. Gardiner*** **[1933] 177 CLR 378.**

**[18]** However, Justice Wengappuli stated in ***Ganesh Chand v. FICAC*** *(supra)* "Although the Courts would grant a stay in proceedings where it can clearly be seen that the prosecution is foredoomed to fail, a weak case for prosecution need not be stayed." He quoted Lord Justice Brooke who said in *Ebrahim,* ***R (on the application of) v. Feltham Magistrate's Court*** [2001] EWHC Admin 130, at 133 that:

> *"It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure*

*to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. "*

**[19]** His Lordship Justice Wengappuli further stated in ***Ganesh Chand v. FICAC*** *(supra)*: "In a rare but deserving situation, even if a strong case is available to the prosecution, Courts have intervened and stayed prosecutions." His Lordship cited ***State v. Sat Narayan Pal*** [2008] FJCA 117; [2009] 1 LRC 164 (8 February 2008); as one such instance. In that case, the Court of Appeal followed the judgement of ***R v. Horseferry Road Magistrates' Court, ex p Bennett*** [1993] 3 LRC 94, where the House of Lords clearly laid down the criterion for such intervention when it held that;

*"... it was unconscionable for the courts to allow a prosecution, however well substantiated, to go ahead in circumstances where gross breaches or a gross breach of fundamental rights and the system of justice had occurred."*

**[20]** However, it must be reiterated that, it is common factor in all jurisdictions to have considerations limiting the granting of stays. In ***R v. Jewitt*** 1985 CanLII 47 (SCC), the Supreme Court of Canada held that the power to stay criminal proceedings should be exercised only in clearest cases where compelling an accused to stand trial would undermine the community's sense of fair trial and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings (As per Justice Wengappuli in ***Ganesh Chand v. FICAC*** *(supra)*).

**[21]** In the instant case the Applicant takes up the position that the then Minister for Education, Mr. Filipe Bole, endorsed the Staff Welfare Insurance Scheme to cover Council Members of Fiji National University (FNU), with effect from 2 November 2012.

**[22]** In the Legal Submissions filed on behalf of the Applicant it is stated as follows (paragraphs 5 and 6):

*"5. Upon endorsement of the Scheme on 2nd November 2012, by Minister Bole his later directive on Ministerial letterhead on 14th November 2012 to the Applicant to pay his medical expenses under the Scheme to cover his bypass surgery was in fact a Ministerial directive to begin with and such a directive was made to an office holder who was appointed under a subordinate law [Fiji National University Decree] passed by the Interim Government who were in power between 5th December 2006 to 6th October 2014.*

*6. The legal issue for analysis and determination before this Court is three-fold:*

*(a) Is the directive of Minister Filipe Bole issued on 14th November 2012, in his executive capacity as the Minister for Education, one which was made pursuant to an enactment that was passed between the period 6th December 2006 and 14th December 2014?;*

*(b) If the answer to the above is in affirmative then such a directive is precluded from any challenge in any jurisdiction, is it a Court of any Tribunal, within the provisions of Section 173 (4) (d)?; and*

*(c) Whether the exemption under Section 173 (4) (d) discharges the Applicant from any criminal liability, if the directive upon which he acted was deemed unchallengeable in any jurisdiction?"*

**[23]** I have held in ***Saumatua v. Suva City Council*** [2016] FJHC 452; HBC 88 of 2012 (25 May 2016); that for a proper understanding of this issue it is important to analyse Subsection 173(4) of the Constitution in its entirety. Accordingly, Subsection 173(4) of the Constitution is reproduced below:

*(4) Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question—*

*(a) the validity or legality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;*

*(b) the constitutionality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;*

*(c) any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, for being inconsistent with any provision of this Constitution, including any provision of Chapter 2 of this Constitution; or*

*(d) any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution.*

**[24]** Therefore, as I held in ***Saumatua*** (supra), if the provisions of Section 173 (4) (d) were to be dissected it would read as follows:

*1. Notwithstanding anything contained in this Constitution;*

*2. no court or tribunal (including any court or tribunal established or continued in existence by the Constitution);*

*3. shall have the jurisdiction;*

*4. to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy;*

*5. in any proceeding of any nature whatsoever;*

*6. which seeks or purports to challenge or question;*

*(a)....*

*(b)....*

*(c)....*

*(d) (i) any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken,*

*(ii) under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws),*

*(iii) made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution (which is the 6 October 2014),*

*(iv) except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any such laws),*

*(v) made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution (which is the 6 October 2014).*

**[25]** The Applicant submits that the letter dated 14 November 2012, was a directive issued by Mr. Filipe Bole in his capacity as Chairman of the FNU Council. It is important therefore, to look at the contents of the said letter. The letter, in its entirety is reproduced below:

| | | |
|---|---|---|
| **Our Reference:** | **Your Reference:** | **Date: 14th November 2012** |

Dr. Ganesh Chand
The Vice Chancellor
Fiji National University
SUVA

Dear Ganesh,

For the purpose of the medical cover of my heart bypass surgery at the Mercy hospital in Auckland, scheduled for November 27, 2012 I enclose herewith the scheduling and cost estimate of this programme.

I shall be very grateful to FNU if it could from now on contact the hospital and handle the necessary details for settlement of costs. I'd appreciate to be kept informed.
Yours sincerely,

F N Bole
**Chairman of FNU Council**
**Minister for Education, National Heritage, Culture & Arts**

**[26]** The Respondent submits that it is pre-mature at this stage to decide as to whether the contents of this letter amounts to a directive or not and that is a matter to be decided during the trial. I must agree with this contention. Indeed this would be a matter to be decided at the trial.

**[27]** In any event, to come within the ambit of Section 173 (4) (d) the Applicant must satisfy Court that any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, comes within the purview of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws).

**[28]** In this regard the Applicant has referred to the Executive Authority of Fiji Decree 2009 and the Fiji National University Act No. 39 of 2009 (FNU Act). Both the above were enacted in 2009, and as such were made during the period 5 December 2006 and 6 October 2014. [In terms of Section 164 of the Constitution, the Executive Authority of Fiji Decree 2009, has now been repealed].

**[29]** The Counsel for the Applicant referred to Sections 4, 8 (1), 8(2), 9 and 11 of the Executive Authority of Fiji Decree.

**[30]** Section 4 of the said Decree reads as follows:

*"4. Until such time as a Parliament is elected in accordance with a Constitution yet to be adopted, the President of the Republic of the Fiji Islands shall have the following powers:*

*(a) to appoint a Prime Minister by Decree;*

*(b) to appoint other Ministers on the advice of the Prime Minister;*

*(c) to make laws for the peace, order and good government of Fiji by Decree acting in accordance with the advice of the Prime Minister and Cabinet;*

*(d) to exercise the executive authority of Fiji which is hereby vested in the President."*

**[31]** Section 8 (1) and 8(2) of the Executive Authority of Fiji Decree is reproduced below:

*8.-(1) Ministers (including the Prime Minister) have such titles, portfolios and responsibilities as the Prime Minister determines from time to time.*

*(2) On the advice of the Prime Minister, the President, by direction in writing, assigns to the Prime Minister and to each other Minister responsibility for the conduct of a specified part of the business of the Government, including responsibility for general direction and control over a branch or branches of the public service or over a disciplined Force, as the case may be.*

**[32]** As could be seen, the above provisions have only general application and the functions and operation of the FNU is not caught up under this Decree.

**[33]** Section 28 of the FNU Act, provides that the Chancellor of the University shall be the Chairperson of the University Council. The Council of the University is established in terms of the Section 7 of the said Act. The functions and powers of the Council are defined in Sections 8 and 9 of the Act. Section 12 of the Act deals with the Membership of the Council.

**[34]** Section 30 of the FNU Act stipulates, inter-alia, that the Vice Chancellor shall be appointed by the Council, and that the Vice Chancellor is the Chief Executive Officer of the University and may exercise the powers and perform the functions conferred on him by the said Act or another Act or by the Council.

**[35]** These provisions apart, the Applicant is unable to specifically refer to any provision of law under which the purported decision was made or authorized (by the Minister or even himself), or any action taken (by himself), or similarly to any decision which may be made or authorised, or any action which may be taken, which would bring it under the ambit of Section 173 (4) (d) of the Constitution.

**[36]** During his submissions the Counsel for the Applicant submitted that Section 173 of the Constitution is an 'Immunity' provision. However, the Constitution provides that Section 173 is for 'Preservation of Laws'. I agree with the contention of the Counsel for the Respondent that the Immunity provisions in the Constitution are found in Chapter 10 (Sections 155 to 158 of the Constitution).

**[37]** For all the aforesaid reasons I am of the opinion that this Court does have jurisdiction to hear the substantive matter (Suva High Court Criminal Case No: HAC 166/2015). Accordingly, I find that the Notice of Motion filed by the Application seeking a permanent stay of proceedings is without merit.

**Conclusion**

**[38]** Therefore, this application for a permanent stay of criminal proceedings in Suva High Court Criminal Action No: HAC 166 of 2015 is dismissed.

**[39]** I make no order for costs.

HIGH COURT OF FIJI SUVA

Riyaz Hamza
**JUDGE**
**HIGH COURT OF FIJI**

AT SUVA
Dated this 5th Day of July 2018

**Solicitors for the Applicant** : **R. Patel Lawyers, Barristers & Solicitors, Suva.**
**Solicitors for the Respondent** : **Office of the Fiji Independent Commission against Corruption, Suva.**