

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAM 207 OF 2013

BETWEEN : PRATISHNA NARAYAN

AND : STATE

Counsel : Mr. Shivam N. for the Applicant
: Ms. Prasad J for the State

Date of Ruling : 22nd May 2014

**RULING ON APPLICATION FOR PERMANENT
STAY OF PROCEEDINGS**

1. Ms. Pratishna Narayan, (hereinafter referred to as the applicant) seeks a permanent stay of proceedings in the Magistrate's Court Criminal Case No. 1197 of 2012 where she has been charged with 7 counts of "theft". The total sum alleged to have been stolen by the applicant, is \$30, 561.15 from Morris Hedstrom Limited between 11th of November 2011 and 21st February 2012, whilst been employed as a wholesale supervisor.
2. Whilst denying all the allegations leveled against her, the applicant relies on the following two grounds when asking for a stay of criminal proceedings initiated against her.
 - (a) The video recording has been destroyed through re-recording.

- (b) There were no receipts to confirm the amount of money received through sales by the wholesale department making the money subject to these proceedings illegally obtained.
3. During the Hearing, the learned counsel for the applicant informed court that he is not pursuing ground (b) and relies only on ground (a).
4. It was revealed through affidavits, oral submissions and written submissions of both parties that,
- (a) The cash (in general) were been collected by the salesmen or delivery boys and handed over the same to the wholesale department.
 - (b) A video camera which was focused to the counting table is been installed in the wholesale department and a directive was in force that the cash brought into the department should be counted at the counting table.
 - (c) The said video camera was focused mainly to the counting table and that does not cover the applicant's table.
 - (d) The internal investigating officer of the complainant company had reviewed the camera footage when the case came into light in early 2012 and did not take steps to save the same as he found no footage of applicant counting money.
5. Had the video footage was available, the applicant argues, that she could have shown the trial court that it was only the cash register, but not the money brought to her for signing and she blindly signed it without counting the money. Whilst denying receiving any money with the cash register, the applicant further says that the video footage would have been sufficient to prove how much money was handed over to her after counting the same on the counting table.

6. Anyway, during the hearing the learned counsel for the applicant did concede that it is 'practically impossible' to ascertain the 'amount of money' even though the video footage is available. The applicant's argument has now confined only to the fact that the non-availability of the video footage have deprived of her showing that she never received any money after counting the same at the counting table. Thus, the applicant urges that the whole criminal proceedings should be stayed as:
- (a) The initial internal investigators of the company had not only acted in a "bad faith" by deciding not to retain the video footages, but also they have decide to do so maliciously because those were not supportive to the prosecution and;
 - (b) She would be prejudiced to such an extent that she would not have a fair trial as she does not have any alternative way of proving her defence in the absence of the said video footage.
7. The Respondent, Director of Public Prosecutions says that they disagree with the proposition that there were any video recordings of the applicant receiving or collecting money as the camera was not focused on her table. The Respondent argues that there is no value of the video footage, though saved, as the applicant had received money on her workstation, which was outside the purview of the camera. The DPP submits that they will call primary evidence at the trial proper to show who gave how much money to the applicant and the total amount she received. Finally, the Respondent urges that the applicant had failed to show any actual prejudice suffered by her in the absence of the video footage and it is not a necessary or only piece of evidence capable of helping her in her defence.
8. It is trite law that the applications to stay the criminal proceedings are been entertained only in exceptional circumstances, where the court finds that the accused with the prevailing circumstances, cannot have a fair trial or it would be unfair for the accused to be tried. The judicial discretion, when deciding the issue of 'stay', especially over the destruction of evidence, is to be used sparingly with the ultimate objective of ensuring a fair trial in accordance with

the law. This "fairness", is not only to the accused, but to the prosecution as well. As Lord Diplock stated in *R. v Sang* (1979) 69 CAR 282, at 290

"...the fairness of a trial ... is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted,"

Then it is the duty of the accused to show court in civil standards or on balance of probability, that he will be deprived of a fair trial due to the serious prejudice caused with the destruction of evidence. Nevertheless, the destruction of evidence itself does not automatically lead to stay proceedings, though it might have some effect to the trial.

9. Stay of proceedings in criminal trials has originated in the common law to ensure a fair trial. In *Connelly v. Director of Public Prosecutions* [1964] AC 1254 at 1301, Lord Morris said that:

"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers, which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of process and to defeat any attempted thwarting of its process..."

In Attorney-General's Reference No. 1 of 1990 [1992] 95 CLR CA 296 at 302, Lord Chief Justice Lane said that:

"Stays 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"

10. In *R. v. Derby Crown Court, ex parte Brooks* [1984] 80 Cr. App. R. 164 Sir Roger Ormrod stated that:

"The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of processes if either: [a] the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or [b] on the balance of probability the defendant has been, or will be, prejudiced in the prosecution of or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused or to genuine difficulty in effective service."

11. It is accepted law in Fiji that the High Court has the inherent jurisdiction to stay proceedings. This issue was discussed extensively in **Ratu Inoke Takiveikata and 9 others v. State**, FJHC HAM 39 of 2008. Bruce J pointed to two instances where the court should consider a stay of proceedings:

"19 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."*

12. Lord Justice Brooke in *Ebrahim, R (on the application of) v Feltham Magistrate's Court* [2001] EWHC Admin 130, at 133 said that:

"27. It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible

evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."

13. Several case authorities cited by Brooke LJ in paragraph 29 of *Ebrahim* (supra) is highly relevant to the present case as well. In *Reid*, (No. 9605572Y3, 10th March 1997), the police, after actually viewing the video film, decided that it does not contain anything relevant to the crime, a violence broke out at a chemist's shop, whilst other cameras did not cover the area of the incident, and did not seize the video footage. Police took up the stance that had the recordings been relevant to the crime, those would have been seized. The trial judge refused to stay the proceedings saying that there is no unfairness caused by the actions of police. The Court of Appeal also held with the trial judge's decision.
14. *Regina v Christian James Swingler* [1998] EWCA Crim 2284, is a case of rape, alleged to have been taken place close to a bridge over a railway line. There were several independent witnesses for the prosecution. Even though video cameras were mounted on the bridge, the detective police constable who was in charge of the investigation had not sized any recordings as he was informed by the British Transport police that the cameras were not switched on at the material time. By the time it was disclosed that the cameras were in fact working on that night, it was after one month and by which time the recordings had been destroyed.
15. The most important finding of *Swingler* (supra) by Lord Justice May, Justice Rougier and Justice Fabyan Evans is that if the defendant to have a successful allegation against the prosecution about abuse of process, they have to show court that there was either 'an element of bad faith' or 'some serious fault' on the part of the police or the prosecution authorities. The Court of Appeal in *Swingler* (supra) identified such circumstances existed in *Birmingham* (1992) CLR 117, when the police did not reveal the existence of a video camera

footage even with the requests of the defence, which could have contained important material to the case, guilt or otherwise of the seven accused, as the camera was focused to an area where the violent disorder broke out at or outside the night club with assaults on police officers as well. A stay of proceedings ordered by the trial judge was upheld by the Court of Appeal, as the trial would not be fair by the accused, though the disappearance of the video tape by the time of the trial was not a deliberate manipulation of the prosecution.

16. *Medway* (Case No. 98/7579/Y3, Royal Courts of Justice, Strand, London, Thursday 25th March 1999) is more focused on the present issue. A police officer, after having a look at the CCTV camera footage, which was operating in the street where the robbery took place, formed the opinion that the contents show nothing of value and did not seize it to be used during the trial. The trial judge did not order a stay as the CCTV's positioning is very unlikely to catch something of the said robbery. Lord Justice Mantell, whilst upholding the trial judge's decision to refuse stay, said that:

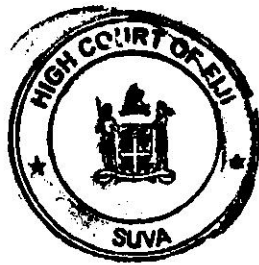
"We recognize that in cases where evidence has been tampered with, lost or destroyed it may well be that a defendant will be disadvantaged. It does not necessarily follow that in such a case the defendant cannot have a fair trial or that it would be unfair for him to be tried. We would think that there would need to be something wholly exceptional about the circumstances of the case to justify a stay on the ground that evidence has been lost or destroyed. One such circumstance might be if the interference with the evidence was malicious."

17. The debatable issue, even in this instance, is the non-availability of video footage of the CCTV camera at the work place of the applicant. The existence of the CCTV is not in dispute. Both parties have agreed that the CCTV was not focused to the table of the applicant, but to the counting table, which was used to count the money brought inside by the delivery boys. It is admitted by the prosecution through Investigating Officer Rakesh Prasad's affidavit that the video footage did not show the applicant counting or receiving money. On the other hand the applicant claims in her affidavit, that she did not receive any money but blindly signed on the cash registry.

18. Crux of the applicant's argument is that this court should exercise its inherent jurisdiction to stay the criminal proceedings against her as she won't be able to show the trial court through CCTV footage that the money did not reach her table physically from the counting table as the recordings are destroyed or not in existence. This court is not inclined to agree with this contention. The applicant is been charged with 7 counts of 'theft'. The burden is on the prosecution to prove all the elements of the offence of 'theft' beyond reasonable doubt or to the fullest satisfaction of the learned Magistrate. In doing so, the prosecution will have to call their own witnesses and produce documentary evidence to court. The applicant will surely have the benefit of cross-examining the witnesses and question the documents to create a reasonable doubt in the prosecution story. This is, as always been, the routine of a criminal trial.
19. This court does not wish to pursue the evidential value or the weight of the missing video footage. That is because the trial is yet to commence in the Magistrate's Court and the assessment on the video footage evidence by this court might have an adverse effect to the case of the applicant. Thus, it is suffice to say that the non-availability of the video footage, which any way did not focus the applicant or her table directly, would not prejudice the applicant in putting forward her defence at the trial. In any event, this court cannot see this missing piece of evidence will deprive the applicant of having a fair trial as this proposition pertaining to "destruction of evidence" can always be put to the prosecution witnesses and address the learned trial magistrate on that issue. On the other hand, this court sees no reason to say that it is unfair to proceed with the criminal trial simply because of this piece of evidence is distrusted.
20. Most importantly the decision of not to retain the video footage in issue was taken by the internal investigators of the company, before it reached the police investigators or the prosecution. Thus, in the first place, no blame can be attributed to the police or the prosecution in this instance. Secondly, apart from the unfounded allegation of the termination of the applicant's husband on 7th May 2013, who had worked for the same company in a senior administrative position after the applicant was terminated on 26th of April

2012, there is nothing to say that even the internal investigators had acted in bad faith or done something seriously wrong by deciding so.

21. In the light of the above analysis, this court concludes that the applicant's request to stay the criminal proceedings against her in case No. 1197 of 2012 of the Magistrate's Court on the basis of 'destruction of evidence' or, to be more precise, the non-availability of a video footage, is without merit and in fact, premature. Hence, the application is refused.
22. The Judgment of the court has to be delivered to the Criminal Registry of the Magistrate's Court of Suva without any delay.



Janaka Bandara
Judge

At Suva

Office of Neel Shivam Lawyers for Applicant

Office of the Director of Public Prosecutions for the State