IN THE SUPREME COURT OF NAURU

[MISCELLANEOUS CAUSE] Misc. No 54 of 2015

BETWEEN TYRONE DEIYE **APPLICANT**

And THE REPUBLIC **RESPONDENT**

Before: Khan J

For the Applicant: A Vakaloloma
For the Respondent: W Kurisaqila

Date of Hearing: 12 June 2015

Date of Ruling: 16 June 2015

CATCHWORDS:

Application for stay of proceedings – what is the legal requirement for application for stay of proceedings – remedies available for abuse of process – basis of power to stay proceedings – onus and standard of proof – evidence required
Legal position of witnesses – defence counsel had an audience with the complainant whereupon she disowned her testimony in court and confessed to him that she had committed perjury – defence counsel not to have contact with complainant in criminal trial without first informing the prosecution – any contact with complainant should be in the presence of an independent witness – defence counsel act of contacting the witness deprived the court of provisions of section 100 of the Criminal Procedure Code whereby the witness could not be recalled

Defence counsel filed permanent application for stay of proceedings on the basis of his conversation with the complainant – application refused – application in itself was an abuse of process of court

RULING

Background

1. The applicant was charged with three counts of stealing in the District Court in Criminal Case No 154 of 2014. The charges against him read as follows:

FIRST COUNT
Statement of Offence (a)
STEALING: Contrary to section 398 of the Criminal Code Acts Queensland 1899 1st schedule adopted
Particulars of Offence (b)
TYRONE DEIYE on the 23rd May 2013 at Nauru did steal AUD $1280.00 one thousand two hundred and eighty dollars the property of the Republic of Nauru

SECOND COUNT
Statement of Offence (a)
STEALING: Contrary to section 398 of the Criminal Code Acts Queensland 1899 1st schedule adopted
Particulars of Offence (b)
TYRONE DEIYE on the 9th May 2013 at Nauru did steal AUD $640.00 six hundred and forty dollars the property of the Republic of Nauru

THIRD COUNT
Statement of Offence (a)
STEALING: Contrary to section 398 of the Criminal Code Acts Queensland 1899 1st schedule adopted
Particulars of Offence (b)
TYRONE DEIYE on the 8th October 2013 at Nauru did steal AUD $4320.00 four thousand three hundred and twenty dollars the property of the Republic of Nauru

2. The charges were heard by the Resident Magistrate Ms. Emma Garo in the District Court. The matter was set down for trial on 19 May 2015 and the trial commenced on 20 May 2015 when the prosecution called 4 witnesses. The name of the four prosecution witness are as follows:

    1. Elkoga Gadabu – Secretary for CIE (PW1)
    2. Mel June Detenamo – Project Officer (PW2)
    3. Kay Brechtefeld – Finance Assistant Planning (PW3)
    4. Cathy Dageago – owner of the vehicle (PW4)

3. Upon completion of the prosecution case Mr. Vakaloloma, counsel for the defendant informed the learned trial Magistrate that he will be making a submission of no case to answer and sought an adjournment to 21 May 2015 to present his submissions.

4. After the adjournment on 20 May 2015 Mr. Vakaloloma went back to his hotel. According to him later that evening he heard a knock on his door and he opened the door. He saw that a lady was standing outside. He said he did not recognize her and she then introduced herself to him and told him that she was Ms. Cathy Degeago (PW4) who had given evidence against the applicant earlier that day. She told him that she wanted to talk to him about the case and the evidence she had given. Mr. Vakaloloma did not stop her from talking to him. She told him that she had lied in court when giving evidence against the applicant and that she had received full payments in respect of the car rental for which the applicant was charged in relation to the three counts. She also told him that the counsel from the Office of the Director of Public Prosecutions (DPP) Mr. Livai Sovau had coached her to give evidence in the way that she did.

5. It is not clear as to how long the conversation took place. Mr. Vakaloloma wrote a letter following the conversation to the learned trial Magistrate. The next morning he brought the letter and gave it to Mr. David Toganivalu (Registrar) and requested him to arrange for an audience with the learned trial Magistrate in her chambers.

6. The Registrar saw the Magistrate and gave her a copy of the letter. The Magistrate refused to give an audience to Mr. Vakaloloma and told the Registrar to advise him that he can make an application in open court when the Court resumes.

7. When the Court resumed at around 10am Mr. Vakaloloma informed the learned trial Magistrate of the contents of the letter. I must point out that a copy of the letter was not annexed as part of this application, but according to the ruling of the learned trial Magistrate dated 22 May 2015 the contents of the letter was that Ms. Cathy Degeago had told Mr. Vakaloloma that the learned prosecutor Mr. Livai Sovau and the interpreter had influenced her to change her evidence.

8. The Magistrate was very concerned at the serious allegations and told Mr. Vakaloloma that whatever he had told her about the contents of the letter was evidence from the bar table. The case was adjourned to 2.30pm when the DPP Mr. Wilisoni Kurisiqila appeared on behalf of the prosecution. He informed the learned trial Magistrate that Ms. Cathy Degeago was being interviewed by the police.

9. Mr. Vakaloloma also filed an affidavit of Ms. Cathy Dageago in the District Court which is referred to in the applicant's affidavit at paragraph 11 as being annexed thereto but in fact it was not annexed and as such I do not have a copy of that affidavit.

10. The learned trial Magistrate delivered her ruling on 22 May 2015 in which she stated that she would make her findings on the submission of no case to answer.

Application for Stay of Proceedings

11. On 22 May 2015 Mr. Vakaloloma filed two applications on behalf of the applicant. The first application was for temporary stay of proceedings and the other one was for permanent stay of proceedings.

12. The application for temporary stay of proceedings was listed before the Registrar as there were no judges on the Island at the material time. He adjourned the matter to 8 June 2015 when the Supreme Court session was to resume and made an order for the prosecution to file its response.

13. The matter was called before me on 8 June 2015 and the DPP sought an extension of time to file its response by 9 June 2015 and the application for temporary stay was heard by me on the 9 June and I gave my ruling and refused to grant the application.

14. The application for permanent stay was heard by me on 12 June 2015.

Law on Abuse of Process

15. The doctrine of abuse of process is judge-made and developed by the Courts over a considerable period of time. Its aim is preventing the judicial system being used in a way that is inconsistent with its fundamental values, purposes and principles.

16. In *William v Spautz*[1], Mason CJ, Dawson, Toohey and McHugh JJ pointed to two important reasons for the doctrine, at 520:

"The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failures will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice"

17. In *Hui Chi Ming*[2] Lord Lowry described abuse of process as [at 57]:

"...something so unfair and wrong that the court would not allow a prosecutor to proceed with what is in all other respects a regular proceeding".

18. In *R. v Beckford*[3] Lord Justice Neill of the Court of Appeal of England and Wales stated at 100:

"The jurisdiction to stay can be exercised in many different circumstances. Nevertheless two main strands can be detected in the authorities:

[1] (1992) 174 CLR 509
[2] [1992] 1 AC 34
[3] (1996) 1 Cr. App. R. 94

a) *Cases where the court concludes that the defendant cannot receive a fair trial;*

b) *Cases where the court concludes that it would be unfair for the defendant to be tried".*

19. In *R v Rogers*[4] *Mason CJ* of the High Court of Australia stated at 256:

"These statements indicate that there are two aspects to abuse of process: first, the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter complained of will bring the administration of justice into disrepute. This led the majority in Walton v. Gardiner to state the question whether criminal proceedings should be permanently stayed was to be determined by a weighing process involving a balancing of a variety of considerations ((12) (1993) 177 CLR at 395-396). Those considerations, which reflect the two aspects of abuse of process outlined above, include ((13) ibid. at 396.):

> *"the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice".*

Remedies for Abuse of Process

20. It is said that the remedy is an exceptional one[5], to be exercised on the discretion of the judge[6], but one that should be given if an abuse of process is demonstrated[7] and there is no lesser means to alleviate the abuse of process.

Basis of Power to Stay Proceedings

21. *Mason CJ in Jago v District Court of NSW*[8] stated at 25:

"It is convenient to comment by considering the inherent power of courts to prevent abuses of their process. It is clear that Australian courts possess inherent jurisdiction to stay proceedings which are an abuse of process: Clyne v. N.S.W. Bar Association [1960] HCA 40; (1960) 104 CLR 186, at p 201; Barton v. The Queen [1980] HCA 48; (1980) 147 CLR 75 at pp 96, 107, 116".

22. In the case of an inferior statutory Court the power is implied from the Court's express statutory jurisdiction.

23. In *DPP v Shirvanian*[9] Mason P described the power as "*an essential attribute of the exercise of the jurisdiction with which it is invested"* and stated at 185:

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[4] (1994) 181 CLR 251

[5] Jago v District Court of NSW (1989) 168 CLR 23 at pg 76 per Gaudron J

[6] R v Carroll (2002) 213 CLR 635 at 657 per Gaudron and Gummow JJ

[7] R v Carroll (2002) 213 CLR 635 at 657 per Gaudron and Gummow JJ

[8] (1989) 168 CLR 23

"Since the principle which gives rise to the power in a proper case to grant a stay is that "the public interest in holding a trial does not warrant the holding of an unfair trial" (Jago (at 31; 311-312), per Mason CJ), it follows that such power resides in a magistrate of the Local Court hearing a (summary) trial unless excluded by clear words. The duty to observe fairness, at least in its procedural sense, is a universal attribute of the judicial function. Those aspects of a fair trial known as the principles of natural justice apply by force of the common law and the presumed intent of Parliament unless clearly excluded in a particular context. In my view, the same can be said about the power to prevent abuse of process as an incident of the duty to ensure a fair trial. And I can see no principled ground for excluding a power to grant a stay to prevent or nullify other categories of abuse of process.

24. The issue of whether the Local Court has the power to permanently stay proceedings in indictable matter being dealt with summarily was recently considered by Magistrate Heilpern in *R v KF*[10]. His Honour, referring to the decision of Dawson J in *Grassby v The Queen,*[11] held that "where there has been no election by the DPP, the court vested with the necessary power to permanently stay the proceedings."[12]

25. There are other basis for stay of proceedings like delay, lost or destroyed evidence, prejudice caused by publicity etc. which is not relevant to this matter.

Onus

26. The onus of satisfying the Court that an abuse of process exists lies with the party alleging it.[13]

27. The totality of all the factors involved in a case should be considered in determining the question of whether there is an abuse of process.[14]

Standard

28. The power has long been described as discretionary but must be exercised where grounds for it are proved.

Evidence

29. Generally, the notice of motion seeking the stay will need to be supported by an affidavit by the instructing solicitor.

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[9] (1998) 102 A Crim R 180
[10] (2011) NSWLC 14
[11] (1989) 168 CLR1
[12] R v KF [2011] NSWLC 14 at para 11
[13] Williams v Spautz (1992) 174 CLR 509 at 529
[14] R v Gagliardi & Filippidis 26 A Crim R 391 at 407

30. In *Litter v R*[15] Hodgson JA expressed the view that an applicant for a permanent stay should provide sworn evidence, at 513:

"In my opinion, an applicant for such an extraordinary remedy bears a heavy onus, and, if not unfit for trial, should normally be prepared to state on oath what he or she says would be the particular difficulties he or she would face in dealing with a trial of the charges brought".

Application for Stay

31. In the application before me there is no affidavit of Mr. Aseri Vakaloloma who was the only person who had the conversation with Ms. Cathy Dageago and no one else was present at the relevant time, including the applicant.

32. The applicant filed 2 affidavits, the contents of which is based on the information provided to him by Mr. Vakaloloma to which objections have been taken by the DPP as being hearsay. Mr. Vakaloloma submits that it is not hearsay and thus admissible.

33. In my view it is plainly hearsay and therefore I cannot rely on it.

34. I have mentioned previously that the affidavit of Ms. Cathy Dageago was not annexed to the applicant's affidavit when paragraph 11 of the applicant's affidavit stated otherwise. To state that a particular document is annexed to the affidavit and then it is not annexed in my view is plainly unprofessional.

Legal Position of Witnesses

35. It is correct that there is no property in a prospective or potential witness. In *Harmony Shipping Co SA v Davis*[16] (Lord Denning MR) stated that there is no property in a witness whether expert or lay. If there were, one party may be able to 'buy all possible experts' in a certain area. The keyword is prospective or potential witness.

36. It is a universal practice in all common law jurisdictions that the defence counsel should not have contact with the complainant in criminal matters and should only do so after notifying the opposing party. Professor Dal Pont[17] notes:

"When interviewing a prosecution witness, defence counsel must be careful to ensure that nothing is said or done to intimidate the witness. It is especially unwise to interview complainants in sexual offences without notifying the prosecutor in advance".

"He also suggests that such interviews undertaken in the presence of an independent witness. Solicitors in other jurisdictions have been recently sanctioned or even imprisoned for misunderstandings arising when contacting prosecution witnesses".

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[15] (2001) 120 A Crim R 512
[16] [1979] 3 All ER 180
[17] G Dal Pont, Professional Responsibility (5th Ed) 2012, Thompson Reuters at p 569

37. As the trial proceeds the witnesses go through certain phases and to protect the integrity of their evidence, they are provided with certain safeguards, for instance a lawyer is precluded from conferring with his witness or even a client as a witness while he or she is under cross examination without first seeking the consent of the cross examiner.

38. Once a witness testimony is completed and any party wishes to adduce further evidence from that witness, he or she will only be able to do so when the Court grants leave for the recalling of the witness (section 100 of the Criminal Procedure Code (CPC)). If the approval is not granted by the Court then no further evidence can be adduced in that trial from that particular witness.

39. I am at a loss to understand as to why Mr. Vakaloloma had discussions with Ms. Cathy Dageago for he should have known better that the Court will not entertain his application for her recall as her evidence would be tainted. This is such a basic proposition that even a first year law student would know.

40. By having the discussion with Ms. Cathy Dageago in his hotel room Mr. Vakaloloma usurped the functions vested in the Magistrate presiding over the criminal trial. Section 100 of the CPC provides that any Court at any stage of any proceedings of its own motion or on an application by any party may recall a witness for further re-examination.

41. To a question by me as to whether it was unethical for him to talk to Cathy Dageago he responded that the case for the prosecution had closed and therefore there was nothing unethical about it.

42. The sole basis for making this application is the conversation Mr. Vakaloloma had with Ms. Cathy Dageago in that she discussed her evidence in Court and confessed to him to having committed perjury and that she was coached by Mr. Livai Sovau to give evidence in the way that she did. If I were to grant the application than I would be elevating the meeting that he had with Ms. Cathy Dageago to the functions vested in the Magistrate by virtue of section 100 of the CPC. Had he correctly used section 100 then that would have been the natural outcome.

43. Mr. Vakaloloma had no regard for the Court's process and its sanctity. He has shown a complete disregard for the welfare of the witness Ms. Cathy Dageago and is using the discussions with her which is a breach of well-established common law practice afforded to a witness in a Court of law. This application is in itself an abuse of process of the Court and is therefore dismissed.

DATED this 16th day of June 2015.

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Mohammed Shafiullah Khan
Judge