

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL MISC NO. HAM 376 OF 2022

BETWEEN : RIDDHI MUKESHWAR BHAVSAR DAMODAR

AND : STATE

**Counsel : Mr V Kapadia for the Applicant
Mr E Samisoni for the State**

Date of Hearing : 10 March & 19 April 2023

Date of Judgment : 5 May 2023

JUDGMENT

[1] The applicant seeks the following relief pursuant to the inherent jurisdiction of the Court:

The charge of careless driving against her be permanently stayed and/or she be acquitted upon the following grounds:

- a. Failure of the State to provide the Accused with the CCTV Footage dated 26th January, 2021 from Quality Print Pte Ltd building shown to the applicant at her caution interview on 26th January, 2021 at the Totogo Police Station.
- b. Destruction of critical evidence of the said CCTV Footage by the State causing grave prejudice to the applicant as she will not have a fair trial without the CCTV footage.
- c. No measurements and distances are provided to the applicant in the sketch plan disclosed by the Police.

[2] **Factual Background**

The basic facts are not in dispute. On 26 January 2021, the applicant drove a motor vehicle that got involved in a collision with two other vehicles at a roundabout situated at Walu Bay that connects Amra Street to Foster Road to enter Suva city.

[3] The prosecution alleges that the applicant is at fault for not following the right hand rule of driving when approaching a roundabout. The right hand rule gives vehicle on the right side of the roundabout the right of way. This is how the allegation was put to the applicant by CPL Jitoko:

“After the sketch drawn, I informed the driver of II 247 Riddhi Damodar when you are approaching the roundabout, you should comply right hand rule. In this case Riddhi Damodar should stop and give way to the taxi coming from Amra street.”

[4] During the applicant’s caution interview, CPL Jitoko showed her a video footage of the scene of the collision captured by a CCTV from the Quality Print building next to the roundabout. This was the first time the applicant came to know about the CCTV footage evidence.

[5] After the applicant was charged with careless driving, her counsel requested the prosecution to disclose the CCTV evidence of the collision. The prosecution did not provide the CCTV evidence saying that the investigating officer did not retain the video sent to him on his mobile phone by the owner of the CCTV and that the original video was automatically deleted from the server after 1 month (CPL Jitoko’s statement).

[6] The relevance of the CCTV evidence is explained in the affidavit of Rahul Solanki who was present during the applicant’s caution interview and saw the video evidence. Rahul Solanki said:

THAT I worked with the accused at Damodar Brothers Limited in January, 2021

THAT on the 26th January 2021 I received a call from the Accused requesting me to be present at the Totogo Police Station for her caution interview as she had been involved in a car accident

THAT I went to Totogo Police Station immediately to be present with the Accused during her caution interview

THAT the Police at some stage in the Caution Interview showed the Accused the CCTV footage that was obtained from Quality Print which showed the part of the roundabout and the full view of Amra Road. The video of the footage was a few minutes long

THAT I could see the CCTV footage also shown to me by the Police Officer that the Accused's black Hyundai vehicle had entered the roundabout first and was already completely in the roundabout when a station wagon taxi suddenly speeded up from Amra Street and turned to its right after the Accused's vehicle had passed the roundabout.

THAT the CCTV footage clearly showed the taxi coming out of the side of the road at the roundabout which is Amra Road after the black Hyundai vehicle of the Accused had entered well into the roundabout.

THAT I recall that the CCTV footage of the collision was shown to the Accused from a Police computer and not from a mobile phone or a Viber app.

[7] The applicant is contesting the charge and the trial is pending in the Magistrates' Court. Her defence is that she did not cause the impact and is not at fault. She alleges that the driver of the vehicle that entered the roundabout from Amra Street caused the impact and is at fault.

[8] The applicant says that she will be prejudiced in the conduct of her defence of the charge due to the missing evidence. She says that she had taken photographs of

the scene of the collision and the damage that had been caused to the three vehicles involved in the collision. She says that the CCTV evidence would have objectively supported her defence that she was not at fault because the collision was caused by the taxi driver who entered the roundabout from Amra Street in a high speed and without giving the truck driver the right of way that was entering the roundabout from the right side of Foster Road. She says that with the missing evidence, she will be compelled to give evidence to prove the authenticity of her photographs that shows she was exiting the roundabout when the impact occurred.

[9] **Legal Principles**

Section 15 (1) of the Constitution guarantees every person charged with an offence the right to a fair trial before a court of law. Whenever this constitutional guarantee is being threatened, the High Court has inherent power to grant an appropriate relief to an accused.

[10] In *Takiveikata v State* [2008] FJHC 315; HAM039.2008 (12 November 2008) Bruce J explained the nature of the inherent power of the Court as follows:

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. (para 19)

- [11] The circumstances which may give rise to abuse of process may vary in each case and there is no exhaustive list of circumstances that may amount to abuse of process (*Uate v State* [2020] FJHC 378; HAM276.2019 (1 June 2020)).
- [12] Existence of the power to stay proceedings is not an issue. The issue is the scope of that power.
- [13] In *R v Jewitt* 1985 CanLII 47 (SCC), the Supreme Court of Canada held that the power to stop a criminal trial 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.
- [14] In *Jago v The District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23 Mason CJ of the High Court of Australia said:

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..."

- [15] In *Moevao v Department of Labour* [1980] 1 NZLR 464, Richmond P of the New Zealand Court of Appeal said at p.470:

....it cannot be too much emphasized that the inherent power to stay of 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.

- [16] In *Queen v Edwards* [2009] HCA 20, the High Court of Australia has held that the decision to stop a trial on the grounds of delay or lost evidence is an extreme step that should only be taken when there are no alternative methods to deal with the prejudice suffered by the accused.
- [17] **Analysis**
The State concedes that CCTV footage evidence is no longer available. Counsel for the State submits that there are sufficient safeguards to ensure the trial is fair despite the missing evidence.
- [18] Counsel for the applicant submits that the alternative offered by the State to test the evidence at trial is not sufficient to set off the prejudice suffered by the applicant. I agree.
- [19] It is well established that the prosecution has a duty to the courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence (*Tuisolia v Fiji Independent Commission Against Corruption* [2010] FJHC 100; HAM122.2009 (1 April 2010)).
- [20] It is also well established that evidence relevant to guilt or innocence must, so far as necessary and practicable, be kept until the conclusion of a trial. (*Robert Murphy v DPP* [1989] 1ILRM 71, *Braddish v DPP* [2001] IESC 450).
- [21] It is clear that the CCTV footage evidence was relevant evidence. The investigating officer saw it fit to obtain the evidence and showed it to the applicant during her caution interview. But the investigating officer has not offered any reasonable explanation as to why he did not see fit to secure the CCTV footage evidence for the trial. Whether the evidence was incriminatory or exculpatory of the accused is not an issue. Once the investigating officer came to be in possession of the evidence it was his duty to secure the evidence for the trial.
- [22] I am satisfied that it is more likely than not that the CCTV evidence if led in the trial could have potentially exonerated the applicant from criminal responsibility for

careless driving. Without the CCTV footage she will be compelled to give evidence to explain her account of the collision and will be prejudiced in objectively presenting her defence that she was not at fault. There is no alternative relief but to stay the prosecution.

[23] **Result**

The proceedings against the applicant in the Magistrates' Court at Suva in Traffic Case No. 50/2021 is permanently stayed.




.....
Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Kapadia Lawyers for the Applicant