

**IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA**

CIVIL JURISDICTION

Miscellaneous Action No. HBM 46 of 2020

BETWEEN

VINOD KUMAR of Varadoli, Ba.

[APPLICANT]

A N D

THE COMMISSIONER OF FIJI POLICE FORCE

[FIRST RESPONDENT]

A N D

THE ATTORNEY GENERAL OF THE REPUBLIC OF FIJI

[SECOND RESPONDENT]

**Appearance : Mr Krishnil Patel for the applicant
Mr Josefa Mainavolau for the respondents**

Hearing : Wednesday, 09th December, 2020 at 2.30 pm.

Decision : Wednesday, 24th March, 2021 at 9.00 am.

DECISION

[A] BACKGROUND FACTS

- (01) By notice of motion filed on 06-10-2020, the applicant seeks the following orders;
- i. *A declaration that the Applicant is entitled to full disclosure of the investigation report and police statements recorded and compiled by the Sabeto Police Station of Fiji Police Force into the incident which resulted in the Applicant's injury;*
 - ii. *An order for unconditional release of the investigation report and police statements to the Applicant without delay;*
 - iii. *Costs;*
 - iv. *Such further or other order(s) that the Honourable Court may deem fit, just, expedient and necessary in the circumstances.*
- (02) The application is made pursuant to section 25 and 44(1) of the Constitution of the Republic of Fiji and Rule 3(1) of the High Court [Constitutional Redress] Rules 2015 and inherent jurisdiction of the Court.
- (03) The application was supported by an affidavit sworn on 30-09-2020 by the applicant. The application was opposed. An affidavit in opposition sworn on 15th October, 2020 by Sgt. 2802 Abdul Saiban, the Station Sergeant at Sabeto Police Station was filed on behalf of the respondents.
- (04) The supporting affidavit which is as follows sets out sufficiently the facts surrounding this case.
1. *I have either personal knowledge of the matters to which I depose in this affidavit or, in so far as they are not within my personal knowledge, they are true to the best of my knowledge, information and belief.*
 2. *My solicitors, Krishnil Patel Lawyers, on my instructions, filed a Writ and Statement of Claim against Nilesh Prasad and Fairdeal Earthmoving Contractors Limited (hereinafter "**Defendants**")*
 3. *The Writ and Statement of Claim sets out my claim for compensation for the injuries suffered by me due to the negligence of the Defendants. I now produce a copy of the Writ and Statement of Claim, annexed and marked "**VK-1**".*
 4. *I am aware that the incident was reported to the Sabeto Police Station. The Sabeto Police Station conducted an in-depth investigation into the circumstances surrounding the incident. They have recorded witness statements and compiled their report in respect of the incident.*

5. *I instructed my solicitors to liaise and obtain the investigation report and the police statements (hereinafter “Documents”) from the Sabeto Police Station which will reveal the findings of the investigation.*
6. *My solicitors exchanged correspondences with the Fiji Police Force for release of the Documents. The request was declined without a good reason. My solicitors were informed to subpoena the Fiji Police Force at trial for production of the documents. Annexed are copies of the correspondences marked “VK-2”.*
7. *I require the disclosure of the Documents so my solicitors can study the findings of the investigation and discuss the same with me in preparation for the trial.*
8. *I believe that the release of the Documents may put to rest the issue of liability. This may result in an early settlement or truncate the proceedings at trial and also save time, costs and resources for all the parties involved in the personal injury action afoot before the court including the Honourable Court.*
9. *In the premises, I humbly pray for order in terms of the Application.*

(05) In his affidavit in opposition, Sgt. 2802 Abdul Saiban claimed that; (reference is made to paragraph (12) and (13) of the affidavit).

12. *THAT in reply to paragraph 9 of the Plaintiff’s Affidavit, I state that the witness statements are confidential and privileged information and by law they cannot be disclosed to a third party.*
13. *THAT further, said witness statements are not public documents as they pertain to a private citizen. The statements were obtained in the course of police investigation and they remain the property of the 1st Defendant. The Plaintiff does not have a right of access to information on a private citizen that is held by a public body. However, the Plaintiff can subpoena the witness statements for civil personal injury claims.*

[B] CONSIDERATION AND THE DETERMINATION

(01) The applicant has filed a writ and a statement of claim against one Nilesh Prasad and Fairdeal Earthmoving Contractors Ltd seeking compensation for the injuries sustained by the applicant whilst in the course of his employment due to the alleged negligence of the defendants.

(02) The applicant in his statement of claim pleads *inter alia* that;

1. *At all material times, the plaintiff was an employee of All Engineering (Fiji) Limited (hereinafter “Employer”), a company operating its business from 12 Ravouvou Street, Lautoka involved in the business of engineering works.*
2. *The second defendant is a limited liability company having its registered office at HLB Crosbie & Associates, Top Floor, HLB House, 3 Cruickshank Road, Nadi Airport.*
3. *At all material times, the first defendant was an employee and/or agent of the second defendant.*
4. *At all material times, the first defendant was the operator of the Kato excavator.*
5. *The second defendant contracted the Employer to lift and fit the ram cylinder to its stone crusher situated at the second defendant’s job site in Sabeto, Nadi.*
6. *On or about 31st March 2016, the plaintiff with his co-workers attended to the job site of the second defendant with a Hiab truck to lift and fit the ram cylinder to the stone crusher.*
7. *The second defendant refused the use of Hiab truck and demanded the use of its Kato excavator to carry out the works despite the insistence of the plaintiff.*
8. *The second defendant’s employees went to fetch chain and links so the ram cylinder could be tied to the boom of the excavator for lifting.*
9. *The first defendant lined the excavator’s boom on top of the standing ram cylinder whilst the plaintiff gripped the standing ram cylinder to keep it steady.*
10. *On or about 31st March 2016, the first defendant whilst in the course of his employment was negligent in operating the excavator which resulted in the injury to the plaintiff.*

Particulars of Negligence

- (i) *The first defendant was using mobile phone whilst operating the excavator and hit the lever for the boom which caused it to drop on the plaintiff’s hands severely crushing the plaintiff’s hands;*
- (ii) *The first defendant failed to engage the safety switch in the excavator whilst he was talking on the mobile phone;*
- (iii) *The first defendant was inattentive whilst operating the excavator a heavy machinery;*
- (iv) *The first defendant failed to exercise due care and skill whilst operating the excavator;*

- (v) *The first defendant failed to immediately switch on the safety switch when he hit the lever for the boom to avoid it from dropping on the plaintiff's hands;*
- (vi) *The first defendant failed to take heed of the presence of the plaintiff who was standing in front of the excavator and was visible to the first defendant through the transparent window of the excavator.*
- (vii) *The first defendant was reckless in his operation of the excavator.*

11. *By reason of the aforesaid negligence of the first defendant, the plaintiff sustained severe injuries and was admitted to the Lautoka Hospital for medical treatment.*

Particulars of Injuries

- (i) *Rays amputation of plaintiff's right ring finger and left index finger;*
- (ii) *Loss of use of dominant right hand;*
- (iii) *Limited range of motion in plaintiff's both hands with transverse sensory loss;*
- (iv) *Loss of grip in both hands;*
- (v) *Constant pain in both hands and pain exacerbates in cold weather;*
- (vi) *Swelling of both hands;*
- (vii) *Loss of bone and flesh from the amputations;*
- (viii) *Twisting of the right hand from its normal position.*

12. *As a result of the said injuries, the plaintiff lost his employment with his Employer and is medically unfit for future employment.*

13. *The plaintiff has suffered loss of amenities and enjoyment of his normal life.*

(03) The incident which resulted in the injury to the applicant was reported to the "Sabeto Police Station". The Sabeto Police Station has conducted an in-depth investigation into the circumstances surrounding the incident. They have recorded witness statements and compiled their report in respect of the incident.

- (04) The applicant's solicitors exchanged correspondences with the Fiji Police Force for release of the documents. The request was declined by the Commissioner of Fiji Police Force. The applicant was informed by the respondents to subpoena the Fiji Police Force at the civil trial for production of the documents.
- (05) It is this which has triggered the present application. The applicant says that he needs the documents to enable his solicitors to study the findings of the investigation and discuss the same with him in preparation for the trial. The applicant further says that the release of the documents may resolve the issue of liability. He says that the release of the documents may result in an early settlement and also save costs, time and resources.
- (06) The applicant substantially relies on the recent decision of this court in "**Poonam Jyotika Kohli as Administratrix of the estate of Avinesh Sanjay Ram v The Ministry and the Minister of Lands and Mineral Resources & Ors**¹, where the court ordered the release of investigation report by the Mineral Resources Department into the death of a miner.
- (07) What are the respondents reasons opposing the release of witness statements and police investigation report? It was Mr Mainavolau's submission to me, which was challenged by Mr Patel, that the documents should not be disclosed;
- Because of its confidential nature. Counsel relied on Indian cases of **Natabar Jana v State & Another AIR 1955, Cal 138;**, **Bengal v Sanitram Mondal AIR 1930 370 and Isab Mandal v Queen Empress 28 Cal 348(A)** and submitted that the witness statements obtained during the course of police investigations are not classified as public documents and fall within the nature of confidential.
 - That the disclosure would be against public policy.
- (08) I am concerned here with a situation where the claim is by the Commissioner of Fiji Police to withhold the disclosure of the witness statements and the police investigation report on the grounds that;
- (A) The witness statements and the police investigation report are confidential.
- (B) The disclosure of the witness statements and the police investigation report would be contrary to public policy.

I must confess to surprise, and, even to some degree of indignation, that, I have not been supplied with a sworn written statement from the Commissioner of Fiji Police

¹ High Court Lautoka, Civil Action No - HBM 13 of 2019

regarding his claim to withhold the disclosure of the witness statements and the police investigation report and his written reasoned statement of the grounds for opposition.

- (09) It is of course an elementary principle of law that the person taking the objection to production of the document should himself have read and considered the document and formed the view that on grounds of crown privilege or public interest privilege or public interest immunity the document ought not to be disclosed or produced, either because of its actual contents or because of class of document to which it belongs.

See; **Duncan v Cammell**
(1942) AC 624

❖ **Robinson v State of South Australia**
(1931) AC 704

❖ **Bruce v Walderin**
(1963) VR 3

❖ **Grosvenar Hotel, London**
(1964) 1 Ch 464

- (10) The Police Commissioner does not depose by way of an affidavit that **he has himself perused** the police investigation report and witness statements regarding the circumstances surrounding the workplace accident which resulted in crush injuries to the applicant's hands. It is obviously essential that the person asserting the claim for privilege should himself have seen the document.
- (11) The Police Commissioner does not depose by way of an affidavit that **he has himself examined** the Police Investigation Report and the witness statements. **It seems to me perfectly plain that the Affidavit in Opposition in this case falls far short of standard.** To be more precise, how did the Police Commissioner make up his mind that the report should not be disclosed on the ground of public interest, on the ground of privilege and confidential and on the ground of public policy, without reading the contents of the report? In the result, applying the rule of law enunciated in the above judicial decisions, I completely reject the Affidavit in Opposition of the Station Sergeant and I give it absolutely no weight whatsoever.
- (12) Having said that I want to make it clear that on public policy the truth should always be accessible to the Court. The ultimate authority to determine the availability of privilege

in a particular case is the judiciary and not the executive. [Conway v Rimmer², Sankey v Whitlam³]

Confidentiality

- (13) Mr. Mainavolau, counsel for the respondents submit that the witness statements and the police investigation report is not a public document. As I said, counsel relied on Indian cases of Natabar Jana v State & Another AIR 1955, Cal 138;, Bengal v Sanitram Mondal AIR 1930 370 and Isab Mandal v Queen Empress 28 Cal 348(A) and submitted that the witness statements obtained during the course of police investigations are not classified as public documents and fall within the nature of confidential. In – Isab Mandal v. Queen Empress’, 28 Cal 348 (A), it was held that a written statement recorded by a police officer in the course of investigation did not come within the description of a record within the meaning of Section 35 of the Indian Evidence Act. If the statement recorded by police officer is not a record within the meaning of Section 35 of the Indian Evidence Act, it follows that it cannot be a public document within the meaning of Section 74. Further in ---‘Govt. of Bengal v. Santiram Mandal, it was held that records of statements made not on oath in course of a departmental enquiry by a government officer, were not public documents. It was not a case of recording of a statement by a police officer, but the recording of a statement by a police officer in the course of investigation would be analogous to the recording of a statement in the course of a departmental enquiry by a government officer.
- (14) On the other hand, Mr Patel, counsel for the applicant urged that witness statements be admitted as a public record or document.

What is the definition of a public document?

“Any document or record evidencing or connected with the public business or the administration of public affairs preserved in or issued by any department of the government”.

[Black’s Law Dictionary]

- (15) The question is whether the applicant has, a right to inspect and obtain copies of the witness statements and police investigation report regarding the circumstances surrounding the workplace accident which resulted in crush injuries to the applicant’s hand for the purpose of his making a successful civil claim.
- (16) The definition of a public document is “a document forming the acts or record of the acts of a public officer”. It must be conceded that a policeman is a public officer.

² (1968) 1 AER 874

³ (1978) 21 ALR 505.

The Sabeto Police Station has conducted an in-depth investigation into the circumstances surrounding the incident. It is empowered to record witness statements and make investigations under the Police Act, 1965. The act of writing witness statements and making investigations are founded on information received by the police. The document is a result of the investigation under the provisions of the Police Act. Now, can it be said that the record containing the witness statements and the police investigation is a document forming the acts or records of the act of a public officer? I am of opinion that it is.

- (17) In the present case, there can be no question as to the interest of the applicant to inspection who sustained crush injuries from the workplace accident. It is plain that the applicant who sustained injuries from the accident is legitimately interested in knowing beforehand the circumstances surrounding the accident for the purpose of making a successful claim. His interest is a legitimate one. If therefore, the documents sought to be inspected and obtain copies of the documents are public documents because it forms the act or the record of the act of a public officer and if they are unprotected by special privilege, it follows that the claim to inspection and to obtain copies must be allowed.
- (18) It is true that the police officer acts in performance of a statutory duty under Police Act 1965. If an investigation amounts to an act of a public officer within the meaning of that section, and the report of it is, in consequence a public document. It practically follows that the injured applicant is at liberty to look into the witness statements and the investigation report and to obtain copies of it.
- (19) The conclusion at which I arrive is that the injured applicant is ipso facto entitled to inspect and obtain copies of the witness statements and investigation report. Whether he is entitled to call for them at the trial is a different question with which I am not concerned now.
- (20) In my view, counsel for the respondent cannot derive any assistance from the Indian authorities he cited. His reference to Indian authorities ignores an essential difference which exists between the circumstances of the police in this country and the circumstances of the police in India. In Fiji, the police is invested by law, i.e., the Police Act, 1965 with special powers to record statements from the witnesses and make an investigation relating to an incident founded on information received by them. **In India, an investigation is allowed by the Code of Criminal Procedure. There the law does not sanction an investigation by the police with special powers to record statements from the witnesses and make an investigation relating to an incident founded on information received by them. In India, an investigation is allowed by the Code of Criminal Procedure. There the law does not sanction an investigation by the police with special powers.**

- (21) Leaving all that aside and let me assume for a moment that the witness statements and police investigation report is confidential. I desire to emphasize that the mere fact that the report is confidential is not enough to establish a public interest to be weighed against the disclosure and use of relevant information and evidence.
- (22) The origin of the doctrine of confidentiality is found in **Prince Albert v Strange**⁴.
- (23) It has been clearly laid down that the mere fact that a document is private or confidential does not necessarily produce the result that its disclosure and production can be withheld.
- (24) In the context of the present case, I cannot help but recall the rule of law enunciated in the following judicial decisions.
- (25) In **Duncan v Cammell Laird & Co. Ltd**⁵, Viscount Simon LC said;

“It is not a sufficient ground that the documents are “state documents” or “official” or are marked “confidential”. It would not be a good ground that, if they were produced, the consequences might involve the department or the government in Parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation.

(Emphasis Added)

- (26) In **Asiatic Petroleum Co. Ltd v Anglo-Persian Oil Co. Ltd**⁶, Swinfen-Eldy, L.J. observed;

“The foundation of the rule is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official which alone is no reason for their non-production: the general public interest is paramount to the interests of the suitor”.

- (27) Applying the rule of law enunciated in **Duncan v Cammell** (*supra*) and **Asiatic Petroleum Co. Ltd. v Anglo-Persian Oil Co. Ltd.** (*supra*), I venture to say beyond peradventure that the doctrine of confidentiality has no application even by any stretch of imagination to the instant case.

⁴ (1849) 01 HAT 01.

⁵ (1942) 1 AER 587

⁶ (1916) 1 K.B. 822,

I interpose to mention that the proposition advanced by counsel for the respondent demonstrates a clear misconception on his part as to the scope and width of doctrine of “confidentiality”.

- (28) Applying the principles of **Duncan v Cammell & Co** (*supra*) and **Asiatic Petroleum Co. Ltd v Anglo-Persian Oil Co. Ltd** (*supra*) to the instant case, it is clear beyond question that the confidential documents are not privileged from disclosure and production. The law has never accorded privilege against disclosure and production to confidential documents.
- (29) In light of the rule of law enunciated in the case of **Duncan v Cammell & Co** (*supra*) and **Asiatic Petroleum Co. Ltd v Anglo-Persian Oil Co. Ltd**, (*supra*) it seems to me perfectly plain that the Police Commissioner cannot defend his interest against the applicant’s claim by invoking the doctrine of public interest immunity.
- (30) In **United States v Nixon**⁷, the Supreme Court refused, in the absence of a need to protect military, diplomatic or sensitive national security secrets, to accept the argument that the very important interest in confidentiality of presidential communication is significantly dismissed by the production of such material for *in camera* inspection and went in to hold that this interest must give way to the **superior public interest requiring that justice be done in cases**.

Public Interest

- (31) Mr. Mainavolau, counsel for the respondent submitted that the disclosure of the police investigation report and the witness statements would be contrary to public policy and prejudicial to the state.
- (32) There are two aspects of the public interest which pull in contrary directions. It is in the public interest that full effect should be given to the normal rights of a litigant. It is in the public interest that in the determination of disputes the courts should have all relevant material before them. It is, on the other hand, in the public interest that material should be withheld if, by its production and disclosure, the safety or the well-being of the community would be adversely affected. There will be situations in which a decision ought to be made whether the harm that may result from the production of documents will be greater than the harm that may result from their non-production. [Per Lord Morris, **Conway v Rimmer**⁸].

⁷ (1974) 418 US 683

⁸ (1968) AC 940

- (33) The law relating to privilege on the ground of public interest has been the subject of authoritative decisions not only in England but in Australia and New Zealand as well during the last quarter century.
- (34) The House of Lords case of **Conway v Rimmer and Another**⁹ can be regarded as a landmark and break-through in this field.

Lord Reid says at page 888:-

I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice. That does not mean that a court would reject a Minister's view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh then the Minister's view must prevail; but experience has shown that reasons given for withholding whole classes of documents are often not of that character.

Again Lord Reid says at pages 888 -889:-

"There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to as in the language of Lord Simon in Duncan's case, whether the withholding of a document because it belongs to a particular case is really "necessary for the proper functioning of the public service"..... I can see nothing wrong in the judge seeing documents without their being shown to the parties."

- (35) A very useful guideline is contained in the judgment of Woodhouse P. in the New Zealand case of **Fletcher Timber Ltd v Attorney General**¹⁰:-

If the balance of public interest can be seen to support the claim of immunity without prior inspection by the Judge then the consequential decision against production will be made without further ado. In that regard the certificate itself should demonstrate with sufficient particularity what is the nature and the significance of the documents both in terms of any need to preserve their confidentiality on the one hand and for the actual litigation on the other. But where this is not the position, where the Judge has been left uncertain, it is difficult to understand how own inspection could affect in any way the confidentiality which might deserve protection. And in that situation I think it

⁹ [1968] 1 All ER 874

¹⁰ [1984] 1 N.Z.L.R. 290 at 295

would be wrong to put aside such a direct and practical means of resolving the difficult. Indeed if it were to happen the primary responsibility of the Courts to provide informed and just answers would often depend on processes of sheer speculation, leaving the judge himself grasping at air. That cannot be sensible nor is it necessary when by the simple act of judicial reconnaissance a reasonable confident decision could be given one way or the other.

- (36) A cursory glance at the Affidavit in Opposition reveals that the Station Sergeant merely says that the production of the document is contrary to public policy and prejudicial to the state.

For my part, I am constrained to say that the opinion of the Police Commissioner and/or the Station Sergeant does not really give assistance to the respondents in view of the fact that the Police Commissioner does not say by way of a sworn written statement that he has himself perused the witness statements and the police investigation report and its disclosure would be contrary to public policy.

- (37) Moreover, the opinion formed by the Police Commissioner in relation to the contents of the investigation report and the witness statements is very doubtful. Because he does not depose by way of an affidavit in opposition that he read and examined the document. How did he make up his mind that the report should not be produced on the ground of public interest without reading the contents of the report?
- (38) In the instant case, the applicant has filed a writ and a statement of claim against one Nilesh Prasad and Fairdeal Earthmoving Contractors Ltd seeking compensation for the injuries sustained by the applicant whilst in the course of his employment due to the alleged negligence of the defendants. The incident which resulted in the injury to the applicant was reported to the “Sabeto Police Station”. The Sabeto Police Station has conducted an in-depth investigation into the circumstances surrounding the incident. They have recorded witness statements and compiled their report in respect of the incident. The applicant says that he needs the documents to enable his solicitors to study the findings of the investigation and discuss the same with him in preparation for the trial. The applicant further says that the release of the documents may resolve the issue of liability. He says that the release of the documents may result in an early settlement and also save costs, time and resources. In these circumstances, the document in question which is now in the custody of the Police Commissioner is vital to the applicant which discloses the circumstances surrounding the workplace accident which resulted in crush injuries to the applicant’s hand.
- (39) Strictly speaking, the number of documents the disclosure of which would involve danger to the State, State Departments, Ministries and public interest are relatively small. Certain documents are treated as immune from disclosure by their very nature for example, where disclosure would be injurious to the national defense or to good diplomatic relations (such as cabinet papers).

- (40) It is clear beyond question that the police investigation report and witness statements in relation to the circumstances surrounding the workplace accident which resulted in crush injuries to the applicants hands in the present case **does not** on the face of it belong to a class the disclosure of which would prejudice the public interest or involve danger to the State, State Departments or Ministries.
- (41) The disclosure of the investigation report and witness statements in relation to the workplace accident which resulted in crush injuries to the applicant's hands will not affect military, diplomatic or sensitive departmental secrets. The report in question does not relate to military diplomatic or sensitive national secrets.

[C] **ORDERS**

- (i) Objections overruled.
- (ii) I order the 1st respondent to disclose to the applicant the investigation report and witness statements into the circumstances surrounding the workplace accident which resulted in crush injuries to the applicant's hands.
- (iii) The investigation report and the witness statements should be disclosed within seven (07) days from the date of the decision.
- (iv) There will be no Order as to costs.

.....
Jude Nanayakkara
[Judge]

High Court - Lautoka
Wednesday, 24th March, 2021