IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Case No: HBC 59 of 2018

BETWEEN: **JOSAIA VOREQE BAINIMARAMA** of New Wing, Government Buildings, Suva, Prime Minister of the Republic of Fiji.

FIRST APPLICANT

A N D: **AIYAZ SAYED-KHAIYUM** of Suvavou House, Victoria Parade, Suva, Minister of Economy and Attorney- General of Fiji.

SECOND APPLICANT

A N D: **AMAN RAVINDRA – SINGH** of Tukani Street, Lautoka, Fiji, Barrister and Solicitor.

RESPONDENT

Appearance : Ms. Gul Fatima for the Applicants.
Respondent appeared in person

Hearing : Wednesday, 3rd August, 2022 at 12.00pm
Judgment : Tuesday, 9th August, 2022 at 10.30am

JUDGMENT

(A). INTRODUCTION

[01]. This is an application by the respondent seeking a permanent stay of proceedings in this case on the following grounds:

(a). Abuse of process.
(b). Prosecutorial misconduct

[02]. The hearing in the applicants' application for committal for contempt of court was concluded on 13.06.2022 and the court's decision was delivered on 28.07.2022. The court found the respondent guilty of contempt of court. The mitigation and sentencing hearing was scheduled for 01.08.2022.

[03]. However, before the mitigation and sentencing hearing, the respondent filed an application for permanent stay of the proceedings. On 01.08.2022 the respondent did not appear in court but by his instructions to counsel who appeared on his behalf insisted that the application for permanent stay be dealt with. The hearing of the application for permanent stay was scheduled for 03.08.2022.

[04]. At the hearing of the application for permanent stay, both parties made oral submissions to court and were directed to file written submissions by Friday, 05.08.2022.

[05]. This is my Judgment on the respondent's application for permanent stay of the proceedings.

(B). BURDEN AND STANDARD OF PROOF ON AN APPLICATION FOR STAY OF THE PROCEEDINGS

[06]. The respondent bears the burden of proof of establishing the facts which might justify the intervention of the court by way of stay of proceedings. The standard of proof which must be attained is proof of civil standard. The facts must be established by evidence which is admissible under law[1].

(C). GROUNDS OF THE APPLICATION

[07]. The basis for the application for stay was contained in the affidavit of the respondent sworn on 28.07.2022. They are as follows in very broad terms.

- *Abuse of process*
  - *Violation of right to fair trial*
  - *Committal proceeding cannot be used to recover money*
  - *Compliance with Order 3.*
- *Prosecutorial misconduct*
  - *Applicants and their solicitors have misled the court*

[1] Ratu Inoke Takiveikata & Others v State (2008) FJHC 315. HAM 039. 2008 (12.11.2008)

(D). EVIDENCE

[08]. The basis for the case for the respondent was contained in his affidavit sworn on 28.07.2022.

[09]. No oral evidence was called in support of the application. The plain fact is that many of the allegations of facts cried out to be tested in cross-examination. Affidavits are not pleadings. Affidavits are evidence.

(E). DISCRETIONARY AND EXCEPTIONAL REMEDY

[10]. The power to impose a stay is discretionary and that a stay should only be imposed in exceptional circumstances[2].

[11]. The exceptional nature of the remedy was recognized in:

- State v Rokotuiwai[3]
- State v Naitinicaka George Speight[4]
- State v Buksh & Others[5]
- Sahim v State[6]

(F). THE COURT'S POWER TO IMPOSE A STAY OF PROCEEDINGS IS A RESIDUAL ONE

[12]. The power has always been considered a residual one[7]. That carries with it the obvious implication that only when all else fails or no other remedy is realistically available may the court consider imposing stay[8].

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[2] R v Humphrys (1977) 1 AC 1
Barton v R (1980) 147 CLR 75
Moevao v Department of Labour (1980) 1 NZLR 464
R v Derby Crown Court, ex parte Brooks (1985) 80 Cr. App R 164
Jago v Dsitrict Court (NSW) (1989) 1 68 CLR 23

[3] (1998) FJHC 196

[4] (2001) FJHC 1

[5] (2005) FJHC 432

[6] (2007) FJHC 119

[7] Connelly v D.P.P; R v Humphrys (1977) 1 AC 1
FICAC v Qarase, HAM 110 of 2012

[8] Ratu Inoke Takiveikata & Others v State (supra)

[13]. Before the court may consider imposing a stay, the law requires that courts consider other remedies[9].

[14]. In **"Shiri Narayan v FICAC[10]"**, the High Court held; *"A stay of proceedings, whether it is due to delay or any other reason, is a remedy that should only be restored to when all other possible remedies available to an accused have failed.* ***An application for a stay of the proceedings, whether it is made on the grounds of delaying or any other reasons, cannot be allowed if other remedies are available to the applicant."***

[Emphasis added]

(G). CONSIDERATION AND THE DETERMINATION

[15]. The paragraph (6) to (15) of the respondent's affidavit sworn on 28.07.2022 is titled *"Abuse of Process – violation of right to fair trial 13.06.2022."*

[16]. In paragraph (6) to (15), the respondent complains that he did not receive a fair hearing in the committal proceedings for contempt of court and he argues that this amounts to an abuse of process of the court.

[17]. The first difficulty I have in accepting this as a ground for imposing a permanent stay is connected with the nexus between the alleged breach of his constitutional rights to have a fair hearing which allegedly occurred in the committal hearing conducted on 13.06.2022 and the pending sentencing hearing. The respondent must show on the balance of probabilities that there is a serious risk that the pending sentencing inquiry will be tainted by prejudice and a fair sentencing hearing will not be possible. No evidence was placed before the court on that point. Then how could the applicants be debarred from proceeding?

[18]. Second, I do not accept that the alleged breach of his constitutional rights to a fair hearing which allegedly occurred in the committal hearing conducted on 13.06.2022 could be transformed into an abuse of process for an imposition of stay of proceedings in the pending hearing on sentence.

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[9] R v Heston – Francois (1984) Cr. App R 209
A.G.'s Reference [No. 1 of 1990) 1992 Q.B. 630
R v O' Connr [1995] 4 SCR 411, (1996) 130 DLR (4th) 235
R v Taillerfer & R v Duguay [2003] 3 SCR 307

[10] HAM No. 144 of 2016, Ruling 09.06.2017,

[19]. With respect, it seems to me that the respondent's understanding as to *"abuse of process"* as a ground for imposition of permanent stay is misconceived.

[20]. A permanent stay will be granted on the ground of **abuse of process** when the proceedings have been commenced and maintained for improper and ulterior purpose. Moreover, if the proceedings obviously lack any proper foundation in the sense that there is no evidence capable of sustaining a committal, they will obviously be vexatious and oppressive. In such a case, the proceedings themselves are an abuse of process of the court and will inevitably result in the discharge of the respondent.[11]

[21]. If the committal hearing which was conducted on 13.06.2022 was an abuse of process of the court, the respondent should have invited the court either at the commencement or in advance to intervene to halt the proceedings in *limine* in order to prevent the respondent from being subjected to unfair, vexation and oppression on the following grounds;

- *That the proceedings, are brought to serve some collateral purpose of the applicants.*
- *That the proceedings against the respondent lack any foundation.*

[22]. The respondent cannot now call for an inquiry into the moving party's motivation and foundation in instituting the committal proceedings for contempt of court to halt the pending sentencing hearing. It appears to me reasonable to conclude that absence of bona fide on the part of the respondent is obvious from the timing of his application for permanent stay. Why the respondent wait did until committal hearing has been determined. " *Vigilantibus Et Non Dormientibus Jura Subveniunt*" - The law assists those that are vigilant with their rights and not those that sleep there upon .

[23]. It is very difficult to see how the pending inquiry for sentencing amounts to abuse of process of the court. No evidence was placed before the court to establish that the fairness of the pending inquiry for sentencing is in jeopardy. There is nothing in the evidence to show that there is a real danger to the fairness of the sentence hearing. The authorities make the point that one of the reasons that a stay of proceedings

[11] Grassby v The Queen (1989) 168 CLR at page 6 .

should be wholly and exceptional remedy is because **the court should not be seen to have a part in the initiation and continuation of the proceedings**[12].

[24]. What the respondent alleges under paragraph (6) to (15) of his affidavit is breach of his constitutional rights to have a fair hearing and constitutional redress process is available to the respondent to put right any injustice which may have resulted from the alleged breach.

[25]. So, I am satisfied that there is another remedy available to the respondent and I cannot consider imposing a stay. As has been pointed out in paragraph (12), (13) and (14) above, it is the duty of the court to consider other remedies, because the power has been always considered a residual one.

[26]. In the case of **R v Taillefer & R V Duguay** the Supreme Court of Canada observed[13].

> *This Court had frequently underlined the draconian nature of a stay of proceedings, which should be ordered only in exceptional circumstances. A stay of proceedings is appropriate only "in the clearest of cases", that is, "where the prejudice to the accused's rights to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued" (O'Connor, supra, at para. 82 [see[1995]4 SCR 411, (1996) 130 DLR (4th) 235).* ***It is a "last resort" remedy, "to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted".*** *O'Connor, supra, at para. 77; see also Tobiass, supra, at paras 89-90 [see [1997] 3 SCR 391], Carosela, supra, at paras 52 -53 [see [1997] 1 SCR 80]; Regan, supra, at paras 53 et seq. [see[2002]1SCR 297].*
>
> [Emphasis added]

[27]. Further, the respondent complains that (in paragraph (16) and (17) of the affidavit) the applicants have abused the process of the court by using committal proceedings against him to recover money and argued that a money Judgment cannot be enforced by committal proceedings.

[28]. I cannot accept the force of this proposition. It must be remembered that the committal proceedings for contempt of court was instituted because there had been

[12] See, for example, Grassby v R [1989] 168 CLR 1.
[13] [2003] 3 SCR 307

a failure to confirm to all Judgment orders of J. Seneviratne dated 24.07.2020. **A failure to confirm to lawful orders of a court partakes to some extent of defiance. The process for contempt is an important means by which courts enforce orders**. This conclusion flows from the decision in **McCann v Randall**[14].

In McCann, I found this ;

> *"Proceedings for contempt may be either for the purpose of inflicting punishment upon one who has willfully disobeyed a lawful order of the court, or for the purpose of obtaining the result which might have been reached by the enforcement of its decree but for the intervention of the wrongful act of the party violating its order, or, in, appropriate cases, for both purposes."*

[29]. However, the ordinary process of appeal procedure is available to the respondent to put right any injustice which may have resulted, if it can be shown that the mechanism is in correctly operated.

[30]. On that basis, account may properly be taken of other remedy clearly open to the respondent and the extra ordinary remedy of stay is a last resort remedy to be taken when all other acceptable avenues of protecting the respondent's rights are exhausted [15] [see, also paragraph 12, 13 and 14 above].

[31]. What remains to be considered is the paragraph 22 to 48 of the respondent's affidavit in which the respondent complains that during the hearing of the committal proceedings for contempt of court, **fabricated, misleading and unlawfully obtained evidence was adduced against him by the applicants**.

[32]. The applicants categorically denies this and the opposing contention from the applicants is that the alleged wrongs should be dealt with an appeal as it is an appealable ground.

[33]. I can say one thing with certainty. The committal hearings for contempt of court was decided only in accordance with the evidence and arguments properly and openly put before the court. At the committal hearings for contempt of court, the respondent was before the court and had every opportunity of presenting his case on facts. The respondent did not go into the witness box to explain his position to the alleged contempt. It was open to the respondent to cross-examine the

[14] 147 Mars. 81, 90, 17 N.E. 75. 83 (9 Am. St. Rep 666).
[15] See foot note (9) above.

applicants as to the affidavit evidence. He chose not to cross-examine. I note with concern that the respondent did not file affidavit in opposition to the applicants' affidavits despite he was given 28 days. All those tools were available to the respondent.

[34]. The disclosure of the alleged fabricated, misleading and unlawfully obtained evidence only occurred after the court found him guilty for contempt of court. The court is concerned about the timing of the disclosure. If there was something sinister, why wait till the court finds him guilty? There is risk that the exercise of the jurisdiction to grant a stay may encourage some defendants to seek a stay on flimsy grounds for tactical reasons.

[35]. Nevertheless, I do not need to resolve what the applicant alleged. I cannot investigate into those matters. This is quite essentially what a Court of Appeal Judge has to deal within an appeal. The appeal process is available to the respondent to put right any injustice which may have resulted (if any) from the alleged wrong.

[36]. For all these reasons, extra ordinary remedy of stay would be inappropriate.

ORDER

The application for a permanent stay of the proceedings is refused.

HIGH COURT OF FIJI
SUVA

09/08/2022

Jude Nanayakkara
[Judge]

High Court - Suva
Tuesday, 9th August, 2022