

**STATE v SAT NARAYAN PAL (HAC002 of 2004)**

HIGH COURT — CRIMINAL JURISDICTION

5 GATES J

24, 26 May 2006

10 **Evidence — voir dire — conduct of voir dire — relevant factual issues — recorded conversation via video tape — whether Accused lured improperly to commit offence — whether investigation conducted in good faith — permanent stay of proceedings — Constitution of the Republic of Fiji ss 26(1), 37(1).**

15 The State sought to adduce evidence of a recorded conversation via video tape attached to one of the three participants, including the Accused, in a restaurant. It prepared a transcript which included translation of the parts which were spoken in Hindustani. The Accused alleged that his statements were sought by inducements, coaxing and entrapment and that the crime would not have been committed without him having been lured into it. He also stated that the persons purporting to act to expose corruption who were not police officers or official investigators, acted in bad faith. Their motives were not to intercept  
20 crime and to bring criminals to justice but acted only to protect themselves and their company from prosecution and especially from harmful public exposure for bad trade practices. They sought to deflect attention from themselves and instead to place the Accused under the spotlight. Their bad faith disqualified them as private individuals from testifying on matters concerning which they may themselves have committed the offences.  
25 The Accused did not give evidence and a voir dire was held to determine the relevant factual issues. The issues were whether: (1) the Accused was lured improperly to commit an offence; and (2) the investigation was conducted in good faith.

**Held** — (1) There was no evidence of prior inclination to carry out regular corrupt acts. There was evidence fit for the assessors that the Accused was angling for a payment in  
30 order to drop the prosecution against Blue Gas to avoid publicity and to close the file. Those ideas came from his side and he was not incited by Punja or Lee. The Accused took the initiative and he was not lured into a trap or pulled away from a straight path.

(2) There was no satisfactory explanation as to why the suspicions were not communicated to the proper authorities namely, the police. They could have brought some independence into the investigation so that the rivalries of the two gas companies would  
35 play no part. At the end of the day, the tables were indeed turned on the Accused. His caution interview of the managing director for Blue Gas in which full and clear admissions of the underfilling of the gas cylinders had been made never resulted in any further action against Blue Gas. There was no prosecution of Blue Gas, nor was a letter of warning issued even. Ajai Punja was not even sure what happened to the underweight cylinders.  
40 There was a lack of bona fide inquiry in the recorded conversation which amounted to an abuse of process.

Determination made.

**Cases referred to**

45 *Amato v R* (1982) 140 DLR (3d) 405; *Connelly v Director of Public Prosecutions* [1964] AC 1254; [1964] 2 All ER 401; (1964) 48 Cr App Rep 183; *Edwards v United Kingdom* [2003] Crim LR 891; *Teixeira de Castro v Portugal* (1999) 28 EHRR 101; *Hsing v R* (1991) 25 NSWLR 685; [1991] 56 A Crim R 88; *R v Latif*; *R v Shahzad* [1996] 1 WLR 104; [1996] 1 All ER 353; (1996) 2 Cr App Rep 92; *R v Pethig* [1977] 1 NZLR 448; *R v Shaheed* [2002] 2 NZLR 377; *R v Horseferry Road Magistrates Court*; *Ex parte Bennett* [1994] 1 AC 42; [1993] 3 All ER 138; *Sherman v United States* (1958) 356 US 369; [1958] USSC 87; *R v Veneman and Leigh* [1970] SASR 506, cited.

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*R v Birtles* [1969] 1 WLR 1047; [1969] 2 All ER 1131; (1969) 53 Crim App Rep 469; *R v McCann* (1971) 56 Cr App Rep 359; *R v Looseley*; *Attorney-General's Reference (No 3 of 2000)* [2001] 1 WLR 2060; [2001] UKHL 53; [2001] 4 All ER 897; (2002) 1 Cr App R 29; *Ridgeway v R* [1995] 184 CLR 19; (1995) 129 ALR 41; *S v Ebrahim* (1991) (2) SA 553; [1991] ZASCA 3, considered.

A. R. Singh for the State

M. Raza for the Accused

[1] **Gates J.** The State seeks to adduce evidence of a conversation which was also recorded on video tape. From a premises in Cumming Street, Suva a DV camcorder was aimed through a shop window across the road at a small restaurant known as the Curry House. The camcorder recorded pictures of the outside of the restaurant and of passers-by. It did not show the three participants seated inside, but it recorded the conversation via a wireless transmitter attached to one of the three. The State wishes to adduce evidence of that conversation. It has prepared an acceptable transcript which also includes translation of the parts which were spoken in Hindustani.

[2] Mr Raza's submission is in three parts. First it is said the statements made by the Accused were brought about by inducements, coaxing and entrapment. He says the crime would not have been committed without the Accused having been lured into it.

[3] Second, it is said the persons, who were purporting to act to expose corruption who were not police officers or official investigators, had acted in bad faith. Their motives were not to intercept crime and to bring criminals to justice. They acted only to protect themselves and their company from prosecution and especially from harmful public exposure for bad trade practices. They sought to deflect attention from themselves and instead to place the Accused under the spotlight. Their bad faith disqualified them as private individuals from testifying on matters concerning which they may themselves have committed offences.

[4] Lastly, it is said the recording amounted to a breach of the Accused's constitutional rights, of personal privacy [s 37(1)], and the freedom from unreasonable search [s 26(1)]. The lack of bona fides in these unauthorised "investigators" meant that the court should conclude its balancing process by coming down in favour of excluding all evidence of the conversation.

[5] Accordingly a voir dire was held to determine the relevant factual issues. The Accused did not give evidence.

#### Was the Accused lured improperly?

[6] For the State Rakesh Chand gave evidence of having been stopped on 12 November 2002 by the Accused, an inspector in the Department of Fair Trading. Rakesh was a driver for Blue Gas a company which sold bottled gas to members of the public and to retail establishments. A weighing of 10 cylinders revealed that some of the bottles were underweight. He was asked to accompany the Accused to the Weights and Measures office.

[7] Rakesh's immediate superior James Lee and the Managing Director Ajai Punja were already at the office. On 18 November 2002 the Accused called the driver in for an interview. At the end of the interview the Accused told him that he the Accused had not worked for a period of 6 years, that he was going overseas

on 7 December, and lastly he asked could Rakesh get him something. The Accused told the driver he had to answer to Fiji Gas, the rival company supplying gas to consumers in Fiji.

5 [8] The driver told James Lee and Ajai Punja that the Accused wanted something from Blue Gas.

[9] James Lee, the Suva Manager for Blue Gas, remembered 10 or 12 gas cylinders had been unloaded from their truck and weighed. After that on 10 18 November 2002 he remembered going to the Weights and Measures office with Rakesh to be interviewed. In his case, the interview could not be recorded because the Accused's computer developed a virus it was said.

[10] Though he could not be interviewed formally, James Lee was spoken to by the Accused. He was invited into the Accused's office. The Accused told him he was being pressurised by Fiji Gas. The Accused showed him the file or 15 complaint, which he said was not to be shown to anyone else. Lee was told it could be a big case if it went to the media.

[11] He told Lee that he was the only one who could help them. Then he said "Pay me 6 years of my salary". He invited Lee to return the next day with Ajai 20 Punja for his interview. This interview he said would not be saved on the hard drive only on a floppy and a private copy.

[12] After Ajai's interview, Lee said that the Accused told them the walls have ears and he pointed to the partition of his office. They walked outside. They were to communicate by mobile phone. He advised Ajai to have a good meeting with 25 his directors re the \$168,000 for his salary. This was the 6 years of salary which the Accused had lost while interdicted. Ajai said he needed time to sort it out.

[13] A call was put through to the Blue Gas office by the Accused on 20 November. A meeting was arranged at the Curry House in Cumming Street. 30 As soon as this was fixed arrangements were made to go to Fiji TV's premises where Ajai was wired up with a transmitter. Lee and Punja went to the Curry House for the appointment with the Accused and the conversation was transmitted to the camcorder installed in the shop across the street.

[14] Richard Broadbridge said he was told at an evening function by Ajai Punja 35 of a government official attempting to extort money from him. As a journalist with Fiji TV at the time, he was very interested in capturing this story. Broadbridge wanted to get the next encounter on tape. He said the decision was entirely Ajai Punja's. He had some communication with Lee in the Curry House by mobile phone, but no direct part in how the conversation went with the 40 Accused.

[15] Ajai Punja gave evidence of meeting the Accused at his office on 19 November 2002. He said the department was claiming that he had underfilled his gas bottles. He said the Accused told him he was the only person who could solve Mr Punja's problem. Fiji Gas had complained of Blue Gas selling 45 underweight gas cylinders and of filling up Fiji Gas bottles.

[16] Mr Punja said he could feel the Accused wanted something. The Accused also told him he had been out of work for 6 years and had lost salary for all of those years, which he wanted to claim. He calculated his loss out aloud as \$28,000 per annum for 6 years which equalled \$168,000 in all. He wanted that 50 kind of money to close the file. Mr Punja did not come to any agreement on this and left. He told Mr Broadbridge about it at the evening cocktail.

[17] During the course of prior telephone calls the Accused had told Mr Punja he was a very poor man with no house, no car and no bank account. Mr Punja sensed that the Accused was trying to extort money from him. But he made no complaint either to the Accused's departmental superior or to the police.

5 [18] Ajai Punja said he did not have any evidence before 19 November, no back up as he put it. He believed by taping the conversation at the Curry House he would obtain that evidence.

[19] In the evidence given this far there is no suggestion of the Accused being lured into a situation unwillingly, of a trap being set up for an unwary innocent:  
10 *Sherman v United States* (1958) 356 US 369 ; [1958] USSC 87. The suggestions and hints were all instigated and made, from the uncontradicted evidence at this stage, by the Accused.

[20] Listening to the tone of the speakers on the tape, and reading the transcript,  
15 which could still be read another way, one could reach a conclusion that the Accused was confidently in control of the conversation. He made the running. He informs Punja and Lee about a substantial bribe, perhaps fictional, offered to him, by their rival company. This is the same amount he had spoken about already, the \$28,000 per annum x 6 the lost salary for 6 years.

20 [21] Rather it appears the Accused is whetting the appetite of Punja and Lee drawing them up to the range of figures within which he believes he should be bought off from accepting the Fiji Gas deal. He injects urgency into the matter by mentioning his upcoming departure for Australia. Ajai asks the Accused what he should do. The Accused says how he, the Accused, will benefit if he follows the  
25 Fiji Gas plan. He warns them that the rival company is thinking of reverting to a monopoly for this market.

[22] Whenever the conversation meanders, the Accused brings it back to the point. "There's only one thing we can do" he says [Line 197]. He says he will pick the file and get rid of it. There will be no case. The matter will not go to the  
30 Press. He presents the alternatives again. Then he says to Ajai, "what can you offer me? Tell me".

[23] The offer starts at an air ticket to Australia is raised to \$10,000, then to 50,000, all of which are rejected by the Accused. Ajai asks him "You tell, how much". The Accused tells him to give half of that offered to him he says by Fiji  
35 Gas. This is how the \$80,000 final figure was reached. The Accused went on to lay down his terms on timing and form of payment.

[24] In considering whether there has been entrapment here, it is necessary to consider whether these private investigators were simply presenting the Accused with an opportunity to develop his corrupt request which they would capture on  
40 tape and thus have a record of the actual words expressed as opposed to a less accurate account vaguely recalled orally, or whether it was that they had given encouragement or stimulation to offences which would not otherwise have been committed: *R v Pethig* [1977] 1 NZLR 448 at 451: *Amato v R*  
45 (1982) 140 DLR (3d) 405 (*Amato*) per Estey J (dissenting).

[25] If there were to have been investigational breaches such that there had been an incitement to commit this offence, such evidence could not be used at trial: *Teixeira de Castro v Portugal* (1999) 28 EHRR 101; *Edwards v United Kingdom*  
[2003] Crim LR 891; *R v Birtles* [1969] 1 WLR 1047; 2 All ER 1131;  
50 (1969) 53 Cr App Rep 469 (*Birtles*) where Parker LCJ said at All ER 1131; Cr App Rep 473:

it is vitally important to ensure so far as possible that the informer does not create an offence, that is to say, incite others to commit an offence which those others would not otherwise have committed. It is one thing for the police to make use of information concerning an offence that is already laid on.

5 [26] On the evidence thus far, though there is no evidence of prior inclination to carry out regular corrupt acts, there was evidence fit for the assessors that the Accused was angling for a payment in order to drop the prosecution against Blue Gas to avoid publicity, and to close the file. Those ideas came from his side and he was not incited by Punja or Lee. The Accused took the initiative: *R v Latif*;  
 10 *R v Shahzad* [1996] 1 WLR 104; [1996] 1 All ER 353; (1996) 2 Cr App Rep 92. I find the Accused therefore was not lured into a trap or pulled away from a straight path: *R v Looseley*; *Attorney-General's Reference (No 3 of 2000)* [2001] 1 WLR 2060; [2001] UKHL 53; [2001] 4 All ER 897; (2002) 1 Cr App R 29 (*Looseley*), nor was this as Bray CJ put it in *R v Veneman*  
 15 *and Leigh* [1970] SASR 506, a case where the witness “beguiles and seduces an unwilling accused to commit or attempt to commit the crime.”

#### **Was the investigation conducted in good faith?**

[27] I have already found that these private individuals, at least Punja and Lee,  
 20 were acting on reasonable suspicion that the Accused appeared to be proceeding along a path of criminal activity. There is a further ingredient to be considered however, and that is whether they were acting in the course of a bona fide inquiry: *Amato*.

[28] If the inquiry is one carried out in good faith for proper purpose, the courts  
 25 may overlook the partial involvement of investigators in the crime. An obvious example would be where the police may act to save lives, mitigate consequences, and the like: *Birtles* where Parker LCJ said at All ER 1131; Crim App Rep 472:

30 Before leaving this case, the Court would like to say a word about the use which, as the cases coming before the Court reveal, is being made of informers. The Court of course recognises that, disagreeable as it may seem to some people, the police must be able in certain cases to make use of informers, and further and this is really a corollary — that within certain limits such informers should be protected. At the same time, unless the use made of informers is kept within strict limits, grave injustice may result.

35 [29] In *R v McCann* (1971) 56 Cr App Rep 359 at 363–4 Roskill LJ observed:

This Court, whilst ever keen to ensure that the liberties of individuals are not adversely affected, should be very slow to criticise those who have to take difficult decisions under pressure of events, when those decisions are taken in complete good faith.

40 [30] As the law has developed, good faith alone is clearly not enough. But it is at least an essential when put against the overriding of the liberties of the individuals thereby adversely effected. Good faith removes some of the distaste for the work of informers and agents provocateurs. In this case there is no satisfactory explanation as to why the suspicions were not communicated to the  
 45 proper authorities namely the police. They could have brought some independence into the investigation so that the rivalries of the two gas companies would play no part.

[31] Mr Raza submits that Punja and Lee acted out of self-interest and to  
 50 protect Blue Gas. They were not concerned to intercept crime or to bring a criminal to justice. Upper most in their intentions and actions was the need to stifle any information getting to the public that Blue Gas had been selling gas

cylinders which were underfilled. The Accused himself had reported to them that their rivals wanted exposure of this conduct and official condemnation of misleading conduct and poor trade practices. Blue Gas had been pretending to sell cheaper gas, which in reality was not true because the bottles were not fully filled. Their rivals were not concerned about the likely prosecution, only the revelation to the public.

[32] Broadbridge had not been informed by Punja that he had already been interviewed under caution as the Managing Director of Blue Gas and its public representative. Nor had Punja informed him that he had made frank admissions in a caution interview that most of the bottles weighed were found to have significant deficiencies in the quantity of gas filled. Nor had he told him of the statement he had made to the Inspector, that is, "what could he do about it?."

[33] Punja had said in the interview that the cylinders were filled, at Vuda Point and weighed on their certified scale there. After being filled, the cylinders were checked again. How was it then that the significant deficiencies were present? There has been no evidence of discussions with the inspector on the rechecking of the weighing scale or of the system, or the staff involved. There was no explanation as to how the deficiencies in the gas bottles came about. This deficiency was calculated with Punja's approval at a quantity of two-and-a-half tonnes of gas sold per month, gas which had not been supplied to customers. A 13 kg cylinder was being sold at the time by Blue Gas for \$23.95.

[34] Broadbridge ran a TV story of how the Accused's conversation in the Curry House was recorded. Later the TV station showed the arrest of the Accused from his home. The story ran in follow-ups for another 3 days. Clearly there had been substantial coverage of the incident. Punja was interviewed in which he said he wanted to expose corruption. The viewers were not informed of the investigation and probable prosecution of Blue Gas however. The underweight problem was brushed aside as being a problem that was now fixed, and anyway the deficiencies in quantity of gas supplied was within acceptable limits.

[35] There has been no evidence of how Punja had arrived at the opinion that 300 gms of a 13 kg cylinder was within permissible limits. No statutory reference was made nor to any practice of the prosecution service within the Department of Fair Trading in regard to permissible limits.

[36] Broadbridge may have been naive in accepting at face value everything he was told by Punja at the cocktail. He was he said only interested in obtaining a great story when he assisted with the DV camcorder. He should have done more research and more probing. Was there another side to this story? Was what was being done lawful? Why were the police not involved? I accept Broadbridge was an innocent party in this.

[37] Broadbridge accepted in cross-examination that Ajai's father, Mr Hari Punja, was a substantial shareholder in Fiji TV Ltd. He held 300,000 shares. He was also on the Board of Directors. In producing a news item story for a day when he was not rostered for duty, Broadbridge showed an eagerness to assist the Punja family. He did not refer in evidence to any qualms about conflict of interest or loss of journalistic independence. The story had its germination when he attended a social function at Mr Hari Punja's house on 19 November 2002, the night before the videotaping took place.

[38] At the end of the day the tables were indeed turned on the Accused. His caution interview of the managing director for Blue Gas in which full and clear admissions of the underfilling of the gas cylinders had been made, never resulted



in any further action against Blue Gas. There was no prosecution of Blue Gas, nor was a letter of warning issued even. Ajai Punja was not even sure what happened to the underweight cylinders.

5 [39] In the opening remarks of his speech in *Looseley*, Lord Nicholls of Birkenhead said (at [1]):

every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the State do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state.

10 [40] The courts accept that the detection and prosecution of consensual crimes committed in private would be extremely difficult if they were to admit the evidence of passive observers only. Drugs, terrorism, and corruption offences are obvious examples where detection can be extremely difficult. It is the extent of  
15 permissible active participation that presents the dilemma.

[41] In spite of improper motives on the part of the persons gathering evidence here and what might be regarded as a manipulation of the process for their own ends, a fair trial of the charges against the Accused could still take place. However that is not the sole consideration. The courts cannot contemplate for a  
20 moment the transference to the executive of the responsibility for seeing that the process of the law is not abused: *Connelly v Director of Public Prosecutions* [1964] AC 1254; [1964] 2 All ER 401 at 440; (1964) 48 Cr App Rep 183 at 268. The judiciary should accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to  
25 countenance behaviour that threatens either basic human rights or the rule of law: per Lord Nicholls: *Looseley* at [13].

[42] If the decision is to come down on the side of the line to exclude the impugned evidence, the better course is for the matter to be stayed: *Looseley* at [16] and [17]. The artificiality of evidentiary exclusion is to be avoided in  
30 favour of an order that the proceedings be stayed as an abuse of process: *Hsing v R* (1991) 25 NSWLR 685 at 695; [1991] 56 A Crim R 88 at 96.

[43] No two set of facts in cases are the same. But as was noted in the South African Court of Appeal in *S v Ebrahim* (1991) (2) SA 553; [1991] ZASCA 3:

35 the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The state was bound by these rules and had to come to court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied.

[44] In *Ridgeway v R* [1995] 184 CLR 19 at 74; (1995) 129 ALR 41 at 83  
40 Gaudron J said of entrapment and abuse of process:

The inherent (200) powers of superior courts to prevent an abuse of process exist to protect the courts and their proceedings, and to maintain public confidence in the administration of justice (201). And the maintenance of public confidence in that regard depends on ensuring that judicial proceedings serve the ends of justice, not injustice  
45 (202).

[45] In considering the overall circumstances in which the conversation was approached and recorded, I find that there has been a lack of bona fides amounting to an abuse of process. Had there been good faith, an absence of conflict of interest, and no manipulation of the process, I might have found otherwise for the fruit of the recording may well have established guilt. But the  
50 court cannot stand by and lend credence to such unjust manoeuvres which

undermine the credibility of a judicial system: *R v Horseferry Road Magistrates Court; Ex parte Bennett* [1994] 1 AC 42; [1993] 3 All ER 138; *R v Shaheed* [2002] 2 NZLR 377.

[46] As I have already indicated the appropriate remedy is not an order for  
5 exclusion of evidence but rather one for permanent stay of proceedings. I so  
order.

*Determination made.*

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