

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action HBM No. 137 of 2023**

**BETWEEN:**           **SALOTE VUIBURETA RADRODRO** a serving prisoner at  
Women's Corrections Center, Suva

**APPLICANT**

**AND:**                   **THE CHIEF REGISTRAR**

**1<sup>st</sup> RESPONDENT**

**AND:**                   **THE ATTORNEY-GENERAL OF FIJI**

**2<sup>nd</sup> RESPONDENT**

**AND:**                   **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

**1<sup>st</sup> INTERESTED PARTY**

**AND:**                   **THE COMMISSIONER OF PRISONS**

**2<sup>nd</sup> INTERESTED PARTY**

**Before:**               Mr. Justice Deepthi Amaratunga

**Counsel:**             Mr. Karunaratne J. for the Plaintiff

Mr. V. Chauhan for the 1<sup>st</sup>, 2<sup>nd</sup> Respondent and 2<sup>nd</sup> Interested  
Party

Ms. Pene J. for the 1<sup>st</sup> Interested Party

**Date of Hearing:**    19<sup>th</sup> July 2024

**Date of Judgment:** 8<sup>th</sup> August 2024

*Catch words*

*Sections 44(2) and 44(4) of the Constitution- availability of- adequate alternate remedy- any other  
action- abuse of process- discretion in terms the Constitution-Inherent power – to prevent  
continuation of abuse-leave to appeal- availability of appeal- Inherent power- Appeal-  
Constitutional Redress- Issue estoppel.*

# JUDGMENT

## INTRODUCTION

- [1] This is an application seeking leave to appeal from interlocutory decision to strike out this action seeking Constitutional Redress (CR) for abuse of process. Applicant was convicted after a trial for a one count of making a false information to a public servant and obtaining financial advantage. Applicant was charged in the Magistrate's Court and the action was transferred to a division of this court. Applicant objected to the transfer of the said criminal action and a decision was handed down in the court below and this decision was appealed, to a division of this court, without success. There were no further appeals from that decision.
- [2] After that Applicant participated at said hearing and cross examined witnesses and also gave evidence for defence. At the conclusion Applicant was convicted and sentenced. It was appealed and, the appeal is pending before Court of Appeal.
- [3] Applicant sought CR on alleged denial of right to fair trial, as her trial could not proceed before a Resident Magistrate. The same issue of denial of fair trial due to transfer of action to a division of this court from court below, is a Ground of Appeal, in Court of Appeal.
- [4] Before considering merits of CR, on 15.2.2024 Second Respondent, (Attorney General) filed an summons seeking strike out of CR on the basis of Order 18 rule 18 (1) (a), (b), and (d) of High Court Rules 1988 and also inherent jurisdiction of the court. Attorney General is a party to this action and was served with the application for CR and had also appeared on behalf of first Respondent and second Interested Party. These parties also sailed with the summons filed for strike out. First Interested Party also filed an additional affidavit in support of strike out. So all the parties named by Applicant in this application, sought strike out on the basis that CR is an abuse of process as the same issue of denial of right to fair trial, is before Court of Appeal.
- [5] After hearing of summons for strike out. CR was struck off on the basis, that it is an abuse of process to file parallel application seeking CR, when an allegation of denial of right to fair trial can be dealt adequately in the pending appeal proceedings before Court of Appeal in terms of Section 44(4) of the Constitution of the Republic of Fiji – (*The Constitution*).

- [6] CR application which is an abuse the process can even be dealt summarily by the court in order to prevent multiplicity of actions in courts. Such summary jurisdiction is required in order to control the courts own procedure and limited resources, without being abused. Allegation of denial of fair trial is a ground of appeal which provide adequate alternate remedy for a party who rely on said right. Jurisprudence on this issue as a ground for appeal is adequate to safeguard the right under Bill of Rights of the Constitution.
- [7] The resources for administration of justice cannot be allowed to waste through abuse when the constitutional guarantee of right to fair trial in a concluded criminal action can be dealt adequately in the Appeal against the conviction. The right has developed jurisprudence.
- [8] When an action is struck off for abuse of process due to availability of adequate alternate resource it will be equally abuse of process, to grant leave to appeal. In this instance Applicant had exercised this alternate remedy which is an established ground of appeal in appellate courts.
- [9] Without prejudice to above appeal grounds are dealt for consideration of merits of the appeal.

## **APPEAL GROUNDS**

- [10] Applicant being aggrieved by the decision handed down striking out of CR, is seeking leave to appeal against said decision on following grounds.

### **GROUND 1**

“That the Learned Judge of the High Court erred in law and in fact in finding that there was an adequate remedy available to the Appellant for the following reasons;

- a. The matters which impugn on the Appellant’s right of free trial involve facts and evidence which were not before the trial judge in the Appellant’s criminal trial in the High Court;
- b. For the reasons stated in (a) above, there is no automatic right of appeal to the court of Appeal therefore there was no adequate alternative remedy available to the Appellant. “

- [11] The adequate alternate remedy does not mean that identical alternate remedy or identical process in alternate remedy. What is required is that the remedy is adequate to deal with the alleged infringement. In certain instances leave is required before hearing such as Judicial Review, such procedural requirements does not change its character of it being an adequate alternate remedy. The procedural requirements does not make a remedy inadequate if the remedy can be considered as adequate to address the alleged infringement. A different interpretation can lead to proliferation of CR when there are adequate alternate remedies but procedurally different to CR.
- [12] What is the alleged infringement in CR? In the amended motion filed on 21.12.2023, the alleged infringement is Section 15(1) of the Constitution.
- [13] Section 15(1) the Constitution states;
- ‘15.—(1) every person charged with an offence has the right to a fair trial before a court of law.’
- [14] Once the trial had concluded and appealed to Court of Appeal, allegation that the convicted was denied Section 15(1) of the Constitution is a ground for the Appeal Courts to determine in the Appeal. So there is adequate alternate remedy for Applicant. Such issue cannot be determined by CR in this court for obvious reason.
- [15] Applicant in Court of Appeal is required to follow the time tested procedure, in Court of Appeal in order to adduce fresh evidence in an appeal. The process in CR and Appeal cannot be the same but it is an adequate alternate remedy for the alleged infringement which must be dealt in the Appeal and not through a separate application in this court by way of CR.
- [16] An application for CR allows the Applicant to file an affidavit in support which includes evidence, but this is not a reason to consider that the procedure in Court of Appeal is not adequate.
- [17] Where a statute or Rule requires proceedings to be brought in a particular way such as an Appeal the procedure under that needs to be followed, it is an abuse to bring another type of proceedings by way of CR or to avoid such requirements (eg time-bar in Judicial Review: See **Carter Commercial Developments v Bedford** BC [2001] EWHC Admin 669, at [26]-[34]). A party cannot seek refuge under CR, when there is adequate alternate proceedings

## GROUND 2

“That the Learned Judge of the High Court erred in law and in fact that by finding that it was an abuse of court process for the Appellant to file the Constitutional Redress proceedings as such filing constituted filing parallel proceedings because;

- a. The Constitution of Fiji (the Constitution) allows litigants to seek constitutional redress **even when there is an adequate alternative remedy available**;

The Learned Judge had the discretion to either grant or refuse the remedy sought on the basis that an adequate available remedy was available.

- c. For the reasons stated herein, the **availability of the adequate remedy does not constitute a ground for striking out but a ground for refusing the relief sought.**”(emphasis is mine)

[18] The contention found in Ground 2 (a) is factually and legally incorrect. It is misconceived to state that the Constitution allows a party to seek CR ‘when there is **adequate alternative remedy available**’. There is no such right granted, in Section 44(2). Section 44(2) of the Constitution states,

*“(2) The right to make application to the High Court under subsection (1) is without prejudice to **any other action with respect to the matter that the person concerned may have.**”* (emphasis added)

[19] So availability of ‘any other action with respect to the matter’ is not itself a bar to CR. Availability of adequate alternate remedy is a reason to strike out CR. Nowhere in Section 44(2) stated that when there are ‘adequate alternate remedy is available’ a CR is allowed. The words used in Section 44(4) are **not identical** to Section 44(2) of the Constitution. This was done with a purpose and if not there will be a conflict between the two provisions. The two provisions as it stand create no conflict and Appeal Ground 2(a) attempts to read in a meaning that defeat the purpose and if that interpretation is given the two provisions in the Constitution will conflict and such interpretation of the Constitution is avoided.

[20] Section 44(4) of the Constitution states;

*“(4) The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an **adequate alternative remedy** is available to the person concerned.”*(emphasis added)

- [21] Words 'adequate alternative remedy' is not found in Section 44(2) of the Constitution and this was purposefully done as it would be irrational to allow such extended meaning to a provision that is clear and not in conflict with Section 44(4) of the Constitution. So the said Ground of Appeal is without merit for obvious reasons.
- [22] Section 44(2) allows CR even when there are 'other action with respect to the matter' may be available but CR can be struck off *in limine*, when there are adequate alternative remedy is available in terms of Section 44(4) of the Constitution.
- [23] Availability of adequate alternate remedy, is a ground on which the court is granted summary jurisdiction to strike out an application for CR in terms of Section 44(4) read with Section 44(2) of the Constitution. (See Supreme Court decision **Pita Tokoniyaroi v Commissioner of Police** et al (decided on 30.6.2023)). This is an exercise of inherent jurisdiction, granted to the court and it can be utilized when there is abuse of process. This is dealt in this judgment.
- [24] Allegation of denial of fair trial is a ground of appeal after conviction hence it cannot be severed from the Appeal on the basis of that fundamental right is reiterated in the Constitution.

### **GROUND 3**

"That the Learned Trial Judge of the High Court erred in law and in fact when he found that Section 44(2) of the Constitution did not apply to the pending criminal appeals."

- [25] Section 44(2) of the Constitution, as quoted previously in this judgment does provide a right to seek CR 'when there are adequate alternative remedy' available'. Such an interpretation will invariably allow an additional CR actions when there are adequate alternative remedies to deal with such infringements. A good example of adequate alternate remedy is found in allegations of issues that can be dealt in criminal or civil appeals. It is self-evident that Section 44(2) of the Constitution did not apply to pending appeals before Court of Appeal as in this action.
- [26] When an allegation of denial of fair trial is alleged by a convict, it is a ground of appeal in Court of Appeal, and cannot be separated from it and dealt

separately in CR. It is an abuse to seek CR in this court. Section 44(2) of the Constitution cannot be applied in this situation.

- [27] Section 44(2) of the Constitution refers to 'any other action' but this cannot be expanded to include Appeals as multiplicity of actions must be prevented as far as possible. When the issue of denial of fair trial is before Court of Appeal, it is the Appellate Courts which is seized of all the issue and this court cannot decide the same issue in terms of Section 44(2) of the Constitution.

#### **GROUND 4**

“That the Learned Trial Judge of the High Court erred in law and in fact when he failed to consider the application of General and Specific provisions of the Constitution and Law where Section 44 (2) is a General Provision and Section 44(4) Specific a provision.”

- [28] Section 44(2) and 44(4) of the Constitution, must be read together and as discussed above there is a discretion given to court to refuse CR when there is adequate alternate remedy.

#### **GROUND 5, 6**

“That the Learned Trial Judge of the High Court erred in law and in fact when he failed to consider the common law legal principles where the nature, gravity and the threshold of the breach must be considered by the Court when adjudicating in a Strike Out Application when the alleged breach involved the highest officer in the Judiciary and the highest officer in the executive.

#### **ALTERNATIVELY, and FURTHER**

THAT the Learned Judge of the High Court erred in law and in fact by failing to find that the matter before the Court involved unique/ special feature that made it appropriate or the appellant to seek constitutional redress; such feature being the appearance of the interference by the State the relevant judicial proceedings.

- [29] Above two grounds are dealt adequately and it will be abuse of process to allow this CR while the Appeal is pending in Court of Appeal. Allegations of denial of fair trial were always dealt in Appeals adequately.

- [30] There are no merits in the proposed grounds of appeal hence no leave to appeal is granted. The application for leave to appeal can be struck the lack of merit.

### **ABUSE OF PROCESS UNDER INHERANT JURISDICTION**

- [31] This is in addition to use of discretion allowed in terms of Section 44(4) of the Constitution to strike out an action inter alia for abuse. Without prejudiced to what was stated previously there is inherent jurisdiction to strike out actions including CR. In recent decision of Supreme Court of Fiji in **Pita Tokoniyaroi v Commissioner of Police** et al (decided on 30.6.2023) held;

*“So long as there are no statute or Rules limitations, the Court has inherent jurisdiction imbued with general powers to control its own procedure to stop it being abuses. **Bremer Vulcan Schiffbau Und Maschincnfabrik v South India Shipping Corp. Ltd** [1981} AC 909.*

*In **Abhay Kumar Sing v DPP & Or**(AAU0037 of 2003s) the Court of Appeal accepted the exercise of discretion of the trial judge in criminal proceedings; to summary dismiss an application for constitutional redress under the 1998 High Court (Constitutional Redress) Rules”.*

- [32] From the above Supreme Court decision, CR can be struck off summarily exercising inherent jurisdiction of the court in terms of Order 18 rule 18 of the High Court Rules 1988. This is in addition to what was discussed in the exercise of discretion granted in Section 44(4) of the Constitution.

- [33] In **Hunter v Chief Constable of the West Midlands Police** [1982] AC 529at p. 536C held,

*“The inherent power which any court must possess to prevent misuse of its procedure in a way which, although not inconsistent with the **literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would bring the administration of justice into disrepute** among **right-thinking people**”(emphasis added)*

- [34] So the approach adopted for strike out for abuse of process is to apply the yardstick of mindset of ‘right –thinking people’, in order to exercise inherent power of the court to strike out an action for abuse of process. In this regard ‘literal application’ of rules of procedure may be irrelevant if the method utilized in the end is going to create chaos or disrepute to the administration of justice.



- [35] In my mind CR on the ground of denial of fair trial cannot be dealt separately from an Appeal. A right thinking person cannot allow two parallel 'actions' at two different tiers of judicial hierarchy (i.e this court and Court of Appeal) simultaneously. It is irrational to think such jurisdiction was conferred to CR. Such situation will bring judicial administration to unintended confusion and may lead to abuse and or disrepute at the end. So such applications needs to be dealt expeditiously, before more harm is done, hence leave to appeal is refused.
- [36] **Hunter** (supra), Lord Diplock further held at 541B-C,  
“The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.”
- [37] Applicant's CR is alleged infringement of Section 15 (1) of the Constitution, based transfer of Magistrate's Court hearing to High Court and this was exercised without success as appeal from the decision to transfer was heard by a division of this court. This decision affirming the court below, was never appealed to Court of Appeal.
- [38] When the Applicant filed CR application in this court on the ground of denial of fair trial the same ground was alleged in its appeal Court of Appeal. It was admitted that Applicant was seeking an order from Court of Appeal on the issue of denial of fair trial. Simultaneously, Applicant is also seeking a declaration of denial of right to fair trial in CR.
- [39] When a court makes determination, an issue the issue estoppel is applied. The reasons for the issue estoppel are the efficiency, consistency, finality and fairness. The same issue cannot be determined by CR by this court and Court of Appeal, at the same time. This is not only illogical but may also create inefficient, inconsistent and unfair administration of Justice.
- [40] So the abuse of court commenced when CR application filed and the abuse is aggravated by the lapse of time till it was disposed by way of strike out. It cannot be allowed to abuse the process further by allowing leave to appeal against such an abuse.

[41] Lord Bingham held, the jurisdiction to control abuse of process in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at p30H-31F:

“It may very well be, as has been convincingly argued ... that what is now taken to be the rule in *Henderson v Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to *res judicata*. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The **underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter**. This public interest is reinforced by the current emphasis on **efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole**. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.....While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice” (emphasis added)

[42] Apart from reasons given it will be an abuse and against public policy to grant leave to appeal against a decision where court had struck off CR by way of interlocutory decision. Public Policy requirement is also justifies efficiency and

economy of the conduct of the court process, while due process is observed. Abuse of process does not confine to re-litigation or having parallel litigations. The broad principle is that consistency and finality of court determination subject to appeal is paramount. This cannot be circumvented due to wide jurisdiction granted in CR by the Constitution.

[43] In **JSC VTB Bank v Skurikhin & Ors** [2020] EWCA Civ 1337 (21 October 2020) UK Court of Appeal decision after analyzing the cases regarding 'abuse of process' held,

*“It is clear from the above authorities that, contrary to Berenger's contention, proceedings can be struck down as an abuse of process where there has been no unlawful conduct, no breach of relevant procedural rules, no collateral attack on a previous decision and no dishonesty or other reprehensible conduct. Indeed, the power exists precisely to prevent the court's process being abused through the lawful and literal application of the rules, and most likely would not be needed or engaged where a party was acting unlawfully or in breach of procedural rules, where established rules of law or procedural sanctions would usually suffice to protect the court process”*

[44] In the exercise of inherent jurisdiction of the court to control its proceedings CR application cannot proceed in this court. It will be an abuse to allow such a process though literal application of law may allow such an application to be filed in court. For the reasons given in this decision leave to appeal against strike out based on abuse should be refused as grant of leave to appeal will further aggravate such abuse.


## **CONCLUSION**

[45] Applicant was convicted after a trial on evidence presented to the court. Allegation of denial of fair trial is based on the transfer of the said action from Magistrate's Court to a division of this court. Whether the allegation has merits can adequately dealt in Appeal by Court of Appeal. CR is not suitable for such determination considering efficiency, consistency and fairness. It is an abuse to allow leave to appeal against strike out for the reasons given. No order for cost made considering circumstances of this case

**FINAL ORDERS:**

- a. Leave to Appeal refused
- b. No order for costs.



  
.....  
Deepthi Amaratunga  
Judge

**At Suva** this 8<sup>th</sup> August, 2024,

**Solicitors**

Karunaratne Lawyers

Attorney-General Chambers

Fiji Independent Commission Against Corruption