

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

HAM NO. 150 OF 2015

BETWEEN : MICHAEL FULLMAN

Petitioner

AND : STATE

Respondent

Counsel : Mr. N. Vere for the Applicants
Ms. J. Fatiaki for Respondent

Date of Hearing : 15th of December 2015

Date of Ruling : 19th of February 2016

RULING ON STAY OF PROCEEDINGS

Introduction

1. The Applicant files this notice of motion seeking an order to stay the criminal proceedings against the Applicant in Criminal Action Number 51 of 2011 in Sigatoka Magistrate's Court. The notice of motion is being supported by an affidavit of the Applicant stating the ground for this application. According to the affidavit of the Applicant, this application for stay of proceedings is founded on three main grounds that;

- i) Being charged with an offence not known to law

ii) Entrapment,

iii) Unreasonable delay in finalizing the proceedings

2. The learned counsel for the Applicant informed the court that the Applicant withdraws the first ground mentioned above. Hence the hearing was limited to the remaining two main grounds. The Respondent advised the court that they do not wish to file any affidavit in objection but preserved the rights of making submissions at the hearing. The matter was then fixed for the hearing, where the learned counsel for the Applicant made his brief oral submissions. The counsel for the parties agreed to file their submissions in writing. Hence, I invited the parties to file their respective submissions, which they filed accordingly. Having carefully perused the affidavit of the applicant and respective submissions of the parties, I now proceed to pronounce my ruling as follows.

Background

3. The Applicant was initially charged in the Magistrates court in Sigatoka for one count of Official Corruption, contrary to Section 106(a) of the Penal Code. The Applicant has pleaded not guilty, hence the matter was proceeded to the hearing. During the course of the hearing the prosecution has amended the charge with three counts of Official Corruption contrary to Section 106(a) of the Penal Code. The prosecution had called two witnesses during the course of the hearing in the Magistrates court. The accused had given evidence for the defence. The matter is now pending for the judgment of the learned Magistrate.
4. The prosecution alleges that the Applicant has asked Mr. Sushil Sharma a sum of \$ 200, \$ 100 and \$ 172 respectively in three different occasions in order to stop the de-registration of the vehicle registration number EG 089, which was impounded by the Land Transport Authority.

Law and Analyses

5. Having briefly outlined procedural and factual background of the proceedings in the Magistrates court, I now turn onto the ground of entrapment.
6. Osborn's Concise Law Dictionary defines entrapment as " *enticing a person into committing a crime in order to prosecute him*".
7. Lord Hoffman in **R v Looseley Attorney General's Reference (No 3 of 200) (2001) UKHL53, (2002) 2 LRC 382, (2001) 1 All ER 897** held that;

" 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".

8. The Fiji Court of Appeal in **State v Pal (2008) FJCA 117; (2009) 1 LRC 164 (8 February 2008)** has expanded the scope of the definition given in **R v Looseley (supra)** for "entrapment" .Having concurred with the findings of Justice Gates (as his lordship then was) in his ruling in the High Court, the Fiji Court of Appeal in **State v Pal (supra)** held that

"In our opinion they are not or cannot be limited to instances where state agents- police, undercover personal, etc- are those who engage in conduct which is such as to bring the justice system into disrepute or destroy public confidence in the court or judicial process....(para 63)

The way in which the administration of justice can be abused are not limited to rogue conduct of state officials, be they police officers, undercover agents or others. The state ought not to take advantage or be seek to take advantage of rogue conduct, nor should the court be a party to it" (para 71)

9. Accordingly, **State v Pal (supra)** has brought the acts of any other person into the definition of "Entrapment," where **R v Looseley (supra)** only limited it to the acts of state agents or law enforcement agents.
10. Lord Hoffman in **R v Looseley (supra)** has discussed the application of the principle of "entrapment" in the domain of English law, where his lordship found that;

"First, entrapment is not a substantive defence in the sense of providing a ground upon which the accused is entitled to an acquittal. Secondly, the court has jurisdiction in a case of entrapment to stay the prosecution on the ground that the integrity of the criminal justice system would be compromised by allowing the state to punish someone whom the state itself has caused to transgress. Thirdly, although the court has a discretion under section 78 of the Police and Criminal Evidence Act 1984 to exclude evidence on the ground that its admission would have an adverse effect on the fairness of the proceedings, the exclusion of evidence is not an appropriate response to entrapment. The question is not whether the proceedings would be a fair determination of guilt but whether they should have been brought at all".

11. Justice Gates (as his lordship then was) in **State v Pal (FJHC 48; HAC002.2004) (26 May 2006)** has discussed the application of the principle of "entrapment" in Fiji, which is also founded on the same approach as of the R Looseley (supra) . His lordship found that;

"In spite of improper motive on the part of the persons gathering evidence here and what might be regarded as a manipulation of the prices 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 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) 48 Cr. App. R. 183, at p 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 countenance

behaviour that threatens either basic human rights or the rule of law; per Lord Nicholls (Looseley supra para 13)”

12. Entrapment is an improper and manipulative process that creates a crime for the accused to commit by another person and then prosecute him for the same. It is an abuse of the process of the court of law. As the above discussed judicial precedents has found, the court must jealously and vigilantly protect its process from being improperly and manipulatively abused by any person. Hence, the principle of entrapment is not a substantive defence, but a ground to stay the proceedings on the basis of abuse of the court process.
13. Having discussed the principle of entrapment and its application, I now turn onto this instant case. The learned counsel for the Applicant heavily depended on the decision of the Fiji Court Appeal in **State v Pal (supra)** and urged the court that the factual background of this instant case is very much similar to the facts of **State v Pal (supra)**.
14. In the case of **State v Pal (supra)** the accused was an inspector in the Department of Fair Trading. He has requested some financial benefit from the Managing Director of Fiji Blue Gas in order to sideline an investigation against the said Gas Company on the allegation of short- weighting of the gas cylinders. The Managing Director together with few others have recorded the conversation of the accused when he made this offer to them at one of the restaurants in Suva City. The said video recording and the conversation was telecasted on TV.
15. Justice Gates (as his lordship then was) made an order to stay the proceeding permanently in the High Court. That decision was appealed to the Fiji Court of Appeal by the prosecution. The Fiji Court of Appeal, having extensively discussed the applicable laws and the approach adopted by Justice Gates in the High Court, disallowed the appeal.
16. The Applicant in this instant case alleges that Mr. Sharma, who is a legal practitioner in Sigatoka, called him to his office and gave him \$100 for his grog. However, he had later found that Mr. Sharma had video recorded the said incident and reported to the police.

The Applicant submitted that the conduct of Mr. Sharma amounts to an entrapment. Hence the criminal proceeding in the Magistrate court against the Applicant on the there counts of official corruption should be permanently stayed.

17. Having carefully perused the ruling of Justice Gates in the High Court and the Judgment of the Fiji Court of Appeal in **State v Pal (supra)**, I find that the order to stay of the proceeding in the High Court was not founded on the ground of entrapment, but on the ground that the recording of the video and the conversation was not a *bona fide* enquiry.
18. Justice Gates in his ruling in the High Court in **State v Pal (supra)** held that;

“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 the 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 & Shahzed (1996) 2 Cr. Apple RI 92. I find the accused therefore not lured into a trap or pulled away from a straight path R v Looseley; A.G. 's Reference (No 3 of 2000) (2002) 1 Cr. App. R. 29, nor was this as Bary CJ but it in The Queen v Venetian and Leigh (1970) SASR 506, a case where the witness “ beguiles and seduces an unwilling accused to commit or attempt to commit the crime”.

19. Lord Nicholls of Birkenhead in **R v Looseley (supra)** has discussed the test of determining entrapment and the limits of acceptable police conduct, where his lordship held that;

“On this a useful guide is to consider whether the police did no more than present the Defendant with an unexceptional opportunity to commit a crime. I emphasise the word unexceptional. The yardstick for the purpose of this test is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstance. Police conduct of this nature is not to be regarded as inciting or instigating crime, or luring a person into committing a crime.

The police did no more than others could be expected to do. The police did not create crime artificially”.

20. Lord Nicholls went on further and discussed the propriety of police conduct in such a circumstance, where his lordship found that;

“There is by no means the only fact to be taken into account when assessing the propriety of police conduct. The investigatory technique of providing an opportunity to commit a crime touches upon other sensitive areas. Of its nature this technique is intrusive, to a greater or lesser degree, depending on the facts. It should not be applied in a random fashion, and useful for wholesale “virtu-testing”, without good reason. The greater the degree of intrusiveness, the closer will the court scrutinise the reason for using it. On this, proportionality has a role to play”.

Ultimately the overall consideration is always whether the conduct of the police or the law enforcement agency was so seriously improper as to bring the administration of justice into disrepute. Lord Steyn’s formulation of a prosecution which would affront the public conscience is substantially to the same effect (see R v Latif (1996) 1 All ER 353 at 361, (1996) 1 WLR 104 at 112). So is Lord Bingham of Cornhill CJ’s reference to conviction and punishment which would be deeply offensive to ordinary notions of fairness (see Nottingham City Council v Amin (2000) 2 All ER 946 at (49, (2000) 1 WLR 1071 at 1076). In applying these formulations the court has regard to all the circumstances of the case”

21. In view of the test enunciated by Lord Nicholls in **R v Looseley (supra)**, it appears that the approach in dealing with the issue of entrapment constitutes two components. First, the court is required to consider whether the impugned evidence falls with the definition of entrapment. Even though, the court is satisfied that there is no entrapment, the court is still required to consider whether the investigator has properly obtained the impugned evidence. The court needs to satisfy that the investigator has properly obtained such evidence with good faith and has not brought the administration of justice into disrepute.

22. Justice Gates (as his lordship then was) in **State v Pal (supra)** has applied and adopted this two sphere approach in order to reach his lordship's conclusion to stay the proceedings permanently, where his lordship held that;

"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 tape and thus having 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 (19777) 1 NZLR 448 at p. 451: Amato (1982) 140 DLR (3d) 405 per Estey J (dissenting)"

23. Having satisfied that the accused was not entrapped, Justice Gates went further and found that the private investigators had no good faith in recording the video and the conversation. Hence his lordship concluded that it amounts to an abuse of the court process. Justice Gates held that;

"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 court cannot stand by and lend credence to such unjust manoeuvres which undermines the credibility of a justice system;"

24. In this instant case, the learned counsel for the Respondent, in her submission, stated that the prosecution has presented evidence in the Magistrates' court that the Applicant had requested Mr. Sharma \$200 for not to deregister the vehicle registration number EG 089. He has made a similar request from the driver of the said vehicle. Mr. Sharma then called him in to his office and gave him \$100. He had told the Applicant that he got only

\$ 100. That transaction was video recorded. Mr. Sharma then reported this incident to the police and handed over the copy of that video recording.

25. The Applicant in his affidavit in support admitted that he went to Mr. Sharma's office as he was requested. Mr. Sharma had then given him \$100 for his grog.
26. Accordingly, it appears that there is evidence presented before the learned Magistrate that the Applicant was involved in the impounding of the vehicle registration number EG 089. Moreover, there is evidence that he had demanded Mr. Sushil Sharma a sum of \$200 for not to deregister the said vehicle. According to the evidence presented by the prosecution during the hearing in the Magistrate's court, it appears that there is evidence to establish that the Applicant has demanded money and Mr. Sharma has only facilitated the accused to commit the offence. Hence, I do not find that the accused was lured into a trap or incited to commit this crime. Wherefore, it is my opinion that the Applicant was not entrapped into committing this crime.
27. The Applicant has not provided any evidence to establish that Mr. Sharma acted in *mala fide* or in a manipulative manner in obtaining this video recording. Mr. Sharma has stated in his evidence in the Magistrates' court that he informed two police officers about this incident and tried to contact them before he called the Applicant to his office. However, none of them were available at that time.
28. In view of the reasons discussed above, it is my opinion that the Applicant was not entrapped into committing this crime. Further, I am satisfied that there is no any improper or bad faith amounting to an abuse of process in the video recording of the incident. I accordingly find that there is no merit to stay the proceedings on the ground of "entrapment".
29. It is for the learned Magistrate to determine the probative value of the video recording and the truthfulness and the credibility of evidence of the witnesses presented during the course of the hearing in the Magistrate's court.

30. I now draw my attention to the issue of delay.
31. Lord Lane CJ in Attorney General's reference (No 1 of 1990) (1992) Q.B 630 at 643-644 has discussed the applicable principles for stay of proceedings on the ground of delay, where his lordship held that;

"Stay imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust. We respectfully adopt the reasoning of Bernnan J in Jago v District Court of New South Wales (1989) 168 C.L.R.23. In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the action of the defendant himself, should never be the foundation for a stay,

In answering to the second question posed by the Attorney- General, no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held; in other word, that the continuance of the prosecution amounts to a misuse of the process of the court. In assessing whether there is likely to be prejudice and if so where it can properly be described as serious, the following matters should be borne in mind; first, the power of the judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence, secondly, the trial process itself, which should ensure that all relevant issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the power of the judge to give appropriate direction to the jury before they consider their verdict".

32. The Supreme Court of Fiji in Nalawa v State (2010) FJSC 2; CAV002.2009 (13 August 2010) having discussed the approaches in common law on the issue of stay of proceedings, held that;

“The following principles may now be stated as basic to the common law;

- i) Even where delay is unjustifiable a permanent stay is the exception and not the rule,*
- ii) Where there is no fault on the part of the prosecution, very rarely will a stay be granted,*
- iii) No stay should be granted in the absence of any serious prejudice to the defence, so that no fair trial can be held, and*
- iv) On the issue of prejudice, the trial court has processes which can deal with the admissibility of evidence if it can be shown there is prejudice to an accused person as a result of delay”*

33. The prosecution and the defence has already given their evidence in the Magistrate court and the matter is pending for judgment of the learned Magistrate since 9th of June 2014. The learned Magistrate has postponed the judgment on number of occasions, and has informed the parties that he will deliver his judgment on notice. In fact, the delay of nearly two years to deliver a judgment is unreasonable, though it might have contributed to some reasonable excuses.
34. The delay of delivering the judgment may have not affect the Applicant in conducting a fair trial, but it might affect the applicant adversely in number of ways. However, as per the guidelines enunciated in **Nalawa (supra)** I do not find this is an exceptional ground for granting an order for stay proceedings.

35. In conclusion, I refuse and dismiss this application for permanent stay. I further order the learned trial Magistrate to conclude and deliver his judgment within four weeks of this order.
36. The Deputy Registrar of the High Court is hereby ordered to serve a copy of this ruling to the relevant Resident Magistrate forthwith.



R. D. R. Thushara Rajasinghe

Judge

At Lautoka

19th of February 2016



Solicitors : Naipote Vere & Associates for Applicants
Office of the Director of Public Prosecutions for
Respondent