

4. In identifying judicial precedence in Common Law jurisdictions for delay of proceedings, the full-bench of the **House of Lords of England and Wales** in the case of *Attorney Generals Reference (Number 2 of 2001)*¹, has mentioned the possible result of undue delay by the State, as below:

“If, through the action or inaction of a public authority, a criminal charge was not determined at a hearing within a reasonable time, there was necessarily a breach of the defendant's convention right, and such remedy had to be afforded as was just and appropriate.”

5. However, in this matter, this trial had been adjourned on 07 occasions, i.e. on 26/02/2016, on 29/09/2017, on 20/08/2018, on 29/07/2019, on 30/09/2019, on 14/10/2019 and 29/02/2021 due to the application of the Defense counsel or due to the absence of the accused (Applicant) in Court. Further, this matter had been adjourned on 3 occasions, i.e. on 18/06/2017, on 18/04/2018 and on 20/05/2020 on the application of FICAC. In addition, from 12/02/2021 this matter has prorogued due to the pendency of this matter for permanent stay of proceedings filed by the Applicant.
6. In this regard this Court notices that the Constitutional right of the Applicant under **Section 14 (2) (g)** of the **Constitution of Fiji** for a prompt trial has been displaced due to the actions of the Applicant or his legal counsel. Therefore, there does not appear to be any delay caused by State Authorities in this matter to delay the commencement of the trial in the Magistrate's Court of Nadi.
7. On the same vein of sentiment, this Court was surprised to notice the non-commencement of trial proceedings in the case number **966 of 2014** in the **Nadi Magistrate's Court** against the Applicant, since the filing of this application on 12/02/2021 for a permanent stay of proceeding. In this regard, no such interim stay order had been prayed or obtained from this Court by the Applicant. Therefore, trial proceedings in the **Nadi Magistrate's Court** should not have been halted due to this application without order for interim stay of proceedings.

Position of the Applicant

8. The fact of this matter claimed by the Applicant are as follows:
- On or about mid October 2014, Applicant made enquiries with the Fiji Revenue and Customs office to pick a shipment from the Customs Office at Nadi Airport.

¹ 1 All ER 1049 [2004]

- Upon enquiry, Applicant was informed by the Customs Officer **Sakiusa Lasaqa** that the shipment was still subject to verification and could not be released until given the clearance by the Customs Department.
- A few days later, Applicant had followed up with the shipment and he had been informed by **Sakiusa** of the requirements to be met to clear the said shipments. The requirement was to produce a tin letter of the importer.
- Applicant had agreed to fulfil all the requirements as stated by the Customs Officer **Sakiusa Lasaqa**. In this phone call, on 20/10/2014, as per Applicant's submissions, **Sakiusa** had asked to give him something once the clearance was done.
- Applicant had gone to Nadi Office on **Sakiusa's** directions, on 22/10/2014, as per Applicant's submissions, the whole office space had been covered in white paper. Only **Sakiusa** had been at the counter. He had asked the Applicant for the tin letter and he had handed that to him.
- He had on many occasions pressured the Applicant into giving him something so after handing over the tin letters, he cleared the shipment and asked for something for him. Then the Applicant had given him \$500.00 and left the office.
- On the Applicant's way back to Lautoka, he was followed and arrested by FICAC officers in Lautoka on the allegation that he had bribed a FRCS officer, which he denied.
- The Applicant was charged by FICAC towards the end of October 2014 in the Nadi Magistrate's Court.

Entrapment

9. In relation to the above facts, the Applicant claims that he was Entrapped by the prosecution. As per the judicial precedence in this regard, counsel for the Applicant submits the below pronouncement of **Lord Hoffman of House of Lords of England and Wales** in the case of **R v Loosely, Attorney General's Reference (No. 3 of 200) (2011) UK HL53**, as below:

"Entrapment occurs when an agent of the state usually a law enforcement officer or a controlled informers caused someone to commit an offence in order that he should be prosecuted". Entrapment is considered an improper or manipulative process that creates a crime for the accused by another person and then prosecute the accused for the particular crime."

10. In this regard, it is the contention of the Applicant that he had been charged through an improper process and therefore this Court should issue a permanent stay order against the substantive matter pending in the Magistrate's Court of Nadi.

Abuse of Process

11. It is the contention of the Applicant, as claimed above, any evidence obtained unlawfully are not acceptable under the **Constitution of Fiji (2013)**, where the **Bill of Rights** at **Section 14 (2) (k)** states “*not to have unlawfully obtained evidence adduced against him or her unless in the interests of justice required it to be admitted.*”
12. It is further alluded by the Applicant that any breach of the **Bill of Rights** gives effect to abuse of process under the law and the Court has inherent power to stay proceeding in order to redress abuse and to secure fair treatment for the accused.
13. In support of this position, Applicant tenders the decision of **Connelly v DPP (1964) AC1254**, claiming that at 1296 **Lord Reid** had stated the Court has “*a residual discretion to present anything which savors of abuse of process*”, and at 1354 **Lord Delvin** had stated the court have “*an inescapable duty to secure fair treatment for those who come before them*” and **Lord Morris** at 1300 had states that the court has “*a general and inherent power to prevent abuse of process which includes the power to safeguard an accused from oppression or prejudice*”.
14. On the facts of this matter, it is the submission of the Applicant that there had been an abuse of process in this matter and recognizing that shortfall this Court should issue a permanent stay order against the substantive matter pending in the Magistrate’s Court of Nadi against the Applicant.

Position of the Prosecution

15. According to FICAC the applicable facts of this matter are as follows:
 - 16 October 2014 - Applicant calls PW1 (Sakiusa Lasaqa) first and offered to provide something to PW1 to clear that consignment. PW1 informed his superiors of this.
 - 17 October 2014 - The applicant made 3 missed calls to PW1. PW1 returned the call and PW1 informed the Applicant of the requirements for the same which was the presentation of a TIN letter.
 - 20 October 2014 - FICAC was notified and the Applicant called PW1.

21 October 2014 - A call back was sent by PW1 and the Applicant again initiated the call. The applicant reconfirmed the earlier position of giving something for clearing the two consignments in question.

22 October 2014 - Applicant of his own volition scheduled the time for the proposed meet. Thereafter, at the time as scheduled by the Applicant he came to the office and gave the \$500 which was recorded and surveillance was setup in the office of the Fiji Revenue and Customs in Nadi, wherein in the course of the Applicant giving \$500 to PW1 was recorded.

16. According to FICAC, it is well settled law that stay of proceedings is an extremely exceptional remedy that the court will consider imposing only upon the most rigorous circumstances, subject to taking into account that every other remedy or avenue has been exhausted. The rationale behind this was expounded upon in ***Takiveikata v State*** where His Lordship Bruce J reiterated that:

“The remedy operates in complete contradiction to one of the basis imperatives of the criminal law; that regularly brought charges should be tried in accordance with the law. That carries with it the obvious implication that only when all else fails or no other remedy is realistically available may the court even consider imposing a stay.”

17. It is contended that because of the exceptional nature the threshold of considering a stay of proceeding is monumentally high, ***Takiveikata*** enumerated such instances in which a Court may consider imposing a stay of proceeding;

1. *Circumstances are such that a fair trial of the proceedings cannot be had;*
or
2. *There had been conduct established on the part of the executives which is so wrong that it would be affront to the conscience of the court to allow proceeding's brought against that background to proceed.*

18. In ***Jaggo v The District of New South Wales***, the High Court of Australia ruled;

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

Analysis and Finding of Court

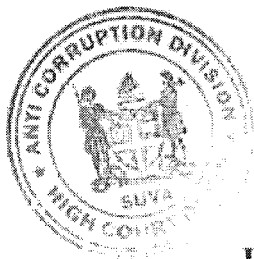
19. In considering the fact of this matter tendered by the Applicant and FICAC, the determination of Court need to be approached by accepting one version of pronouncement of events over the other, which facts have not been subject to cross-examination and further verification by a Court of Law.
20. In this regard, this Court perceives that the version of the Applicant is riddled with certain suppositions that needs to be verified at a proper trial, like why the Applicant didn't inform the authorities as an honest citizen when he was requested for "something" by the customs officer and proceeded to pay the bribe within 2 days, as per the Applicants version.
21. Therefore, this Court see that the existence of Entrapment and Abuse of Process by FICAC will depend on the acceptance of the veracity of the version of the Applicant at a trial and this Court is not in a position to ascertain the truthfulness of witnesses on affidavit evidence, when the substantive matter for trial is pending.
22. In this regard, this Court take guidance from **Justice D. B. Pain** by referring to his pronouncement in the case of **State v Rokotuiwai [1998]**², where he has stated as below:

"I accept that this Court has inherent jurisdiction to prevent abuse of its process in criminal proceedings. Concurrent with that is a duty to endure an accused receives a fair trial. This is made abundantly clear in the cases cited by counsels. The ultimate sanction is the discretion invested in the Court to grants a permanent stay. However, such a stay should only be employed under exceptional circumstances."
23. As enunciated above, the trial in this matter has not yet commenced. Therefore, for assurance of a fair trial, the trial in the substantive matter should commence, without any further delay. Further, in this matter, the Applicant has failed to submit exceptional circumstances for this Court to grant a permanent stay order, except to articulate his version of the trajectory of events, which is drastically contrary to the version espoused by FICAC that needs to be tried at a trial.

² [1998] FJHC 196

Verdict of Court

24. Therefore, in considering the above analysis, this Court is content that this application is without merit and thus dismiss this application.
25. Further, in consideration of the prolonged delay in this matter, this Court direct the **Learned Magistrate of Nadi** to commence the trial in the substantive matter, 966/2014 promptly.
26. The applicant has the right to appeal to the Fiji Court of Appeal in accordance with the applicable law.



A handwritten signature in black ink, consisting of a series of loops and strokes, positioned above a dotted line.

Hon. Justice Dr. Thushara Kumarage

At Suva

This 09th day of September 2022

**cc: *Office of Fiji Independent Commission Against Corruption*
*Office of AC Law, Vitogo Parade, Lautoka***