Takiveikata v State [2008] FJHC 315; HAM039.2008 (12 November 2008)

IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELANEOUS CASE No. HAM 039 of 2008

BETWEEN:
RATU INOKE TAKIVEIKATA
(1st Accused)
JONE BALEDROKADROKA
(2nd Accused)
FEOKO GADEKUBUA
(3rd Accused)
BARBADOS MILLS
(4th Accused)
SIVANIOLO NAULAGO
(5th Accused)
METUISELA MUA
(6th Accused)
EPARAMA WAQATAIREWA
(7th Accused)
KAMINIELI VOSA VERE
(8th Accused)
PAULIASI NAMULO
(9th Accused)
BALLU KHAN
(10th Accused)
AND:
STATE

Appearances:
STATE: Ms A Prasad, Ms N Tikoisuva
ACCUSED 1: Mr A Naco
ACCUSED 2: Mr D Sharma
ACCUSED 3, 4, 7, 8 & 9: Mr F Vosarogo [Legal Aid]
ACCUSED 5: Mr M Raza
ACCUSED 6: Mr T Fa
ACCUSED 10: Mr P Williams, QC; Mr G Leung & Ms K Philips

Date of Hearing: 15 &16 July, 15-19 September, 2008
Date of decision: Wednesday, 12th November 2008, Suva

RULING ON APPLICATION FOR STAY OF PROCEEDINGS

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Introduction

1 The applicants in this proceeding are facing charges before the High Court which allege that they were participants in three counts of conspiracy to murder.

2 To these charges each of the accused has, on arraignment, pleaded not guilty and, but for this application, would be required to face trial in the High Court in the ordinary way. However, each of the accused has applied to the High Court for a permanent stay of the trial of that information.

3 This is my judgement on the application for a permanent stay.

Background

4 In December 2006, members of the military forces of Fiji assumed components of the executive power of the government of Fiji. Some have referred to those events as a coup d'état. Whether that is a technically correct or politically apt expression is not critical to the issues which the Court has to consider in the instant case. The charges before the court concern events which are alleged to have occurred between September and November 2007. By that time, the

commander of the military forces of Fiji, had assumed the office of acting Prime Minister. Also by that time, relevant to these proceedings, there was in place an acting Minister of Finance and an acting Attorney General.

5. The case for the prosecution is that a group of persons which included the accused entered into an agreement to murder the persons who were then, respectively, the acting Prime Minister, the acting Minister of Finance and the acting Attorney General. The prosecution alleges that a military officer, Corporal Kuli managed to infiltrate this group of persons by, amongst other things, pretending to support the course of conduct which was said to be under discussion and which culminated in the charges of conspiracy to murder. At a later stage in this conspiracy, the prosecution alleges that a further military officer, Major Narawa, also infiltrated the group. Again, the case for the prosecution is that Major Narawa did so by leading the alleged conspirators believe that he was on their side. Corporal Kuli and Major Narawa portrayed themselves as military officers (which they were), but ones who were disaffected with the military officers who were then in positions of power in the executive branch of the government of Fiji.

6. The principal source of evidence for the conspiracy comes from the proposed testimony of Cpl Kuli. On the basis of the statements he has supplied, his evidence is that he spoke to the accused and participated in the discussions during which the conspiracy was formulated and, to some extent, refined both as to scope and as to detail. It is no understatement to say that the case for the prosecution hinges on his testimony. In due course, it will be necessary to review components of his proposed testimony as revealed by the three witness statements that he has given. This is because part of the case for the accused in their applications for a stay of proceedings is based on the content of his proposed testimony.

Grounds of the application: overview

7 In very broad terms, the grounds upon which the permanent stay of proceedings is sought are, at least, as follows:

(1) treatment of the accused prior to interception

(2) treatment of the accused on interception

(3) treatment of the accused post interception

(4) unfair and prejudicial publicity

(5) the absence of bona fides in the carrying out of the investigation by, in particular, the military

(6) inadequate disclosure by the State

(7) destruction of material ordinarily disclosable which seriously prejudices a fair trial

There is also an over-arching assertion that the conduct of the military, taken as a whole, is such

that it would be improper to hold a trial.

8 Not every accused relies on each of the grounds outlined above. In due course, it will be necessary to refine the statement of the grounds of the application by reference to specific accused.

9 The factual case put by the accused is complex and is not easy to summarise in a paragraph. The essence of it that members of the military and, towards the end of the period under consideration, the police engaged in a concerted campaign to harm the interests of the accused. Prior to the arrest of the accused the case for the accused is that the military sought to harm the ability of certain of the accused in their employment and business interests. Some of the accused were former members of the Fiji military in an elite unit known as the Counter Revolutionary Warfare Unit (CRW) and having served jail terms for various offences of (or akin to) mutiny, tried to rehabilitate their lives. They secured work as security guards with the 10th accused. The 10th accused was a successful businessman who, so he contended, had fallen foul of the military and the military sought to damage him and his business and economic interests. The accused who were formerly members of the CRW unit were harassed by the military. The conduct includes acts which were unlawful and in some cases amounted to the deprivation of the liberty of some accused. Following their arrest, the military and police by a variety of acts including concerted assaults on the 10th accused and to a lesser extent other accused, the publication of comments adverse to the interest of amongst others, the 10th accused and the revelation of certain personal intimate material belonging to the 10th accused and the treatment of him and his spouse/partner amounted to, taken as a whole, a deliberate course of conduct which was so outrageous as to amount to conduct which should result in a stay of these proceedings. Further it is alleged that the investigation and observation of the accused while the conspiracy the subject of the charges was being formulated, was itself so flawed, improper and not undertaken in good faith so as to justify a stay of proceedings. Finally, the case for the accused is that a stay should be granted because of the deliberate destruction of certain evidence which, so the accused say, would assist them in defending themselves against the charges.

10 As I say, this is only a brief summary of the factual case for the accused. I will examine this in detail later in this judgment.

11 I should add one further point at this stage. The fact that some of the accused had been convicted for various offences of (or akin to) mutiny is not something I have held against those accused. It is common ground that these convictions partly informed the bias alleged against the military. The convictions have not in any way affected my assessment of the evidence and the case. These matters were responsibly exposed in the course of argument as necessary background for me to understand the competing contentions.

Burden and standard of proof on application for a stay of proceedings

12 Before a stay of proceedings could be considered, there must be a factual basis for that consideration. It is common ground that the accused bear the burden of proof of establishing the facts which might justify the intervention of this court by way of stay of proceedings. It is also common ground that the standard of proof which must be attained is proof to the civil standard.

The facts must be established by evidence which is admissible under the law.

Evidence

13 The basis for the cases for the accused and the case for the State was contained, in the main, in affidavits. (There were some statements by counsel from the Bar Table which I accepted.) No oral evidence was called in support of this application. The Court been asked to resolve many of the factual disputes in this case.

14 I made it plain to the parties in the early part of the hearing of this application that I may have difficulty making findings of fact absent oral evidence being called. The reason for that is self-evident. At one stage there were at least intimations that witnesses would be called to give oral evidence. That never eventuated. I make it plain I do not hold the decision not to call oral evidence against any of the Applicants/Accused. That was their right and it was plainly and obviously a deliberate choice. Each of the Applicants/Accused were represented by highly competent counsel and I have no hesitation in proceeding on the assumption that counsel (and thus their respective clients) well appreciated the consequences of the choice to proceed as they did. That was plainly implicit in some of the submissions. The plain fact is that many of the allegations of fact cried out to be tested in cross-examination.

15 An example of this, but by no means the only instance, concerns the allegations of assault made by the 10th accused Mr Khan following his interception by the authorities. (I use "interception" and "authorities" as words intended to be neutral.) This so even in the case of witnesses who said they saw assaults on Mr Khan who were arguably "independent" witnesses. As will become apparent when I examine the evidence on this specific topic, the weight to be attached to these witnesses rather depends on the quality of their observations. How much could they really see? Over what duration?

16 The source of information in relation to the "independent" witnesses came from statements taken by the police. While these statements taken by the police were produced by the State under their disclosure obligations, I did not proceed upon the basis that they were, in effect, statements against the interest of the State. There is no implied assertion by a prosecuting authority that material it produces is true or reliable. Unless the authority expressly asserted truth or reliability, the material is information in the hands of the defence to make of it what they will via the time-honoured and time-tested modes of establishing reliability.

17 Lest anyone suggest it, this was not a case where it was incumbent upon the State to indicate which witnesses it wanted to cross-examine. For the avoidance of doubt, as this case played out, such a suggestion would have been nothing short of absurd. No one could have been in even the slightest doubt that factual issues were well and truly joined. In many respects the stance of the State was simply: prove the factual basis for your case.

18 Some of the issues of fact are broadly common ground or so obviously unchallenged that I could accept them without going further. Some factual matters I have resolved on what I consider to be a common sense or broad-brush approach. Some matters were assumed to be true for the purpose of the application. (The best example of this was the destruction by Cpl Kuli of

certain notes. That was, in part, the very basis of part of the application for the stay.) In other areas, for reasons which will shortly appear, I have had to make findings where there was only affidavit evidence. I have evaluated this on the basis that merely because something was said in an affidavit that it was to be accepted unless directly contradicted by other evidence. Affidavits are not pleadings. Affidavits are evidence and my evaluation of what is said in affidavits was informed by the applicable standard of proof.

Principles of Law

Basic starting point

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.

The authorities demonstrate that the categories of conduct or set of circumstances (or both) which might justify the imposition of a stay of proceedings are never closed. During the course of this application it was remarked that the facts and circumstances of this case are unique. Nevertheless, the law which governs a stay of proceedings in a criminal case as it applies in Fiji and taken together with the burden and standard of proof which applies is more than adequate to deal with the issues which arise. The explanation for this is that the by its very nature, a stay of proceedings only arises in exceptional or unusual if not unique circumstances and the law as it has developed in Fiji is thus designed to meet such circumstances.

20 It is also common ground that the source of the power of a court such as the High Court of Fiji to make such an order is found within the inherent power of that court to regulate its own process. That process is, of course, devoted to doing justice according to law. The doing of justice through the courts according to the law is one of the critical components of a society which has at its base the rule of law.

21 The concept of a stay of proceedings, by its very nature, might in some respects be seen as inconsistent with the very reason that courts such as the High Court of Fiji exist. Such courts exist to resolve disputes and do justice according to law where that dispute is between one member of the community and another member of the community or between the State and a member of the community. A stay stops that process.

22 In the present case, we are concerned with the jurisdiction of the court being engaged by an information laid before the court to do justice according to law between 10 members of the

community and the State in relation to allegations that those 10 members of the community conspired to murder certain persons. The law is that unless there are exceptional circumstances in existence which would justify a stay of proceedings, the community is entitled to expect that the Court will try those accused in accordance with law until a verdict is rendered on that Information. In *Connelly v DPP* [1964] AC 1254, 1304, Lord Morris observed:

> Generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment, and where either demands a verdict a judge has no jurisdiction to stand in the way of it.

As later authorities show, it is not just the prosecutor and the accused who might be said to have an interest in the case. It is also the community.

23 It is generally recognized that *Connelly v DPP* (above) is the modern starting point for any analysis of the scope of the inherent power of a court superior jurisdiction such as the High Court of Fiji to stay proceedings as an abuse of the process of that court. The exceptional nature of a stay of proceedings is at least implicit in the observations of Lord Morris quoted above. Each of the speeches of members of the House of Lords in *Connelly v DPP* (above) made the same point about the exceptional nature of the jurisdiction to stay an otherwise regularly instituted and maintained criminal charge before a court. The exceptional nature of the jurisdiction has been recognised in countless of the decisions of courts of high authority of Fiji and of the balance of the common law world and it is not apposite to mention these in detail at the moment.

24 One of the fundamental consequences of the exercise of this jurisdiction by ordering a stay of otherwise regularly brought and maintained proceedings is that the case is never tried. The person who is said to be the victim never receives his or her day in court. Not a word of evidence is heard in what is almost always an open and public setting of a court in accordance with settled rules of procedure and evidence. The community has an obvious and basic interest in seeing such charges tried. In that regard, the community is deprived of seeing those who are otherwise regularly and properly charged, after a proper hearing, either convicted because the court is sure of their guilt or acquitted and discharged where the court is not sure of the guilt of that person.

25 In the instant case, there might be said to be broader considerations than the interests of those who are alleged by the charges to be the intended victims of the alleged conspiracy. If what is said in the depositions is true then, in at least one sense, the community also has an interest as victim. However these concerns are formulated, they are a critical component of the reasons why a stay of proceedings is an exceptional remedy. The remedy operates in complete contradiction to one of the basic imperatives of the criminal law: that regularly brought charges should be tried in accordance with the law.

26 Nevertheless, in a judicial system devoted to the resolution of disputes by doing justice according to law, that system may have to do justice by ordering a stay of proceedings.

27 In *Connelly v DPP* (above) at page 1296, Lord Reid held that there must "always be a residual

discretion to prevent anything which savours of abuse of process." Lord Morris of Borth-y-Gest held: (page 1301)

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 or practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

Lord Morris added: (page 1301-1302)

The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard and accused person from oppression or prejudice.

28 Lord Hodson (page 1335) described the existence of a power as "undoubted". Lord Devlin would appear to have put the matter more broadly. He held that court had the power subject to statutory rules "to make and enforce the rules or practice in order to ensure that the court process is used fairly and conveniently by both sides". He made the point the rules of evidence and procedure are a reflection of an attempt to do what was fair and just between prosecutors and the accused. Similarly, Lord Pearce (page 1361) considered that every court of justice had an inherent power to protect itself from the abuse of its own procedure. He held that the pleas of *autrefois convict* and *autrefois acquit* did not exhaust that jurisdiction. (Page 1362)

29 The facts of *Connelly v DPP* are reasonably well known. There was no suggestion whatever that Mr Connelly had anything other than a fair trial when he was ordered to be tried on charges of robbery. It is to be recalled that Mr Connelly had allegedly killed someone during the course of that robbery. He had been previously tried for murder in respect of that killing. According to the practice which then operated in England and Wales, a charge of murder was not tried with other charges in respect of the conduct which accompanied the murder. Thus, in Mr Connelly's case he faced a charge of murder and the charge of robbery was not included on the indictment. However, the conviction for murder was quashed on appeal. The prosecution then sought to indict him on a charge of robbery which as a result of the practice that then applied in England had been deliberately left off the indictment. The House of Lords held that the indictment of Mr Connelly for robbery was not, in the circumstances, an abuse of process.

30 It is not necessary in these reasons to recite in full the historical development of the law which in certain circumstances permit criminal proceedings to be stayed as an abuse of process.

31 However, it is right to note certain major developments from 1994 onwards. From at least 1994, courts of high authority have held that a stay might be imposed in essentially two circumstances. The first is where it is demonstrated that the accused cannot have a fair trial. That line of thought falls for consideration in this case and I discuss the principles concerning this later in the judgment. The second group of circumstances is less easy to define - especially if the definition is restricted to one sentence. The second category is essentially concerned with

conduct on the part of the executive which has an impact on the criminal proceedings and, which is so outrageous - whether that outrageousness is unlawful conduct or otherwise - that for the court to countenance such behaviour would bring the system of justice in to disrepute.

32 The first major development appears in *R v Horseferry Road Magistrates, Ex parte Bennett* [1994] 1 AC 42. There, Bennett was unlawfully brought to the United Kingdom as a result of collusion between the South African and British police to faces charges laid in Britain. The police, as a result of their collusion, side-stepped some of the basic protections that an accused has when he is brought from one country to face criminal charges in another country. The protections are included in the process known as extradition. Bennett did not go through that process. He was simply bundled onto an airplane in South Africa. On arrival in the UK, he was arrested and brought before magistrates to be committed for trial. The House of Lords held by a majority of four to one that in those circumstances an English court should refuse to try the defendant. Lord Griffiths held (at p61-62):

> In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary 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.

In this regard, see also: *R v Mullen* [2004] 2 Cr App R 290 where it was held that the British authorities, in securing Mullen's deportation from Zimbabwe, had been guilty of a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts, so that when, many years later, this came to light, his conviction fell to be quashed.

33 In Canada, the Supreme Court imposes a high test under this second heading. The Supreme Court held that a stay proceedings should be imposed:

> where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued

See *R v O'Connor* [1995] 4 SCR 411, (1996) 130 DLR (4th) 235 at p 277.

34 One area in which the courts have been asked to consider allegedly shocking conduct in cases involving *agents provocateur*. In *Nottingham City Council v Amin* [2000] 1 Cr App R 426 Lord Bingham held that it was unobjectionable for a law enforcement officer to provide the opportunity to break the law, an opportunity which the defendant freely takes.

35 In *R v Looseley, Attorney-General's Reference (No 3 of 2000)* [2001] 1 WLR 2060, the House of Lords dealt with two cases in which, in broad terms, undercover officers obtained drugs from

defendants. In each case it was submitted that for the case to proceed would amount to an abuse of process. The question, answered in the affirmative, was whether the English law concerning entrapment was compatible with the European Convention on Human Rights and the guarantee of the right to a fair trial. Lord Nicholls of Birkenhead observed:

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. Entrapment ... is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts.

36 The real difficulty, consistent with the imperative that a stay of proceedings is an exceptional remedy of last resort was to define what unacceptable entrapment was and what conduct on the part of law enforcement officials was acceptable. Lord Nichols noted:
As already noted, the judicial response to entrapment is based on the need to uphold the rule of law. A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly. Police conduct which brings about, to use the catch-phrase, state-created crime is unacceptable and improper. To prosecute in such circumstances would be an affront to the public conscience, to borrow the language of Lord Steyn in *R v Latif* [1996] 1 WLR 104, 112.

Later in his speech, Lord Nicholls added:

Ultimately the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute. Lord Steyn's formulation [in *R v Latif*] of a prosecution which would affront the public conscience is substantially to the same effect.

Further:

The use of pro-active techniques is more needed and, hence, more appropriate, in some circumstances than others. The secrecy and difficulty of detection, and the manner in which the particular criminal activity is carried on, are relevant considerations.

37 Lord Hoffmann identified the underlying rationale for a stay of proceedings cases and put it at para 40 as follows:

The stay is sometimes said to be on the ground that the proceedings are an abuse of process, but Lord Griffiths [in *Bennett*] described the jurisdiction more broadly and, I respectfully think, more accurately, as the jurisdiction to prevent abuse of executive power.

Lord Hoffman made it clear that there is a distinction between active and passive conduct on the part of an informer but that does not always provide the answer. He said:

The need for an authorised and *bona fide* investigation into suspected criminality is sufficient to show that the question of entrapment cannot be answered simply by asking whether the defendant was given an opportunity to commit the offence of which he freely availed himself. This is important but not enough. The matter is more complicated and other factors have to be taken into account. Likewise, I do not think that even the causal question can be answered by a mechanical application of a distinction between 'active' and 'passive' conduct on the part of the undercover policeman or informer. In cases in which the offence involves a purchase of goods or services, like liquor or videotapes or a taxi ride, it would be absurd to expect the test purchaser to wait silently for an offer. He will do what an ordinary purchaser would do. Drug dealers can be expected to show some wariness about dealing with a stranger who might be a policeman or informer and therefore some protective colour in dress or manner as well as a certain degree of persistence may be necessary to achieve the objective. And it has been said that undercover officers who infiltrate conspiracies to murder, rob or commit terrorist offences could hardly remain concealed unless they showed some enthusiasm for the enterprise. A good deal of active behaviour in the course of an authorised operation may therefore be acceptable without crossing the boundary between causing the offence to be committed and providing an opportunity for the defendant to commit it.

The observations of Lord Hoffman were recently followed in *R v Winter* [2007] EWCA Crim 3493.

38 Lord Hutton approved the four factors set out in the dissenting judgment of McHugh J *Ridgeway v R* (1995) 184 CLR 19, 92 as follows:

(1) Whether conduct of the law enforcement authorities induced the offence.

(2) Whether, in proffering the inducement, the authorities had reasonable grounds for suspecting that the accused was likely to commit the particular offence or one that was similar to that offence or were acting in the course of a bona fide investigation of offences of a kind similar to that with which the accused has been charged.

(3) Whether, prior to the inducement, the accused had the intention of committing the offence or a similar offence if an opportunity arose.

(4) Whether the offence was induced as the result of persistent importunity, threats, deceit, offers of rewards or other inducements that would not ordinarily be associated with the commission of the offence or a similar offence.

39 Perhaps most recently, in *Panday v Senior Superintendent Wellington Virgil* [2008] UKPC 24, the Privy Council held that the key issue was the restraint of the improper exercise of executive power. The issue in that case was whether the decision by the executive to conduct a re-trial ordered by an appellate court abused the process of the courts. (It is critical to note that while an appellate court might order a re-trial in criminal proceedings, it is open to the prosecution - which is part of the executive arm of government - to proceeding with the re-trial.) The advice of the Privy Council reviewed the authorities and concluded:

It will readily be seen that the factor common to all these cases, indeed the central consideration underlying the entire principle, is that the various situations in question all involved the defendant standing trial when, but for an abuse of executive power, he would never have been before the Court at all. In the wrongful extradition cases the defendant ought properly not to have been within the jurisdiction; only a violation of the rule of law had brought him here. Similarly, in the entrapment cases, the defendant only committed the offence because the enforcement officer wrongly incited him to do so. True, in both situations, a fair trial could take place. But, given that there should have been no trial at all, the imperative consideration became the vindication of the rule of law.

40 In considering the issue of entrapment, it was made plain in *R v Jones (Ian)* [2007] EWCA Crim 1118 that the precise nature and scope of the offence charged is of considerable importance in determining whether a stay of proceedings is justified. In that case, the essence of what was alleged was that the accused was inciting under-age girls to perform indecent acts upon him. Thus when an under-cover police officer pretended to be such a girl, what was critical was the act of incitement and not the officer's response.

Discretionary and exceptional remedy

41. The authorities recognise that the power to impose a stay is discretionary, and that a stay "should only be employed in exceptional circumstances". See: *R v Humphrys* [1977] 1 AC 1; *Barton v R* [1980] HCA 48; (1980) 147 CLR 75; *Moevao v Department of Labour* [1980] 1 NZLR 464; *R v Derby Crown Court, ex parte Brooks* (1985) 80 Cr App R 164; *Attorney-General's Reference (No 1) of 1990)* [1992] QB 630; *Jago v District Court* (NSW) [1989] HCA 46; (1989) 168 CLR 23; *Tan Soon Gin v Judge Cameron & Anor* [1992] 2 AC 205. The power has always been considered a residual one: *Connelly v DPP*; *R v Humphrys* [1977] 1 AC 1. That carries with it the obvious implication that only when all else fails or no other remedy is realistically available may the court even consider imposing a stay.

42. The exceptional nature of the remedy was recognised in *State v Rokotuiwai* [1998] FJHC 196; *State v Naitini (aka George Speight)* [2001] FJHC 1; *State v Buksh & Others* [2005] FJHC 432; *Sahim v State* [2007] FJHC 119; *State v Pal* [2008] FJCA 13.

43 Before the courts may consider imposing a stay, the law requires that Courts consider other remedies: *R v Heston-Francois* (1984) Cr App R 209; *Attorney-General's Reference (No 1) of 1990)* [1992] QB 630; *R v O'Connor* [1995] 4 SCR 411, (1996) 130 DLR (4th) 235; *R v Taillefer & R v Duguay* [2003] 3 SCR 307.

44 The foregoing is not to prohibit the courts from doing justice. Lord Edmund Davis said in *R v Humphrys* [1977] 1 AC 1, 55E that:

> While judges should pause long before staying proceedings which on their face are perfectly regular, it would indeed be bad for justice, if in such fortunately rare cases as *R v Riebold* [1967] 1 WLR 674 their hands were tied and they were obliged to allow the further trial to proceed. In my judgment, *Connelly* established that they are vested with the power to do what the justice of the case clearly demands....

Prejudice to a fair trial

45 Where the fairness of a trial is in jeopardy, there are circumstances in which a stay of proceedings might be granted to protect this right. The right to a fair trial is fundamental. Section 29(1) of the Constitution requires that every person charged with an offence has the right to a fair trial before a court of law.

46 In *Attorney-General's Reference No 1 of 1990* [1992] QB 630, Lord Lane CJ held that the power of any court to stay criminal proceedings as an abuse of its process is residual and discretionary. At page 643G Lord Lane said that no stay should be imposed:

> ... unless the defence 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 words that the continuance of the prosecution amounts to a misuse of the process of the court.

47 In *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72, 85, Lord Bingham observed that it is "axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all". Lord Bingham has speaking in the context of Article 6 of the European Convention. That requires that the trial process, viewed as a whole, must be fair.

48 However, the right to a fair trial, as section 29 of the Constitution makes plain, does not exist in a vacuum. Section 29 speaks of the right being enjoyed in a "court of law." That says something about not only the nature of the court but also recognises that such a court will have procedures and remedies for the exercise and safeguarding of that right. A stay of proceedings is one such remedy. It is not, as *Attorney-General's Reference No 1 of 1990* clearly recognises, the only remedy or method of securing the right to a fair trial. The conduct of the trial, the application of the rules of evidence and procedure also have a vital role to play in this regard.

49 Another feature of the right to a fair trial not existing in a vacuum was explained by Lord Steyn in *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118. There, he held that:

> the purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.

This, in my judgment, provides a vital understanding of why a stay of proceedings is a residuary, discretionary and exceptional remedy. Thus the injunction in the authorities cited above is look for other means of ensuring a fair trial before taking the step of, in effect, terminating the trial.

50 These are only general remarks about the right to a fair trial. In the course of this judgment I have to return to the content of this right in the context of allegations of deliberate destruction of evidence and the conduct of the investigation generally. There is the further over-arching ground that the conduct of the military, taken as a whole is such that no fair trial can be had.

The seriousness of the charges

51 The charges are very serious. The maximum penalty provided on conviction is life imprisonment. If it was found to be proved after a trial, an agreement to murder any human being would be bad enough. It is at least arguable that an agreement to murder three of the principal officials of the interim government of Fiji given, if proved on the evidence, that the object was to destabilise the country would be all the more serious. However, it is not necessary to speculate about that that: on any view these are serious charges.

52 The fact that the charges are serious ones is a relevant consideration in determining whether or not to stay a prosecution. However, it is possible to overstate the impact of the seriousness of the charges as a relevant consideration. The point was made by Lord Hoffmann in *Attorney General's Reference No 3 of 2000, R v Looseley* [2001] 1 WLR 2060, [2001] UKHL 53.

53 In another context, I have tried to make the point that one of the rationales behind the exceptional nature of this remedy is the public interest in having the charges and the evidence aired in open court. While I do not think it right to overstate this, I proceed on the basis that this is at least as important as ordinary cases and may to a degree be more important in this case. I have tried to keep this issue in its proper place. The seriousness of the charge is relevant in determining whether or not to grant a stay. The degree of relevance critically depends on the extent to which there has been misconduct on the part of the executive which has an impact on the charges brought before the court. On the other hand, I take the view that whether or not the charge can be viewed as a serious one is not critically relevant when determining whether or not to grant a stay where the basis for that stay is that no fair trial of the charges can be held.

Pre-trial publicity

54 Mr Khan asserts that pre-trial publicity in relation to him has been such as to require a stay of proceedings. The contention is upon two bases:

(1) the publicity is of itself sufficiently prejudicial to justify a stay; and

(2) the publicity was generated with the purpose of prejudicing the interests of Mr Khan.

55 Kalpana Arjun is the news archivist at the Fiji television station and has provided an affidavit sworn on 2 July 2008. The affidavit produces selected transcripts and video footage published by the Fiji television station. While I do not think that any issue could be taken as to the accuracy of the copying of the material from Fiji television, nothing can be said from this material about the sources of information of the journalists, whether those sources were accurate and who prepared or presented these reports. I know nothing of whether these reports were fair or balanced. I have proceeded upon the basis that this is what was seen and heard on Fiji television in the news programmes for the relevant date mentioned in the transcripts. Nevertheless, it requires little imagination to accept that these matters were reported as fact and may have been accepted by some of the viewers of these reports as fact.

56 In relation to the broadcast material, it became obvious during the hearing of the application for the stay that the transcripts didn't always match very well with the words spoken. I have largely ignored the transcripts.

57 The first part of the material describes part of the build-up of events prior to the assumption of executive power by Commodore Bainimarama in late 2006 and the formation of the interim administration.

58 The material then moves to a report on December 11, 2006 that a property said to belong to Mr Khan was raided by soldiers on that day. The following day, Fiji television news reported that Mr Khan had gone into hiding but was requesting a meeting with the military commander. The report asserts that Mr Khan owns Pacific Connex. In this report it is said that Pacific Connex is in some form of partnership with the NLTB's then commercial arm known as Vanua Development. The report also describes that the military demanded that the NLTB sells its commercial arm. The report to which reference has already been made appears to be the first suggestion on Fiji television that there was any connection between allegations of corrupt practices and Mr Khan.

59 The television footage also covers comments on the position of Mr Khan as events develop after the arrest of Mr Khan and the other accused. There are comments from law enforcement officials including the Commissioner of Police.

60 There are comments from Mr Khan's lawyers as Mr Khan's hospitalization continues.

61 The presentation of the video news footage concluded with extensive coverage of what was the first appearance of Mr Khan before a Magistrate following his being charged with the offence which he now faces.

62 The newspaper coverage essentially covers the same ground. I read this coverage with the same qualifications as were mentioned in relation to the television footage. While many of the matters mentioned therein appear to be essentially uncontroversial, the coverage is not evidence of the facts asserted or even that the persons who are said to have made the comments actually made them.

63 Some of the material asserts that the military have a degree of animosity towards the accused. The basis for that might be said to vary according the position of the individual. There are descriptions of raids on premises either owned or connected with Mr Khan.

64 The Fiji Sun on 25 October 2006, displays the headline "Army warns millionaire" with the sub-headline "if there's any trouble, we'll come for you first". The lead paragraph of the article says that the army has warned a millionaire businessman over his involvement with Counter Revolutionary Warfare unit soldiers. (Although there is no direct evidence of this fact, a working assumption of my evaluation of the evidence in this case is that the CRW unit was a highly trained and elite band of soldiers. It is common ground that some of the members of that unit mutinied in 2000. They were tried and convicted on that basis and served substantial periods in custody.) The article quotes Colonel Driti who is reported as saying:

I have met Ballu Khan over the issue of him employing those CRW soldiers released from prison.

I warned him in that anything or any sort of instability arises in the country instigated by those CRW boys, the Army will be out to get him first and I'll make sure that he gets implicated.

65 Plainly, on the assumption that on this article accurately reports the matters I have just mentioned, some degree of animosity can be demonstrated from this article. The article also has to be seen in the context of the culmination of an exchange of correspondence between a person who is apparently an employee of Mr Khan and the military. I will deal with this in another context.

66 On 9 December 2006, shortly after the takeover of the government by the military, the Fiji Times reported a raid on the business premises of Mr Khan - Pacific Connex. The lawfulness of this raid is a matter which will be considered elsewhere. Also of significance in this context is that the author of the report asserts that the military was acting on information that several former CRW Unit soldiers were employed as guards at the office. Implicit in this particular part of the report is that this was the cause of the raid.

67 Another significant source of information about the raid comes from the affidavit of Mr Khan. Whatever else might be said, Mr Khan's affidavit was plainly hearsay as to this topic - he was outside Fiji at the time.

68 There is also a report that attributes to Commodore Bainimarama words to the effect the Mr Khan was faking his injuries post-arrest. This is said by Mr Khan to be untrue. I will have something to say about the issue of injuries to Mr Khan in another context. This was said to be

deliberately calculated to undermine the position of Mr Khan. There is no evidence that the Commodore said these words. There is no evidence of his intent if he did say them. This component of the accusation of malice directed to Mr Khan on the part of the military fails for those reasons. I will shortly consider this report on the basis of whether or not the report is accurate there are those who might be assessors who may have seen it and consider it to be true.

69 A report attributed to the Commissioner of Police has him saying that guns and ammunition were found in Mr Khan's custody (custody in the broad sense) after his arrest. It appears to be uncontroversial that no guns were found when most of the accused were intercepted. I decline to assume that the Commissioner was accurately reported and therefore as a component of the accused's case alleging directed malice by the military, this aspect fails. I consider the prejudice to the possible panel of assessors separately.

70 The final piece of reportage upon which reliance is placed as a directed malice issue is substantially more recent. This concerned the interception of an escapee. It was reported that the police said that he was suspected to be involved in the conduct the subject of these charges. That is said to be untrue. It may well is untrue. The police directly challenge the assertion attributed to them. However what is compelling is how utterly innocuous it is. It does not begin to support a case of directed malice. It could have no conceivable adverse effect on the fair-mindedness of possible assessors.

71 The principles which guide the approach of the courts to a claim that proceedings should be stayed on the basis of prejudicial publicity are well-established. The accused must show on the balance of probabilities that there was a serious risk that a future jury may be so tainted by prejudice as a result of grossly adverse and unfair publicity that a fair trial is probably not possible: *Irvin v Dowd* [1961] USSC 112; (1961) 366 US 717, 722; *R v Kray* [1970] 1 QB 125, (1969) 53 Cr App R 412; *Murphy v Florida* [1975] USSC 114; (1975) 421 US 794, 800; *Murphy v R* (1989) 167 CLR 95; *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592; *HKSAR v Yip Kai-foon* [1999] 1 HKLRD 277. There must be more than the prospect that potential jurors know something of the case the subject of the charges. It is unnecessary and unrealistic to require total ignorance by jurors of the facts or circumstances of the case for such would be to require an impossible standard: *Irvin v Dowd* [1961] USSC 112; (1961) 366 US 717, 722; *R v Yuill* (1993) 69 A Crim R 450; *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592, 603, 60 A Crim R 18, 25; *R v Simpson* (1999) 106 A Crim R 590; *HKSAR v Lee Ming-tee & Another* [2001] HKCFA 17; [2001] 1 HKLRD 599, 4 HKCFAR 133; *R v Dudko* (2002) 132 A Crim R 371. In *R v Simpson* (1999) 106 A Crim R 590, 595 Doyle CJ urged courts to take a realistic approach to this issue and observed:

> In deciding what course should be followed in the case of prejudicial publicity before or during a trial, the judge must take these matters into account, but must also bear in mind the public interest in the due and expeditious administration of justice: see *Murphy v R* (1989) 167 CLR 95 at 99. It is also necessary to bear in mind the observation by Mason CJ and Toohey J in *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592, 603, that the possibility of a juror acquiring irrelevant and prejudicial information is inherent in a criminal trial.

Criminal justice is always administered in the public gaze. There is considerable public interest in the administration of criminal justice. Judges are mindful of the fact that the print medium, radio and television regularly feature items relating to particular cases, to the administration of criminal justice generally, and to crime in the community. All sorts of information and attitudes are communicated in this manner. It is pointless and impossible to attempt to isolate a jury from this material. Indeed, it would seem counterproductive to do so, because the jury is drawn from the community and should represent the community. Jurors come to their task with information and attitudes about crime and criminal justice that are influenced by the sources to which I have referred, and the administration of criminal justice must accommodate that fact. It is at that point that the assessment by the trial judge of the impact on a jury of the relevant prejudicial material becomes critical, as does the trial judge's assessment of his or her ability to deal with the situation by directions to the jury, and the trial judge's assessment of the ability of the jury to put the prejudicial material out of their minds. There is nothing new in this, but I make these points because it is important that the courts take a realistic approach to claims that a fair trial has become impossible because of prejudicial publicity, but at the same time not lose sight of the importance of securing a fair trial to the extent that a court can.

72 However, as was observed in *HKSAR v Yip Kai-foon*, it would be wrong to require the accused to establish actual bias on the part of a future jury or panel of assessors. It is sufficient if the individual juror or assessor can lay aside his impression or opinion and render a verdict based on the evidence presented in court: *Spies v Illinois* [1887] USSC 246; 123 US 131; *Holt v United States* [1910] USSC 166; 218 US 245; Reynolds v United States [1878] USSC 141; 98 US 145; *R v Hubbert* (1975) 29 CCC (2d) 279, 291; *Murphy v R* [1989] HCA 28; (1989) 167 CLR 94, 98; *R v Von Einem* (No 1) (1991) 52 A Crim R 373, 386; *Boodram v A-G of Trinidad & Tobago* [1996] 2 WLR 402, 2 LRC 196.

72 In that regard, the court proceeds from an assumption that jurors can and will obey directions from the trial judge in this respect: *R v Kray* [1970] 1 QB 125, (1969) 53 Cr App R 412, 414; *Hinch v A-G (*Victoria) [1987] HCA 56; (1987) 164 CLR 15; *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592, 603, 60 A Crim R 18, 25; *R v Yuill* (1993) 69 A Crim R 450, 453; *R v West* [1996] 2 Cr App R 374, 386; *R v Simpson* (1999) 106 A Crim R 590, 595; *R v Richards & Bijkerk* (1999) 107 A Crim R 318; *Gilbert v R (*[2000] HCA 15; 2000) 201 CLR 414, 109 A Crim R 580; *R v Sheikh* (2004) 144 A Crim R 124. In this regard, in *Hinch v A-G (*Victoria) at page 74, Toohey J expressed the view that in the past courts have given too little weight to the capacity of jurors to assess critically what they see and hear and their ability to render a decision on the evidence before them. The same point was made in *HKSAR v Lee Ming-tee & Another* [2001] HKCFA 17; [2001] 1 HKLRD 599, 4 HKCFAR 133. In this regard, Ribiero PJ endorsed what was said in *Montgomery v HM* Lord Advocate (unreported, 19 October 2000) as follows:

The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced on the other hand by such warnings and directions as the trial judge may think it appropriate to give them

as the trial proceeds, in particular when he delivers his charge before they retire to consider their verdict.

Lord Taylor CJ observed in Ex parte The Telegraph plc [1993] 1 WLR 980, 987:

A court should credit jurors with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and the nature of a trial is to focus the jury's minds on the evidence before them rather than on matters outside the courtroom.

In R v Murdoch & Others (1987) 37 A Crim R 118, 124 that faith in jurors was expressed by Street CJ as follows:

I emphasise particularly the corporate strength that individual jurors draw from the circumstance that each sits with 11 or fewer others, all conscious of the heavy responsibility resting on them to observe directions given by the trial judge upon what may and what may not be taken into account when determining the verdict. Where the charge is one of the most dreadful crimes on the criminal calendar, jurors are no doubt particularly conscious of the weight of their responsibility and are particularly responsive to directions from the judge as to how they should go about their process of judging.

73 By contrast, in *R v Taylor & Taylor* (1994) 98 Cr App R 361, the English Court of Appeal decided to set aside a conviction and refused to order a re-trial in a case because the publicity during the trial had been 'unremitting, extensive, sensational, inaccurate'. The Court of Appeal indicated that it was satisfied that the publicity caused a 'real risk of prejudice' against the accused.

74 In my view, the fact that any trial of the accused in the instant case will be before assessors does not alter the position at all. What is quoted in the context of jurors applies with equal force to assessors.

75 The material which, if true, or if the assessors thought it was true, might support the conclusion that there is a degree of animosity on the part of the military toward the accused or that the military individually or collectively hold a low opinion of Mr Khan and certain others of the accused has little, if any, potential to prejudice a fair trial. Even if it did, there is nothing in the material that I have seen and read which could not be cured by direction to the assessors. Indeed, most of it is so long ago that I would not consider that a direction other than the standard "forget about what you have heard outside the court" direction might revive what little prejudice there is.

76 Assuming they were accurately reported, some of the comments attributed to the Commissioner of Police and others connected with the detection or interception of the accused are what might be called ham fisted. Bearing in mind the standard of proof, as I have already indicated, I am not satisfied that they were made, let alone made in attempt to prejudice the

accused. Even if they were deliberately made for this purpose, they were, in my judgment, singularly mild comments which could not have achieved their purpose even had any trial of this matter been held shortly after they were made. Even if these comments were deliberate they do not even begin to approach the level of misconduct which would justify a stay on what I will call the second limb of the principles discussed above. The same can be said of the accusation that Mr Khan was faking his injuries. I have no doubt that such miniscule prejudice as may conceivably arise by reason of this report could be cured by direction.

77 Even if there was the slightest force in the contentions of the accused in this regard, it is right to mark that, with one exception, the relevant publicity was many months ago and any sting that there might have been in it will have dissipated by now. That exception does not come into play for the reasons I have already adverted to.

78 In my judgment, none of the material, whether taken individually or cumulatively could justify a stay either on the basis that a fair trial is put in jeopardy or because the conduct amounted to directed malice on the part of the authorities which was such as to require a stay.

Conduct which shocks the conscience

Introduction

79 The accused contend that there are a number of strands to this. They are:

(1) Pre-trial harassment by the military

(2) Assaults on and mistreatment of Mr Khan post arrest

(3) Publicity generated by the military to prejudice the accused and a fair trial. (This has been dealt with above

(4) Mistreatment of the partner of Mr Khan

(5) Improper or bad faith investigation by the military

(6) Revelation of copies of an intimate recording in the possession of Mr Khan

It was contended that these individual items were, taken together, clear evidence of a determined campaign of malice against many of the accused. Counsel for Mr Khan went as far as to say that the military was bent on ruining his client and at one stage in his submissions, in connection with the alleged assaults on his client shortly after arrest, submitted that the military were out to kill or at least seriously injure his client. It is said that this directed malice by the military was such that nothing produced in court by the military could be trusted and that the giving of evidence by the proposed witnesses from the military was the culmination of that campaign. While it does not seem to be said that the Director of Public Prosecutions or his prosecutors are party to the conduct, what it amounts to, so say counsel for Mr Khan and the CRW accused, there is a determined conspiracy to pervert the course of public justice by the military to be executed

through the proposed military witnesses.

80 I have already dealt with the publicity aspect. I will not repeat my views on the impact (or, more accurately, the almost total lack of impact) of that.

Pre-trial harassment by the military

81 The essence of the case for the accused in this regard is that members of the former CRW unit were taken to military installations either against their will or alternatively having accepted invitations to go to such an installation, and were detained there against their will. During the course of the conduct in connection with this, these persons were harassed and threatened. On any view, if the assertions of fact are true they make out crimes of assault, kidnapping or various forms of unlawful detention. The case for the State in regard to this is that this is simply untrue. That there was contact between the military and the former members of the CRW unit is not denied. It is not denied that this contact was deliberate and to make sure the former members of the CRW unit knew that they were being watched the military.

82 Mr Khan suggests that this prejudicial conduct has a long history and points in his affidavit to an incident where Mr Khan employed a driver who was formerly in the military, which event was followed by the demotion of a relative of the driver. It is said that this was directed against Mr Khan. In a world where all things are possible, that has to be possible. However, in this case the court can only deal with facts which are established to the civil standard. The assertion in this regard made by Mr Khan is not established to that standard. I do not question is that Mr Khan believes this assertion. Quite simply, that the underlying factual foundation for it is not established to the required standard of proof.

83 Further, it is the case for Mr Khan that the military "raided" the private and business premises of Mr Khan. The allegation is that, in effect, the military shut down Mr Khan's business. In relation to the allegation in relation to the raid on Pacific Connex premises in December 2006, I have already made a series of observations about this raid in the context of the coverage of it in the media. Lieutenant Savenaca Siwatibau Rabuka in an affidavit sworn on 11 July 2008, seems to confirm the raid. No mention of a warrant is included. He says: "We proceeded to Clarke Street and we were instructed to take all the computers to be checked by our IT Personnel and to be returned later." No justification appears to be offered for the seizure of the computers. It is not plain whether the "IT Personnel" did examine them at what if anything was found. There is evidence that the computers were returned. I have broadly made the point that if one simply looks at the media reports themselves (recalling all the qualifications necessary when evaluating these) the primary target seems to have been not so much Mr Khan but the members of the CRW unit employed by Mr Khan. If Lieutenant Rabuka's affidavit is true this seems to contrast with the theory in the media that the prime focus of the raid was related to the CRW personnel. That this raid was directed at diminishing the standing of Mr Khan in the eyes of the Fijian community or damaging Mr Khan's business interests is not established to the relevant standard required by the law. It seems to me that while Mr Khan genuinely believes that this was the intention of the military, the sincerity of his beliefs cannot be used as a substitute for evidence.

84 The raid may well be unlawful. No warrant was produced although there are circumstances in

which a search might be made without a warrant - however, none of the facts necessary to ground this were established. Privacy might have been invaded but whether it was corporate or personal was never examined in argument before me. This was said by counsel for the accused to be simply another example of unconstitutional conduct. I am content to proceed on the basis that it was despite the paucity of focussed evidence on the topic. I can say one thing with certainty. This raid, whatever, the possible level of outrageousness or illegality, does not of itself justify a stay of the present charges.

85 It is undoubtedly true that the members of the CRW unit who were tried and convicted of offences in connection with mutiny had, by the time of the events the subject of this application for stay of proceedings expiated their penal liability to the community for that mutiny. However, the idea that simply because these people had "done their time" meant that they were entitled to implicit trust - or something like it - is naive. Both before and after the events of early December 2006, it would appear that at least some elements of the military viewed this group with continuing anxiety and suspicion. Some flavour of this comes from the affidavit of Colonel Jone Kalouniwai, sworn on 11 July 2008. While his suggestion that each CRW man was worth 4 ordinary soldiers is something I take with a grain of salt, the concerns are clearly set out in his affidavit. So too do we get the same flavour in Colonel Driti's affidavit sworn on 10 July 2008. It is hardly surprising to think that such military officers might view the employment of a significant group of former members of the CRW unit in one team as security personnel as reinforcing or justifying that concern or suspicion. It must not be forgotten that mutiny, either as a civilian or military crime is not just a crime. It is behaviour which is the utter opposite of how a soldier or other member of the disciplined services is expected to behave.

86 Further, at least from the perspective of the military who viewed former members of the CRW unit with anxiety or suspicion, it is hardly surprising that they could regard the employer of those persons with equal if not greater anxiety or suspicion. It would largely depend on how and in what circumstances the members of the unit were employed. Here, they appear to have been employed for what were characterised as security purposes. They do not appear to have been employed by a security company and that security company retained to provide security. It is not very clear on the evidence who, in law, their employer was. It is not clear upon what basis they were paid, their hours of duty, and their precise responsibilities.

87 The giving of assistance to released and unemployed prisoners by way of employment is, on its face, a laudable endeavour. The desire to so assist is expressed by Mr Khan in his affidavit. However, I have some difficulty with accepting the assertion of Mr Khan that he merely employed these people because they deserved a chance and that they were employed solely or principally out of some generous notion of rehabilitation. Mr Khan's employee who wrote to the military setting out the position of Mr Khan really adds nothing to this. In order to employ the members of the CRW unit, Mr Khan actually dispensed with a security company which had previously been retained. Whether the people in that company lost their jobs is something I cannot make findings about. Their jobs may well have been at risk.

88 Further, on a view most favourable to the accused, the affidavit material suggest that Mr Khan did not know about the identity of the CRW people until after they had been retained. I confess to a high degree of scepticism about Mr Khan (affidavit paragraph 26) "subsequently"

discovering their history. Nevertheless it must have been blindingly obvious to him that if he persisted in retaining their services that this would be viewed with disfavour if not outright hostility by the military. It is undoubtedly true that it is not for the military to regulate who ordinary members of the Fijian community employ. So much is obvious. However, a businessman with the skills and intelligence of Mr Khan must have realised that the continuing retention of the CRW people as his "security" was like a red rag to a bull.

89 The affidavit of Mr Khan details bases for believing that the military were less than happy with Mr Khan's business activities as early as 2004 and an example is detailed in paragraph 30. I regard that as an unacceptable combination of hearsay and speculation. There is no admissible evidence to support it. I place no weight on that incident.

90 Mr Khan detailed how he was invited/summoned to see Colonel Driti. There is no evidence of any compulsion. If there was compulsion it was nothing other than moral compulsion. There is a conflict over what was said at the meeting. In affidavit against affidavit, I cannot resolve this save to say that any words by the Colonel may well reflect the true position. The Colonel is silent as to the accuracy of the item in the Fiji Sun exhibited in BK1. It may be that the precise words do not matter greatly. It seems that Mr Khan could not have been left in any doubt what the military's position was. It has to be remembered that at about the time of this meeting, tensions were escalating in Fiji as between the then government and the military. While it is clear that Colonel Driti was making it plain that Mr Khan and his CRW employees were viewed unfavourably, and it was far from a friendly or social chat I am not prepared to infer malice of the kind contended for by the accused.

91 The next issue is the proposed abolition by the interim government of Vanua Development Co. This is said to be a direct attack on Mr Khan's company. There is no evidence before me as to the reasons for this proposal. They could have been good or bad reasons. There is insufficient material for me to view this as another malicious attack on Mr Khan and his company.

92 I should note at this stage that I was told My Mr Leung, junior counsel for Mr Khan, that Mr Khan was a director and the CEO of Pacific Connex. He told me from the Bar Table that this company is a private company. However, Mr. Leung said that Mr Khan was not a shareholder of the company. Of course I accept what Mr Leung says. It places in clear relief the overall assertions of Mr Khan in his affidavit about interfering with "his" business. That does not diminish his substantial connection with Pacific Connex by reason of being CEO and director.

93 I have already referred to the raid on Pacific Connex. As events unfolded this was next in time.

94 Mr Khan (affidavit paragraph 39) says that the military were ever present when he went on holiday over the Christmas break for 2006/2007. He says that his boats were tampered with. How, why and who did that is not part of the evidence. I cannot infer that this was a malicious attack by the military on Mr Khan and the other accused who were former members of the CRW unit.

95 It is argued that the intelligence about Mr Khan and some of the other accused coming to

Suva on 3 November 2007 was deliberately false or trumped up. In support of that argument is the contention that there were women and children in the convoy. It was argued that there must have been surveillance along the way and it would have been plain from the number of women and children - who were unmistakably such - that this was no assault on the interim government and that no one could have possibly thought so.

96 The first difficulty I have in accepting this as a ground for imposing a permanent stay is connected with the burden and standard of proof. The evidence I have heard from the accused in this regard does not begin to satisfy me to the relevant standard of proof. Second, I do not accept that in any event there is sufficient nexus between the alleged misconduct and the charges facing the accused. The imposition of a stay of proceedings upon the basis of a series of wrongs which occurred in these circumstances do not have sufficient connection to the proceedings which are said to be an abuse of process.

97 It might be argued that this evidence demonstrated the utter hostility and bias towards the accused held by the military and that given the principal witnesses for the State are military officers when they would be prepared to stop at nothing to secure convictions of their enemies. That, it seems to me, is eminently a matter for determination at trial. If a witness is biased by reason of personal bias or what I might call for shorthand for present purposes institutional bias, then that is a matter that can be the subject of cross-examination and, it must be remembered, is one of the recognized exceptions to the collateral evidence rule which ordinarily prohibits answers given in cross-examination going to credit being contradicted by other evidence. I have no doubt that the tribunal of fact in any trial of these accused would be well able to determine where the truth lies in such a case.

98 The accused who have the common history of being members of the CRW unit say they were taken to military camps from time to time and questioned and detained. Further Mr Khan prays this in aid as evidence of the harassment of him by the military detaining his staff. This is said by Mr Khan to provide further evidence of the malice directed at him by the military. This is said by the other accused of directed malice against them.

99 I reject the contentions in this regard with respect to Mr Khan. There is simply no evidence that satisfies me this conduct was directed at him. It would not, in any event, have provided a basis for a stay of proceedings.

100 As to the other accused - those with the CRW connection - the principal difficulty that they face is an evidential difficulty. With one exception (or, possibly, two), there is no evidence other than the assertions in their affidavits to support their contentions. The assertions are generalised.

101 One of the complaints in this regard is non-disclosure. It is said that the military have not disclosed detention records. However, this argument is essentially circular and depends on the Court accepting as true the affidavits to which I have referred. On one of the dates notified to the authorities, there is one record that has been turned up by the State which suggests detention. On the evidence, this seems to provide a basis for inferring that had the other dates suggested in affidavits been dates on which detention occurred, there would be a record. It strikes me as significant that one record has been disclosed. The military could have easily folded its arms and

disclosed nothing. The accused have not established that there has been non-disclosure in respect of military records. That does not end the discussion. It may be they got they dates on which they were detained wrong. It may be the detention was not recorded.

102 I conclude there were times when some or all of the accused with the CRW connection were at military barracks from time to time. With one clear exception, whether that was detention which was unlawful is not something I am prepared to find. I have little doubt that these accused were either summoned or brought to military barracks from time to time. In the circumstances there is likely to have been a campaign on the part of the military to get into the faces of these accused. In the developing and unfolding events of 2006 and 2007 that is, frankly, hardly surprising. Whether it amounted to harassment is not something I am in a position to determine. Whether it was unlawful - with one exception - I cannot determine in their favour because I am not satisfied that it is more probable than not that it was. Subject to one event, these accused have not made out a case of unlawful detention.

103 There is one record from the military of an event of detention. It says that those concerned were detained. Despite the ingenious arguments of the State, "detained" on the record could only have one meaning. I think the accused named in that record were probably unlawfully detained. No justification was offered for the detention. Such a detention is unacceptable. It violates constitutional rights. What I am not prepared to conclude is that it justifies a stay of proceedings. It is open to those involved to seek redress. Civil remedies are open to them. The detention, while not technical or trivial, was hardly prolonged.

104 Lieutenant Colonel Tevita Uluilakeba Mara of the Republic of Fiji Military Forces in an affidavit dated 11 July 2008, deposes to an incident on 6 December 2006 in which Mr Gadekiuba and Mr Namulo were "picked up" and brought to the Queen Elizabeth Barracks. They were spoken to. Lieutenant Colonel Mara said were asked about their involvement concerning the information of the assassination plot, which they both denied. Lieutenant Colonel Mara deposed that he said, "I hope you are not involved in the assassination plan". It is the use of "picked up" that interests me in this context. That could have been an unlawful arrest or detention. It might not have been. There is no evidence as to duration.

105 Further, in Colonel Jone Kalouniwai's affidavit, he speaks of ordering the release of certain unnamed CRW soldiers on an unspecified day from military barracks. Release may be seen to connect with the notion of detention. This is so vague that I cannot take much account of it except to say that someone might have been unlawfully detains for some unspecified duration.

106 What remains to be considered is whether these contacts (I am trying to use a neutral term) between the CRW accused and the military demonstrate malice of the kind on the part of the military of such a degree that a stay of proceedings is justified.

Entrapment

107 It is said that Cpl Kuli acted as an *agent provocateur* in his dealings with the accused at various meetings. Further, Major Narawa is said to have exacerbated this by giving to Cpl Kuli a list of items that Cpl Kuli might suggest as modes of carrying out the plot. (The list has now been

destroyed.) On the list were assassination by sniper rifle, poisoning and crashing into the car carrying Commodore Bainimarama. It is argued that each of these items, when viewed either individually or collectively amount to conduct so grave as to come within the conduct which would be susceptible to a stay under the principles enunciated in *Loosely* (above).

108 The first issue that must be dealt with is the factual underpinning of this part of the argument. The main complaint concerns something said to be said by Cpl Kuli (see his first statement). In a discussion with the 1st accused, Ratu Inoke Takiveikata, Cpl Kuli deposed that he said words to the effect that the interim government and the Commodore Bainimarama would have to be *removed*. The statement was in English.

109 The immediate problem with this is that the statement does not support the conclusion that Cpl Kuli was advocating removal by unlawful means let alone though homicide. Nowhere in the rest of his statement does he incite or cajole the others to conspire to murder. In the statement, he plainly goes along with what was suggested. That was part of his "cover" or "role" of pretending to be a sympathetic and disaffected military officer. In my view, this does not amount to state-created crime.

110 The second problem is that it appears that the position of the accused is that they were not at any stage part of the conspiracy. On what may be a worst case scenario they wanted to wait and see what Cpl Kuli and his team were up to. In short, on this argument the State created no crime.

111 Further, it was argued that placing the "insider" into this group of people shows the determination of the "military" to injure the interests of some or all of the accused. In a world where all things are possible: this is possible. There is no evidence for this. There is certainly nothing which makes it more probable than not.

112 I have also to consider Major Narawa's list to which reference has been already made. It seems to me that this was simply a piece of script writing by the Major to assist Cpl Kuli. The sense I get is that this was on the basis that the conspiracy to murder had already been formed and this was simply a discussion of the means that could be employed. Counsel for Mr Khan was driven to argue that this was reprehensible and dangerous conduct on the part of the Major.

113 As I have already indicated, the primary position of the accused was that they were in no way part of this conspiracy. If so, the list would have been meaningless if the effect of it had been communicated to them. If there was already a conspiracy to murder between the accused, then given the contents of the list and perhaps the background and experience of at least the CRW component of the conspirators, it would be absurd to suggest that these modes of carrying out the conspiracy would not have been within the contemplation of the accused. On no account could this item of evidence be considered to be an attempt to incite the accused to commit crime. This component of the case fails.

The military knew better (or knew more)

114 As I have already noted in a different context, it is contended that the police and the military must have known that the convoy in which most of the accused were travelling on 3 November

2007 was not one bent on assassination and a possible coup d'état. It is contended by the accused that given the number of women and children and the festivities of the previous night and the "fact" that the members of the convoy *must* have been under surveillance that the forceful interception by the police and military at the police post is yet further evidence of bad faith on the part of the military. It was contended that the police or military surveillance *must* have known that no weapons were loaded into the vehicles in the convoy. It is further contended that the fact that no arms were found puts the seal on the validity of this contention.

115 On the assumption that Major Narawa is to be accepted, it is fairly clear that the authorities believed that the conspiracy existed and that the execution of the conspiracy was imminent by 3 November when these accused were intercepted. On that hypothesis, there must have been a growing anxiety on the part of at least the military about what may happen and when. It appears that no weapons were found in the convoy. Were the military wrong? It is possible. It is possible this was not the time for the execution of the conspiracy. It is possible that the arms were not actually coming in this convoy but it was intended to collect them elsewhere. It is possible the military got the date wrong and they intervened too quickly. It is also possible there never was a plot. The State argued that - possibly invoking images of Saddam Hussein - that the women and children might have been a human shield or, on a less sinister view, possibly simply a distraction. There are a multitude of other possibilities.

116 Each of these possibilities invokes a degree of speculation. The case for the accused requires the Court to speculate as to the nature and scope of surveillance and, to the extent there was surveillance, the effectiveness of such surveillance. In the absence of evidence I am not prepared to conclude that such was the state of knowledge that the military knew what was going on and, more importantly what was NOT going on *ie* this was an innocent convoy to Suva. Still less am I prepared to speculate that this indicates bad faith on the part of the authorities. This argument fails.

Assaults on and mistreatment of Mr Khan post interception

117 The next item for consideration is the alleged assault on Mr Khan at the time he was intercepted on the way to Suva at Delainavesi Police Post.

118 It is not necessary to recite in detail the competing allegations. It is sufficient to say that Mr Khan says that from the time he and the convoy in which he was travelling was intercepted, he was severely beaten. At one stage, counsel for Mr Khan described the assault on his client as a murderous attack or attempted murder. Making full allowance for some elements of rhetoric in those submissions, if the version deposed to by Mr Khan is to be accepted, this is not far wide of the mark.

119 The position of Mr Khan was supported by a variety of other affidavits from, amongst others, his partner and others in the convoy.

120 The position of the State is that while force was applied to Mr Khan, affidavits tendered on behalf of the prosecution described Mr Khan as resisting arrest. On that basis, of course, reasonable force may be used to effect an arrest. I must say that the affidavits tendered by the

State are not the most explicit. See, for example, the affidavit of Warrant Officer Tevita Teu Korovou, sworn on 11 July 2008 where he said:

> Ballu Khan was angry, was talking loudly and pointing in an aggressive manner. I then asked two of my officers to escort Ballu Khan to the Delainavesi Police Post whilst I went to check the second vehicle.

This does not describe much in the way of resistance. He does say Mr Gadekiuba punched an officer, but not much more than that. There are other affidavits which speak of "not seeing" violence.

121 Police statements were shown to me from persons who were said to be independent. There were two of these. Both of the statements describe assaults on a person who must in the circumstances, have been Mr Khan. It is not insignificant that one describes, by many orders of magnitude, a far more intense assault than the other one. It was not suggested by the State that the statements were not genuine. What was suggested is the accuracy and reliability of what they said they saw was not something which could be assessed on paper.

122 There are, of course, medical reports in relation to Mr Khan. These describe his condition at various times after interception. It is not without relevance to note that Mr Khan was in hospital for a considerable period. While I claim no medical expertise, it is very clear to me that if the version propounded by Mr Khan was true to the full extent of what appears in his affidavit then either the doctors who prepared these reports were singularly poor observers of the condition of Mr Khan or alternatively there is, to put it at its lowest, some element of exaggeration in the account given by Mr Khan and, to a lesser extent, those who were also in his convoy. Further, that same point can be made by reference to the description of one of the possibly independent witnesses.

123 It is also to be noted that one of the newspaper reports exhibited to the affidavit of Mr Khan attributes to his then lawyer a remark, apparently made shortly after visiting his client in hospital, which might be said to be inconsistent with the level of assault claimed by Mr Khan. I cannot place any weight on this because there is no evidence that the lawyer was accurately reported (assuming he made a statement that all).

124 Further, I suspect that the lawyer in question has no greater medical qualifications than I do and what he observed is probably not of utterly compelling weight. Nothing in what I have just said in any way impugned is the honesty of that lawyer. Of course, that lawyer was Mr Fa who by the time of these proceedings was appearing for the 6th accused, Metuisela Mua. I permitted Mr Fa to make a statement from the bar table in relation to issues concerning his ability to have a confidential professional conversation at the hospital with Mr Khan who then his client. Nothing was said by Mr Fa about the condition of Mr Khan during that statement and he was not asked. He did not give an affidavit as to his observations as to the condition of Mr Khan.

125 What really happened? If Mr Khan was assaulted to the extent he described that would be nothing short of outrageous. As I say, counsel for Mr Khan elevated the assault to the level of murderous. If ever there was an element of this case which cried out for oral evidence and for

witnesses to be examined, cross-examined and re-examined this had to be that element. I am not prepared to simply say, as was (at least) hinted in counsel's submissions on behalf of Mr Khan, that, in effect, the affidavits from his side and the affidavits from the other side cancel each other out and the independent observers win. (For the avoidance of doubt, the submission on behalf of Mr Khan was put in a far more elegant and cogent fashion than this.)

126 Even if the affidavits from both sides might be said to have cancelled each other out there were a multitude of questions about not just what was seen but the ability of the giver of the statement to see what they said that they saw. I am not questioning the veracity of the statement giver. That may have arisen for consideration had there been oral evidence. What I was more concerned about was the accuracy and reliability of some aspects of what they said they saw compared, for example, to what one sees in the medical reports as to Mr Khan's injuries.

127 In the end, after very careful thought in relation to this matter, I strongly suspect that Mr Khan was assaulted by some of the police or military or both at the point of interception and following that point. I strongly suspect that the assault exceeded the degree of force which would have been appropriate to bring Mr Khan under control. Such a degree of force would, of course, have been unjustified. On the state of evidence as it was left with me, beyond that, I do not think that that I could go any further. Accordingly, applying the standard of proof appropriate in an application for a stay of proceedings, the case for Mr Khan is not established.

128 Accordingly, I cannot and do not take this aspect of the case into account in determining whether the conduct of the authorities justified a stay of proceedings either by itself or in combination with other factors to which I have or will shortly refer. I must add: no one could walk away from this specific element of the case and say that their position was vindicated. All walk away from the case knowing that all I can say is that this element was not proved to the required standard on the evidence the parties chose to place before me.

129 Further, Mr Khan complains that the police stood by and did nothing to intervene in the assault contrary to their duties at common law and pursuant to statute to prevent crime. The position of the police would appear to be that any assaults that took place were in the course of trying to bring Mr Khan under control. The validity of this complaint on behalf of Mr Khan stands or falls with the other matters concerning the arrest. Connected with this complaint is the complaint that the police failed to investigate the assaults said to be perpetrated on Mr Khan at the police post. The lawyers for Mr Khan wrote on 7 February 2008 demanding an investigation and indicated that Mr Khan was willing to assist in the investigation. I infer that Mr Khan and his lawyers were not overwhelmed with a response. Nevertheless, the State did disclose to statements in connection with these events to which earlier reference has been made. These complaints do not take the matter very much further in determining how to resolve the issue of whether or not to impose a stay of proceedings.

Unlawful detention

130 Mr Khan complains that he was unlawfully detained by the authorities after interception at the police post. He was taken to a police station and following that to two hospitals: Colonial

War Memorial Hospital and Suva Private Hospital. In essence, the situation may be summarised: thus:

Arrest	3/11/07
Detention Central Police Station, Suva	3/11/07
Admitted: Colonial War Memorial Hospital	3/11/07
Discharged: Colonial War Memorial Hospital	14/11/07
CID Headquarters (detention at Central Police Station)	14/11/07 - 16/11/07
Admitted : Suva Private Hospital	16/11/07 - 8/1/08
Appearance before Magistrate	8/1/08

Mr Khan spent something like 60 days in those three places. When Mr Khan was taken from CID Headquarters to Suva Private Hospital he was escorted by the police. (affidavit paragraph 92) In Suva Private Hospital the evidence is that there was a police guard outside his room at all times. (affidavit: paragraphs 94, 98, 99 &103) They stopped people entering. They controlled Mr Khan's exit. Mr Khan said (affidavit paragraph 95 & 98) said he was told by the police that he was under their detention. Mr Khan says that he was unlawfully detained.

131 Supt Tevita Lesu (affidavit dated 24 January 2008 in the 2nd Habeas Corpus proceedings) says that following arrest, the condition of Mr Khan required that he go to Colonial War Memorial Hospital. Supt Lesu says that at this time he was under the control of the Medical Superintendant at that hospital and that in such circumstances he was "released from police custody". (affidavit, paragraph 9). While at the Colonial War Memorial Hospital Supt Lesu said:

> Police maintained a minimal presence to provide security to [Mr Khan], given the serious nature of the offences for which he was being investigated and for monitoring [Mr Khan] to ensure that he completed his course of treatment, which would enable the police to then recommence their investigations into these serious alleged offences."

Supt Lesu said that when Mr Khan was discharged from Colonial War Memorial Hospital, he was arrested. (affidavit paragraph 12)

132 On 16 November 2007, Mr Khan was taken to Suva Private Hospital. Supt Lesu says that Mr Khan was:

handed over to the medical authorities at the Suva Private Hospital for medical examination. The Police provided security on his trip to the hospital and he was transported in a police vehicle. This was because of the seriousness of the nature of the investigation and the allegations for which he was being investigated.

While Mr Khan was at the Suva Private Hospital, Supt Lesu described the situation as follows:

upon being taken to the hospital and being admitted by the medical authorities, the Police ceased to detain [Mr Khan]. However, whilst he [was] admitted to the hospital, police presence [was] required at the hospital to provide security to [Mr Khan], given the serious nature of the offences and that he is alleged to have been involved in. Furthermore, police presence was required to ensure that the applicant complete his course of treatment . . . "

Supt Lesu categorically denied that Mr Khan was under arrest at the Suva Private Hospital. He pointed to the fact that while Mr Khan was at that Hospital the police provided security, monitoring and were waiting for the discharge of Mr Khan. Superintendent Lesu pointed to the fact that while at the hospital, Mr Khan was able to have visitors, see his lawyers and indeed was visited by a foreign journalist who interviewed him at the hospital.

133 The affidavit of Supt Lesu was filed in the second habeas corpus proceedings and at the time of the filing of his affidavit (5 January 2008) Mr Khan had not been brought before a magistrate.

134 On the evidence I am satisfied that he was under arrest from some time shortly after he arrived at the police post. His personal liberty was restricted by the police or the military. Using well-known touchstones in this regard, he could not go where he wanted to go.

135 In my opinion, the police were perfectly entitled to arrest him. A police officer may arrest, without a warrant (no warrant was ever produced), any person whom he suspects upon reasonable grounds of having committed a cognizable offence: section 21 Criminal Procedure Code. Conspiracy to murder is such an offence. The officers had more than sufficient grounds to hold a suspicion that Mr Khan was guilty of such offence. (If the military effected the arrest they are, in law, private persons and covered by section 24 of the Criminal Procedure Code. That provides that private person may arrest if he reasonably suspects the arrestee of having committed a felony provided a felony has been committed.) Section 25 of the Code which places arrest issues back in the hands of a police officer. Once he is arrested by the police officer under section 25, detention becomes, in effect the same as if first arrested by a police officer.

136 The right of personal liberty is protected by the Constitution. The Constitution provides:

23. (1) A person must not be deprived of personal liberty except:

(e) if the person is reasonably suspected of having committed an offence

Section 23 of the Criminal Procedure Code places practical qualifications on this right and requires that a person who is arrested to be taken before a Magistrate without unnecessary delay.

137 The 1st to 9th accused appeared in the Magistrates Court on 8 November 2007. It took until 8 January 2008 to bring Mr Khan before a Magistrate.

138 Mr Khan deposes that he protested to the police that he was unlawfully detained (affidavit paragraphs 95, 98) Mr Khan commenced a second application for habeas corpus proceedings on 27 December 2007, 12 days before he was finally brought before a Magistrate. I have already referred in detail to the affidavit sworn by Supt Lesu in opposition to their application.

139 The State argues that there is significance in the fact that the proceedings instigated were withdrawn. The unstated submission is that was based on a realisation that the detention was lawful. Counsel for Mr Khan replies by contending that these proceedings were withdrawn because following Mr Khan's appearance before a Magistrate he was no longer in unlawful custody and, as habeas corpus is concerned with the present unlawfulness of custody, the proceedings could no longer succeed. I could not infer from the withdrawal of such proceedings that the custody was lawful.

140 A further submission by the State in support of the contention that the detention was not unlawful is that the guard at Mr Khan's door was for his own protection. The first legitimate question might be "protection from whom?" In the affidavit of Serupepeli Neoko, an Inspector of Police, sworn on 10 July 2008, we see the police saying (affidavit paragraph 12) that Mr Khan was interviewed for 49 hours and 54 minutes. This occurred at CID headquarters. Nowhere is it suggested that because of the interviews it was not practicable to take Mr Khan before a Magistrate. It may be the police had other priorities. They wanted interviews. That is not the test.

141 Further Inspector Neoko says (affidavit paragraph 11) that from 16 November 2007, two officers were posted at the hospital "so that they could provide support to Ballu Khan as he could not walk properly." Acting Senior Superintendant Waisea Tabakau (affidavit dated 11 July 2008) says that the police guards were present for Mr Khans "own safety as well as for the safety of the public". No factual basis is made for either assertion. As to Mr Khan's safety no evidence has been presented that he was in danger. Equally, while the police might have believed that Mr Khan was a danger to the public, that is not a proper basis for detention when account is taken of the requirement to bring a suspect before a Magistrate within a reasonable time. That there may be circumstances in which a court might refuse bail on the basis that a person may commit other offences whilst on bail, it is simply not open for the police to determine this. While I am prepared to accept that Mr Khan may have had difficulty in walking, I do not for one moment accept that the officers were there to help Mr Khan. Mr Khan does not seem to have wanted their help. He instituted habeas corpus proceedings on 27 December 2007. That is unequivocal confirmation that Mr Khan was not consenting to being where he was - at least under police guard.

142 The issue of the true nature of the detention can be confirmed by uncontested facts.

143 The first is that it is uncontested that Mr Khan's spouse or partner was not allowed by the military to see him for a number of days. No medical reason has been given for such exclusion. No other reason has been given. There does not seem to be any basis for fearing that she was someone from whom Mr Khan needed protection. Indeed, Supt Lesu makes much of the fact that by the time Mr Khan was placed in Suva Private Hospital he was entitled to receive visitors and to see his lawyer in private. The implicit contrast with the position while Mr Khan was in Colonial War Memorial Hospital is blindingly obvious. Subject to some possible limitations, Mr Khan was always entitled to see his partner. It is very difficult to see how Supt Lesu can make a virtue out of according somebody a right which is guaranteed by the Constitution. Further, there is evidence of control and restraint from the fact that while Mr Khan's lawyer was allowed to visit, it was only for very circumscribed periods and with an officer in the room during the visit. The restrictions were not for medical grounds. No other ground has been suggested. It is to be noted that the situation in relation to lawyers continued until 16 November 2007 when Mr Khan saw counsel in private. In paragraph 103, he deposes that the police then accorded him privacy rights and the right to see his lawyer in private.

144 The essence of the case for the prosecution seems to be that Mr Khan was arrested, taken to Colonial War Memorial Hospital when not under arrest, taken to CID Headquarters and arrested and then he ceased to be arrested when he went to Suva Private Hospital. All along, there were guards outside his door. I reject without any hesitation whatever the notion that this was for his own protection. In any event, whether as a matter of strict technicality Mr Khan was "under arrest" does not address the true issue. The obligation following his arrest on 3 November 2007 was to take him before a magistrate without unnecessary delay.

145 There is no suggestion that Mr Khan consented to or requested such exclusions or controls over access. I conclude that Mr Khan was being detained and was not free to come and go as he wished. I conclude that no lawful justification for his detention has been made out. It has not been suggested that the fact that Mr Khan was for at least some part of his stay in hospital receiving medical treatment and would in all probability wished to remain in hospital somehow provides a justification.

146 Section 23 of the Criminal Procedure Code requires an arrested person to be taken before a Magistrate "without unnecessary delay". This appears to invoke the common law. The position at common law also required a person who was arrested to be taken before a court *without unnecessary delay*: *Wright v Court* (1825) 107 ER 1182; *John Lewis & Co v Tims* [1952] AC 676. That permitted a constable to do what was reasonable in the circumstances: *Dallison v Caffrey* [1965] 1 QB 348, [1964] 2 All ER 610; *R v Ku Fat-sui* [1989] 2 HKC 526, 529. Delay beyond what is reasonable leaves the person who detained the suspect open to an action in trespass and the detention at this stage would, at common law, be unlawful. Section 23 of the Criminal Procedure Code permits two forms of delay. The first might be described as institutional: delays associated with finding a sitting magistrate, completing the formalities of arrest, delays in finding transport, delays in acquiring sufficient staff and the like. The second form of delay which might be considered not unreasonable concerns investigation. A Police Officer may, in order to facilitate an investigation, do what is reasonable, including taking the accused to the scene of the crime and to other places possibly connected with the crime and he may put the suspect in an identification parade provided his actions are reasonable. There is a

limit to what is reasonable. That is not defined solely by law enforcement needs. It must be understood against the high value placed on personal liberty.

147 The notion of what is reasonable delay in depriving a person of his personal liberty is informed by basic principles. I gratefully adopt a recent recitation of those principles by Hickie J in *Singh v Naupoto* [2008] FJHC 137. Hickie J observed:

> The right to personal liberty is, as Fullagar J described it, "the most elementary and important of all common law rights" (*Trobridge v Hardy* [1955] HCA 68; (1955) 94 CLR 147, at p 152). Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England "without sufficient cause" (Commentaries on the Laws of England (Oxford1765), Bk.1, pp.120-121, 130-131).
>
> ... The jealousy with which the common law protects the personal liberty of the subject does nothing to assist the police in the investigation of criminal offences. King CJ in *R v Miller* (1980) 25 SASR 170, in a passage with which we would respectfully agree (at p 203) pointed out the problems which the law presents to investigating police officers, the stringency of the law's requirements and the duty of police officers to comply with those requirements - a duty which is by no means incompatible with efficient investigation. Nevertheless, the balance between personal liberty and the exigencies of criminal investigation has been thought by some to be wrongly struck ... But the striking of a different balance is a function for the legislature, not the courts. The competing policy considerations are of great importance to the freedom of our society and it is not for the courts to erode the common law's protection of personal liberty in order to enhance the armoury of law enforcement ... [emphasis in original removed]

148 Further in *Commissioner of Police, Fiji Police Force v A Mother & her Child* [2008] FJHC 183, Hickie J made that point that the reference to time limits in the provisions governing arrest did not give the police the right to hold to the extent of the permitted period.

149 In my view, on the evidence available to me, the delay in taking Mr Khan before a Magistrate was wholly unreasonable. Mr Khan was unlawfully detained. The obligation at law (see sections 23 and 25 of the Criminal Procedure Code) is to take Mr Khan before a Magistrate "without unnecessary delay" or to release. I do not consider that Mr Khan had been released when he was in either Colonial War Memorial Hospital or Suva Private Hospital. On the evidence before me there is no suggestion there was ever a form of release. It might be said that while Mr Khan was in Colonial War Memorial Hospital he was not fit to be taken before a magistrate. There are two obvious answers to this proposition:

> (1) it was open to bring the magistrate to him; and
>
> (2) at least by the 14th of November when Mr Khan was released from hospital and taken for interrogation at CID Headquarters, any objection that he was unfit must have fallen away. If he was fit to be interrogated, he was fit enough to be taken before a magistrate.

150 What I cannot identify with total precision is when the delay became unreasonable within the meaning of section 23. On any view, it could not have been more than a few days after interception. The delay in putting the other accused before a Magistrate on 8 November 2007 might well have been within the margins of acceptability. There is no evidence in connection with this. A delay until 8 January in well beyond those limits.

151 It is not difficult to find that the period of detention between the interception of Mr Khan and being his brought before the magistrate was unlawful. The more difficult issue concerns the consequences of that finding.

152 Except in circumstances specifically listed, personal liberty is guaranteed as part of the constitution: section 23. Mr Khan was as much entitled to the guarantees of section 23 as anyone else. Frankly, the right of personal liberty is a matter which is so fundamental that my concern about it is not heightened by calling the unlawful detention "unconstitutional".

153 Two other factors have to be considered here. From 27 December 2007 at the latest, it is plain that Mr Khan was demanding to be released or dealt with according to law. Further, the other accused had been brought before a Magistrate well before Mr Khan. It has not been suggested that there was any practical impediment to bringing Mr Khan before a Magistrate long before the actual date upon which this occurred.

154 The period of unlawful detention is substantial. It cannot be characterised as technical or trivial or minimal. (If it could be so characterised I would not, on the facts of this case, consider it a candidate for a stay of proceedings.) The problem for me is simply the substantial period of unlawful detention and the totally unreasonable delay in bringing Mr Khan before a magistrate. As is pointed out in section 23 of the Constitution, it is lawful to detain somebody after arrest. However, the Criminal Procedure Code makes it clear that at the expiration of any necessary delay that detention must be brought under the control of the courts. The courts are there to hold the balance. Some time is permitted for the police to do what is needed, but the cut-off point when this ceases to be a matter for the police and becomes a matter for the judiciary is also clear.

155 I will return to this issue at a later stage in these reasons.

Denial of access to a lawyer

156 Mr Khan complains that while in the police station and the hospital that he was denied access to confidential legal advice in that while his then lawyer was allowed to see him it was only for very short periods and only with a military officer present. (affidavit paragraph 81). This was confirmed by Mr Fa who was Khan's lawyer in the early stages following Khan's arrest. As I have already noted, by the time of these proceedings he was appearing for the 6th accused, Metuisela Mua. I permitted Mr Fa to make a statement from the bar table in relation to issues concerning his ability to have a confidential professional conversation at the hospital with Mr Khan who then his client. As the statement came from the Bar Table from a senior member of the legal profession of Fiji I was prepared to accept that.

157 As the matter was presented in court, the there were a number of restricted consultations of this type. The problem is that there is nothing specific as to how many there were. On re-reading Mr Khan's affidavit, it is ambiguous as to how many times this occurred.

158 It is clear that from 14 November 2007, the situation changed. This was the first date when Mr Khan was interviewed at CID headquarters. Supt Tevita Lesu (affidavit dated 24 January 2008 in the 2nd Habeas Corpus proceedings) speaks of Mr Fa being permitted to see his client during a break in the interviews. Further Mr Khan refers to seeing Mr Williams, QC and other lawyers in private on 16 November 2007 in private. Indeed, it is explicit that from the time of his stay in Suva Private Hospital, Mr Khan was allowed to see his lawyers in private.

159 The Constitution is quite specific in relation to access to a lawyer during detention or arrest. It provides:

27.-(1) Every person who is arrested or detained has the right:

(c) to consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice require legal representation to be available, to be given the services of a legal practitioner under a scheme for legal aid;

160 The first point to make is that the rights guaranteed by section 27(1)(c) when read literally appears to arise only when a person is arrested or detained. I have held that Mr Khan was at least detained. I have found in fact he was arrested. As I understood the State's argument, there is also a dispute as to whether Mr Khan was under arrest or was detained within the meaning of section 27(1)(c) of the Constitution. Even if I was wrong that Mr Khan was under arrest or not detained it seems to me that the appropriate approach to this issue is to proceed upon the basis that the right of a person to consult with a legal practitioner of his or her choice in private is a more general right. That accords with the passage from the speech of Lord Hoffman to which reference is made below. I leave out of account in this regard considerations relating to the exception to legal professional privilege where the dealing between a lawyer and client was in furtherance of a crime or fraud. That is not suggested here and therefore it is not a matter that I need to consider.

161 The very essence of a consultation with a lawyer is the privacy of that consultation. The corollary of that right to private consultation is, of course, legal professional privilege. Generally, that privilege is absolute: *Wheeler v Le Marchant* (1881) 17 Ch D 675; *Baker v Campbell* [1983] HCA 27; (1983) 153 CLR 52; *R v Derby Magistrates Court, ex parte B* [1996] AC 487; *Three Rivers District Council and Others v Governor & Company of the Bank of England (No 6)* [2005] 1 AC 610. In *R v Special Commissioner & Another, ex parte Morgan Grenfell & Co Ltd* [2002] 2 WLR 1299, Lord Hoffmann held that legal professional privilege:

"is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained

unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."

162 Once facts are established giving rise to the privilege, it is absolute in nature and there is no discretion in the courts to permit inspection even where the interests of justice or some other competing interest arises. Given the nature of a consultation between lawyer and client and, subject to one exception not presently relevant, the absolute nature of legal professional privilege, it is difficult to imagine how this right could be accorded to Mr Khan with the presence of a military officer.

163 The second complaint of Mr Khan is that the consultation(s) was/were permitted but only for a short period. I can readily imagine that there are circumstances where to limit the duration of a consultation would be, in substance, to deny it. This may very well be such a case. For the avoidance of doubt, nothing in this judgement should be construed as indicating that section 27(1)(c) of the Constitution guarantees unlimited time for consultation between lawyer and client. However, this case is at the other end of the scale and it is highly likely that to allow a lawyer to see his client for a very brief period such as that described in the evidence tendered before me would in substance breach the right to confidential legal advice.

164 The State has not sought to justify any derogation from the right to confidential legal advice. The law is that the burden of proof would be on the State to establish such a derogation.

165 However, the position as outlined above in this regard is by no means the end of the analysis. The real issue is, given what appears on its face to be a clear breach of the rights guaranteed to confidential legal advice, whether this is sufficient to justify a stay of proceedings.

166 No evidence was placed before the Court as to the impact of such breach of his Constitutional rights on how Mr Khan actually exercised his legal rights. No evidence was placed before the court as to what advice was given or was not given because of the presence of an officer and which, in the circumstances, should have been given. There is no evidence of the impact of the brevity of the consultation(s). It would appear, for example, that Mr Khan was aware of his legal rights as far as his right to silence is concerned.

167 It bears repeating that on the evidence I am not able to determine whether this right was denied once or more than once. My own experience as a practitioner tells me that given the nature of the client, the charge (or potential charges) and the circumstances that it would be highly unusual to have only one legal consultation in the period after arrest. However, that experience would make me receptive to evidence that there were multiple consultations. That experience cannot rise to the status of evidence or judicial notice.

168 That, of course, is not determinative of the issue. Generally, although not universally, a degree of prejudice to the interests would be required to be established before a stay of proceedings could be justified on the basis of denial of confidential legal advice. In *R v Grant* [2006] QB 60, [2005] 2 Cr App R 28 the English Court of Appeal indicated:

... acts done by the police, in the course of an investigation which would lead in due course to the institution of criminal proceedings, with the intention of eavesdropping upon communications of suspected persons which were subject to legal professional privilege, were unlawful and capable of infecting the proceedings as an abuse of the court's process; that, although not every misdemeanour by police officers in the course of an investigation would justify a stay on grounds of abuse, and although there were cases where prejudice or detriment to the defendant had to be shown, the court would not tolerate or endorse illegal conduct by police or state prosecutors which threatened or undermined the integrity of the justice system and the rule of law, and therefore would not countenance any associated prosecution; that the deliberate interference with a detained suspect's right to the confidence of privileged communications with his solicitor seriously undermined the rule of law and justified a stay on grounds of abuse of process, notwithstanding the absence of prejudice to the defendant.

The same view was expressed in *Secretary for Justice v Shum Chiu & Others* [2008] 1 HKLRD 155. Both of those cases were cases in which the law enforcement authority concerned had or may have listened in to privileged communications - unknown to lawyer and client. Accordingly, the conversation in each case was presumably utterly unguarded.

169 In *Secretary for Justice v Shum Chiu & Others*, Stock JA observed:

On its face, any decision by a law enforcement officer to eavesdrop upon or to record covertly a conversation which he knows to be between an individual and his legal adviser is an affront to the rule of law and cannot be countenanced, unless there exists strong justification for the action taken. It is not possible for a rights-based system of law to work if individuals cannot be assured that they may consult freely with their lawyers without fear that what they say and what is said to them is being overheard by outsiders. There is no point in according to those accused of crimes the right to legal advice and representation unless confidentiality of communication is secure, and the courts must be the firm guardian of that principle:

The fundamental justification for the sixth amendment right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense. Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact finding process itself. Even guilty individuals are entitled to be advised of strategies for their defense. In order for the adversary system to function properly, any advice received as a result of a defendant's disclosure to counsel must be insulated from the government. No severe definition of prejudice, such as the fruit-of-the-poisonous-tree evidentiary test in the fourth amendment area, could accommodate the broader sixth amendment policies. We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society. *United States v Levy* 577 F 2d 200 (1978) at p 209.)

Later, Stock JA added:

The question is always case and fact specific. As was said in *R v Grant*, a deliberate violation of a suspect's right to privileged legal advice will in general be so great an affront to the integrity of the system that the prosecution will be rendered abusive. That said, a number of questions in such cases have to be asked and answered: was the occasion one that *prima facie* was privileged; if so, was the intrusion carried out with knowledge, or where the authority ought to have known, that the occasion was privileged; if the occasion was privileged, was there nonetheless strong ground for believing that it was not protected by privilege; and if there was not strong ground, is there, even so, something in the reasons put forward by the law enforcement authority for the conduct assuming that the evidence of those reasons is believed that takes the situation out of one that would, but for that reason, be condemned as an affront to the public conscience? As to that last question, it is not possible, and it is not wise, to speculate what may suffice but we would suggest that ignorance of the law of privilege would not, for there lies a slippery slope

170 There may be differences between denying the right at all and improperly listening in to the exercise of the right. Plainly, the conduct on the part of those who insisted that there be an officer present and, possibly those who insisted on the conversations between solicitor and client be very brief is utterly unacceptable. As Lord Hoffmann noted, this right is a basic human right.

171 While it may be that of all the accused Mr Khan was more likely to be well versed in at least his basic legal rights, consulting with a lawyer is far more than that alone. It requires no speculation at all to say that not only legal rights but how best to go about the exercise of those rights are part of the kit-bag of every lawyer who turns up to assist a client in the position of a person such as Mr Khan.

172 In order to know how best to protect the client's interests the lawyer needs to know *from the client* what happened. The client often needs to hear the advice *from the lawyer* - even if, in reality, he knows the position himself. Experience demonstrates that a component of the relationship between lawyer and client in such a situation is simply providing the client with an element of fortitude in the face of what is almost invariably a stressful situation for even those of solid temperament. The paradigm of this right is confidentiality. The time at which Mr Khan needed *confidential* advice was quintessentially that moment when it was denied to him. It is no answer to say that his lawyer may well have been careful in what he said, knowing the officer was there. The presence of the officer presented lawyer and client with the opposite of that.

173 I will return to this issue at a later stage in these reasons.

Denial of access to spouse or partner

174 Section 27(1)(d) of the Constitution guarantees the right to a person who is under arrest or detention the opportunity to communicate with, and to be visited by his or her spouse, partner or next-of-kin. The right was not accorded to Mr Khan. The object of such provision in the

Constitution is to recognise the importance of providing to a person under arrest or detention an element of support which may be provided by his or her spouse, partner or next-of-kin. It is not irrelevant to notice that section 27(2) imposes on the authorities the obligation to undertake reasonable steps to inform such a person's spouse, partner or next-of-kin that the person has been detained or arrested. That might give some further indication of the scope of the underlying concern expressed in the Constitution.

175 It would follow from this that such a provision is not to be ignored. However, in my view, although a breach of any constitutional right is to be regarded very seriously, it is not such as to justify a stay of proceedings.

Alleged mistreatment of the partner of Mr Khan

176 Mr Khan contends that the strip searching of his partner by the authorities within a few hours of the interception of the convoy carrying Mr Khan is a basis upon which this trial should be stayed. Mr Khan's partner, Ms Agnes Bulatiko, was one of the persons in the convoy. The argument by the accused is put in two ways. The first is that it is part of the unlawful and outrageous treatment meted out to Mr Khan shortly after the interception of the convoy which continued for some considerable time after that interception. The second way in which this issue is put is that it is a freestanding instance of unlawful and outrageous treatment and which of itself would justify a stay of proceedings.

177 It need hardly be said that the Constitution requires that a person under detention or arrest to be treated with humanity and with respect for his or her inherent dignity. As I have previously noted I cannot imagine that this right is limited only to circumstances where someone is under detention or arrest.

178 I accept that Mr Khan and his partner had a close relationship. It is at least possible that those concerned with the investigation would have appreciated that Mr Khan and his partner had such a relationship. I accept also that a strip search must be, in all but the most unusual of the circumstances (none of which apply here), a humiliating and embarrassing experience. That would be true even if, as here, the search was undertaken by a member of the same sex as the person searched. I do not think it is necessary to speculate as to whether women might find such a search more humiliating and embarrassing than men. That would appear to be an unproductive line of enquiry. It is enough to say that it is readily understandable that such a search is humiliating and embarrassing.

179 The competing contentions would appear to be as follows.

180 On the side of Mr Khan, the search was said to be a deliberate and unlawful act which was part of a continuing process of harassment and humiliation of Mr Khan by harassing and humiliating those who were close to him. If this is right, the search would be, in law, an assault. Mr Khan contends that there could be no necessity for such a search and that it would follow from that that its purpose could only be to impact Mr Khan.

181 The opposing contention from the State is that at the time of the strip search the police were

investigating a crime of potentially the utmost gravity and proper enquiries had to be undertaken with vigour and thoroughness. At that stage, the police did not know whether the partner of Mr Khan was in the conspiracy and, if she was what, if any part she had played in it. At that stage, the police perceived that the enquiries were urgent. The State contends that in the circumstances the search was lawful and a legitimate part of their investigations.

182 The State also argues that even assuming that the strip search was unlawful or even if strictly lawful that it was excessive that it is not something which should be taken into account in determining whether to stay a criminal prosecution not against the person who was the subject of the strip search but the prosecution of another even though that other was the partner of the person the subject of the search. In other words, even if there was unacceptable conduct on the part of the executive which may even shock the conscience of the court there is no sufficient connection between the conduct and the accused. The State argues that even if the conduct attains the level of outrageousness to shock the conscience of the court, the charges are such the trial should proceed.

183 This submission by the State and this aspect of the case is one of the many which has troubled me greatly. Logically there may be conduct on the part of the authorities which either shocks the conscience of the court but has nothing to do with an accused and which thus may not be taken into account in determining whether to impose a stay on such a basis.

184 With the benefit of hindsight there is a respectable case to be made that the conduct on the part of the police was, at minimum, heavy-handed. Taking account of the burden and standard of proof in this matter, I am not satisfied on the evidence that I have read and submissions that I have heard that the conduct was in any sense directed at Mr Khan. I am also not satisfied to the relevant standard that the search was not made for the purpose of the investigation.

185 I have also been troubled by what is, in effect, the remoteness argument advanced on behalf of the State. The argument would seem to have a multitude of dimensions. At its highest, the argument seems to require that before conduct on the part of the executive could be a candidate to be considered on the basis of an application for a stay of proceedings of the *ex parte Bennett* type, that conduct must be visited upon the applicant for the stay. Put another way, the argument seems to be that there has to be a limit to the scope and range of conduct which the court can legitimately consider in determining a stay application on this basis.

186 That argument must be right but what is elusive is where the borderline is located. Circumstances can easily be imagined where the executive might visit sufficiently outrageous conduct upon someone very close to an applicant for a stay of proceedings without having done a thing, at least directly, to that applicant. It may be that the answer is that the further away from the applicant the executive misconduct is, the less likely that it would justify a stay of criminal proceedings against such an applicant.

187 For the reasons I have already outlined, I do not need to resolve this difficult and interesting issue. My instinct is that a court could only consider in the determination of a stay of proceedings application on the basis of the line of authority established by *ex parte Bennett* by reference to conduct visited directly on the application for that stay. However, even if the corollary to my

instinct is correct, in other words that the court could consider in determining such an application executive conduct visited on someone close to the applicant, I am firmly of the view that the conduct in this case, even at its fullest would not justify the imposition of a stay of proceedings on the charges faced by this particular applicant. On that basis, account may properly be taken of other remedies clearly open to the victim of such conduct.

Improper or bad faith investigation by the military

188 While this is a separate strand of the application for a permanent stay, it is closely connected with the first heading. I have already rejected as a free-standing ground for a permanent stay the contention that the pretrial harassment by the military would justify a stay of proceedings. As I have already indicated, it is hardly surprising that the military might view with at least anxiety if not suspicion the employment of former members of the CRW unit in view of their history. That anxiety or suspicion would hardly be ameliorated by the fact that they were employed as a group for security purposes. There was, so it would appear, a belief that there was a cache of arms from the coup d'état of 2000 still unaccounted for which, so it would appear, was sufficiently large to cause anxiety about the prospect of that cache of arms falling into the wrong hands. Cpl Kuli adverted to the believed likely existence of the cache as a component of the alleged conspiracy.

189 Counsel for Mr Naulago argued that the cache was either illusory or very small. There was no evidence for his assertion.

190 In *State v Pal* [2006] FJHC 48, the High Court was faced with an application for a stay of proceedings in connection with a case alleging corruption against the accused. In essence, the accused who was at the time a civil servant had been investigating what is commonly known as short-weighting in connection bottled gas. Those allegedly connected with the short weighting were said to have used Fiji TV's resources to record the accused apparently acting in a corrupt manner. Rather than proceeding with the short-weighting allegations, the State charged the accused in connection with the request by the accused for corrupt payments.

191 When the matter came on for trial before Gates J (as he then was), a stay of proceedings was ordered. The learned judge did not conclude that the conduct in recording the accused making his demand for corrupt monies amounted to entrapment. However, while the judge was prepared to accept that at least some of the parties to the recording process were acting on the reasonable suspicion that the accused appeared to be proceeding along a path of criminal activity, he found that the recording was not in the course of a *bona fide* enquiry. Gates J held: (paragraph [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 court cannot stand by and lend credence to such unjust maneuvers which undermine the credibility of a judicial system.

For these propositions, the learned judge cited *ex parte Bennett* and *R v Shaheed*. The State appealed to the Court of Appeal and the appeal was refused.

192 I must confess that had I been faced with the exactly same set of circumstances I may have found it difficult to come to the same conclusion as did Gates J. Nevertheless, his decision and the decision of the Court of Appeal confirming the stay would appear to be an authority for the proposition that the law of Fiji is that an investigation must be carried out *bona fide* in the sense that it was not motivated by improper purposes.

193 Whether that would be sufficient to justify a permanent stay in any particular set of circumstances would, I have no doubt, be a matter to be determined on the particular facts of the case. Clearly part of the rationale for a bad faith investigation being susceptible to a stay is the court may be in real doubt that the bad faith investigation is not appropriately thorough or might place at risk a fair trial because of matters such as a fear that the requirements for disclosure may not be observed.

194 Nothing in the decision of Gates J or in the Court of Appeal is authority for the proposition that if it was established that an investigation was not carried out on a *bona fide* basis that this would necessarily of itself justify a stay of proceedings. Nothing in either judgment asserts that the absence of *bona fides* in carrying out of the investigation is a free standing basis for imposing a stay of proceedings.

195 The factual underpinning for any assertion that an investigation was not being carried out on a *bona fide* basis as a basis for a permanent stay of proceedings would be required to be established on the balance of probabilities.

196 It was contended in connection with this argument that as soon as Cpl Kuli found out that there was a plot to assassinate members of the government and/or military he should have reported the matter to the police and let the police take it from there. (It has to be remembered that on the face of the witness statements of Cpl Kuli the alleged plot metamorphosed and developed over a 2 month period in terms of - amongst other matters - possible targets.) Complaint was made that rather than hand the matter over to the organisation which is trained in investigation and, perhaps critically to this case, preservation of evidence, the military kept contact with the alleged conspirators until very shortly before the arrest operation. At that stage, so the evidence on the depositions reveals, the operation became a joint police and military operation.

197 These submissions were urged upon the court to establish the absence of *bona fides* on the part of the military. They were also urged on a separate and, in a sense, freestanding ground that the failure to hand the investigation over to the police had a substantially earlier stage has prejudiced the interests of the accused to the extent that no fair trial of the charges could be had - because the police are the persons appropriately trained in the detection of crime and the preservation of evidence.

198 With great respect to those who earnestly propounded the notion that this matter should have immediately been handed over to the police, this argument is unsound. It overlooks the very nature of what was allegedly the subject of the conspiracy. Allegedly, the conspiracy was to not only kill members of the government but also to take over the reins of government. Indeed, if

Cpl Kuli is to be accepted, the alleged conspirators had even taken time to engage a lawyer to provide legal advice in connection with the execution of aspects of their plan. Taken literally, Cpl Kuli's proposed testimony would suggest that the lawyer was even engaged to the extent of suggesting names of persons to act in government posts on the assumption that the conspirators were successful. The argument also overlooks the mode of the execution of the conspiracy - again assuming the accuracy of Cpl Kuli's proposed evidence. If he is to be accepted, the exercise was to be carried out by armed, former members of the Fijian military. (It is said by the accused that this not only was not true but the military knew it to be untrue. I return to deal with this argument later.)

199 Not only does it not surprise me in the least that the Fijian military did not immediately hand the matter over to the police, it seems to me to be highly unlikely that the full scope of the plot (again, assuming there was one) would have been uncovered had they done so. Again, I emphasise that in making this comment I am assuming the accuracy of the proposed testimony of Cpl Kuli and Major Narawa. It must not be forgotten that a critical need in infiltrating the alleged plotters was that they (or at least some of them) believed that they were dealing with a fellow (and disaffected) member of the military. It has not been suggested, obviously for very sensible reasons, that the police would have been able to infiltrate somebody to gather evidence - at least not quickly. It takes no imagination to say that in the circumstances, that either the police would have had to arrest and immediately or alternatively taken a substantial time to infiltrate their own operative into the inner circle of the alleged plotters.

200 It must be remembered that while we know that (again, assuming the accuracy and truthfulness of Cpl Kuli) the conspirators took their own sweet time about taking the matter forward, those who were trying to determine whether this conspiracy did in fact pose a risk were trying to do so by looking prospectively rather than retrospectively. Again, it takes no imagination to immediately see that those trying to evaluate the scope of risk to the government of Fiji and its principal officers were not to know when the alleged plotters might make their move. It takes no imagination whatever to conclude that viewed from the perspective of someone in the position of Major Narawa and those to whom he was reporting that this was hardly the time to be handing the matter over to the police.

201 All that said, I accept the force of the proposition that, from an investigatory perspective, the police, had they been able to infiltrate somebody into the inner circle of the alleged conspirators, might have done a better job of any investigation. However, in my opinion, I do not consider that the military could be criticised for continuing to observe and monitor in the way alleged in the statements of Cpl Kuli and Major Narawa. The quality, or lack of it, of their investigation and recording of the case is something which is preeminently a matter which is capable of being evaluated by a panel of assessors properly directed in law. This particular contention does not cause me to believe that there was an absence of *bona fides* on the part of the military in continuing to investigate this matter without the intervention of the police. Further, I am firmly of the view that such deficiencies as there may have been in the investigation by reason of the military continuing the investigation are matters which can be properly ventilated at trial and considered and evaluated by a properly directed panel of assessors.

202 It was argued that the Commissioner of Police was aware that "something is about to

happen" considerably earlier than the date of interception. There is no evidence of what, if anything, the Commissioner was aware of and there is nothing which would found a suggestion that there was a sound basis for his intervention at a much earlier stage. I suspect that the prosecution wish that he had done so. This might have bought a bit more professionalism into the matter from a preservation of evidence point of view. There is nothing in this point.

203 It is argued that the destruction of the notes of Cpl Kuli (see paragraphs 231 - 293 below), is circumstantial evidence of the absence of *bona fides* in the conduct of the investigation. Further, it is contended that anxieties in this regard are at least heightened by reason of the fact the military witnesses only disclosed what happened to the notes and related matters late in the proceedings. In effect, it is contended that this disclosure only occurred after the Court indicated that unless there was a full accounting for the missing documents there was at least a risk of a stay. It is obvious from the timing of disclosures that the possibility of a stay of proceedings - at minimum - focussed the military witnesses and investigators to provide or purport to provide such an accounting.

204 There are a number of features of the disclosure as now provided which produce question marks. Counsel suggested that this was indicative of the account now provided being cooked up. I cannot say that it is not. That scenario is certainly a possibility. However, I also have to consider whether faced with the possibility that the prosecution might be stayed that this focussed minds in a manner not hitherto focussed and the accounting - including some possibly inept aspects of it - is the product of that fear. In this regard, on the basis of such a scenario, the police and the military involved in the investigation and the preparation of material for trial have been the authors of their own misfortune. Disclosure in the manner that has happened in this case was bound to create suspicion that something was being concocted.

205 However, applying the standard of proof I am not satisfied that the timing and manner of disclosure is not evidence which supports the conclusion of the lack of *bona fides*.

206 A further component of this is the now accepted position that Cpl Kuli destroyed his notes deliberately. Again, counsel for the accused suggest that this is sinister. If I thought that, at the time of destruction, Kuli and the officers dealing with him were thinking of a possible future criminal investigation then I suspect I would be a subscriber to the view that there was something sinister. However, I think the evidence points clearly to the conclusion that what Kuli and the other officers were not even remotely thinking in terms of a criminal investigation. The evidence points to the conclusion that their focus was on what they perceived to be a threat to the stability of the interim government and to the personal safety of leading members of the government.

207 In the instant case, the applicants who rely on the argument that the investigation was not carried out *bona fide* have not established to the required standard of proof that the investigation was conducted in bad faith. Further, for reasons already outlined, the retention by the military of the conduct of this investigation until very shortly before arrest action was taken does not sufficiently threaten the fairness of the trial to justify the imposition of a stay of proceedings.

Revelation of copies of an intimate recording in the possession of Mr Khan

208 There is evidence that video recorded material which was highly personal to Mr Khan and his partner Ms Agnes Bulatiko appears to have been seized by the police following the interception of Mr Khan and his group. Copies of that recording appear to have entered the public domain. A copy was sent to the lawyers representing Mr Khan. For what it is worth, there is an assertion by Ms Bulatiko that she had been told by her hairdresser that she had received an offer of a copy of the material. That is plainly inadmissible hearsay. The evidence of the delivery of a copy of the material to the Fiji Times may also be, at least in a technical sense, hearsay. Nevertheless, these reasons proceed on the assumption that the material was in the public domain.

209 The case for Mr Khan is that this shows part of the unremitting bias of the police against him because this material could only have entered the public domain at the hands of the police. The case for Mr Khan asserts that this must have been done to discredit him in the eyes of the community and, in particular, the pool of assessors who might try Mr Khan.

210 By reference to the law relating to the imposition of a stay of proceedings, this part of Mr Khan's case has two elements:

(1) the conduct of those who were party to the publication of this material with the motivation alleged by Mr Khan is conduct which is so reprehensible as to shock the conscience of the court so as to impose a stay; and

(2) the material itself is such as would discredit Mr Khan in the eyes of the potential pool of assessors so as to place a fair trial of Mr Khan out of reach.

211 There is no evidence supporting the conclusion that there was a deliberate course of conduct by the police as a collectivity or a group of police whether connected to the investigation or otherwise or an individual police officer having caused the entry of this material into the public domain. Still less is there evidence from which I could conclude that this was done with the intention to harm Mr Khan in the conduct of his defence. It is, without doubt, suspicious because it is difficult to imagine how the material could have been procured without, at minimum, some assistance - active or, at minimum, passive - on the part of some or all of those in possession of the original recording(s). After all, how would a person know the material was in possession of the police without some help in that regard by way of passing of information? How would a person know the nature and content of the material unless they had, at minimum a connection with the investigation? I recognise that laxness in security might readily provide an atmosphere in which it would not be difficult to learn of the existence and content of the material. If the material is as has briefly been described to me then I would have to deny ordinary human experience that it might not be the subject of salacious gossip and invitations to "take a look" at the material. That police officers - who are sworn to uphold the law - should not do such a thing is beyond argument. If it is true then the community is entitled to expect better.

212 However, the difficulty is that there no evidence of what happened and how that material got into the public domain. It would not be proper to speculate has to what happened or what motivated the person or persons who were involved. I cannot, on the evidence, conclude that it

was a deliberate act or series of acts on the part of the police or those connected with the bringing of this case to court.

213 Further, I have not seen the material. Those representing Mr Khan did not invite me to do so. The State cogently argued that the Court is not in a position to assess the impact of the material because it is has not seen the material. During the course of argument it was contended on behalf Mr Khan that the making of this submission was of itself was reprehensible. It was nothing of the sort. Accordingly I cannot draw any conclusions as to the impact that it might have on the pool of assessors that might, if it is appropriate to do so, try the accused.

214 Counsel for Mr Khan tendered an affidavit from Ms Tamanikaiwaimaro who is a person who was said by counsel to be a person who is a professional woman of high standing in Fiji, who has spent her life in Fiji and is particularly knowledgeable in Fijian culture and religious attitudes. In the affidavit, she expressed opinions on the adverse impact that the circulation of this material by reason of how Fijian society would view it. This was described by counsel for Mr Khan as expressing views on the sociological impact of this material.

215 The State objected to the tender of the affidavit because it did not accept that the expertise of the witness to express opinions about this had been established. I agree. I am not sure in any event that the topic was one which could be the subject of organised study. There was no evidence of methodology - *ie* how she came to her conclusions. The deponent did not have the advantage of seeing the material. Even assuming Ms Tamanikaiwaimaro was qualified to express the opinion that she expressed, quite how she was in a position to express any opinion in the absence of seeing the material is somewhat difficult to understand. The affidavit was inadmissible. Even if I had admitted her affidavit, I would have placed no weight upon it.

216 It seems to me that the remaining issue is whether the assessors who might try this case might, assuming they have knowledge of either the nature of the material or have seen the material itself, could not put them out of their mind and render a fair verdict according to law. In my opinion, there is no realistic risk of this occurring. Even allowing for the fact that a substantial component of Fijian society might fairly be regarded as conservative and strongly influenced by religious principles, I do not accept that assessors could not bring a fair, open-minded and balanced judgement to the issues which will be presented to them. Indeed, perhaps the most difficult component of this would be whether to give them any direction of a specific nature about this material. That would be a matter for assessment at trial.

217 The only conclusion on the evidence is that Mr Khan has not proved his case in this regard to the standard required. I must make it clear that in so saying, even if the case on this topic had been proved to the hilt, I would not necessarily have concluded that this would have justified a stay on the bases claimed by Mr Khan.

Conclusions

218 It will be apparent that the only real concerns I have under this heading are the substantial unlawful detention of Mr Khan and the denial of his right to confidential legal advice. In this regard, I return to Lord Griffiths in *R v Horseferry Road Magistrates, Ex parte Bennett*:

If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary 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.

Fiji places value on personal liberty. This is evident from provisions such as section 23 of the Constitution and the provisions of the Criminal Procedure Code to which I have referred. Fiji also places a high and, indeed, constitutional value on the right to confidential legal advice. Personal liberty is a basic human right. While it is invidious to rank human rights, personal liberty must on any view be in the upper ranks of human rights.

219 The right to confidential legal advice is, on any view, fundamental to the maintenance of the rule of law and must rank in the same level as rights to access to justice and the courts. A society whose laws have any level of complexity (such as Fiji and the balance of the common law jurisdictions in the world) demand that ordinary members of society have confidential access to legal advice. Lord Hoffman in the passage I have quoted from *R v Special Commissioner & Another, ex parte Morgan Grenfell & Co Ltd* (above) described the right to confidential legal advice as a basic human right.

220 Against that, is the clear imperative that those facing criminal charges should be tried. Every authority that I have taken into account in considering these issues makes it plain that a stay of proceedings is to be an exceptional remedy. Generally, it is, as I have observed, almost the opposite of what justice according to law is all about.

221 In the end, as a member of the judiciary, taking responsibility for upholding the rule of law, I am reluctantly driven to the conclusion that I cannot countenance behaviour by the executive that substantially threatens either basic human rights or the rule of law. It will be readily apparent that the language I have used in the preceding two sentences borrows from Lord Griffiths. I suspect that I will be forgiven for adding the word "substantially" to those I have borrowed. I do not think this raises the bar for a stay. I seek to emphasise how serious conduct must be before doing the essential opposite of what a court is expected to do when a charge is brought before it.

222 That there may have been other conduct on the part of police or military officers which might be described as unlawful or even unconstitutional is not to be doubted. However, for reasons I have given in connection with my discussion of the major issues raised by the accused in support of this application, I could not conclude that every individual item which I found to be established justified a stay on the basis of the recognised tests for imposing a stay.

223 It must be clearly understood that while I think that some other acts were unlawful and possibly unconstitutional, I did not think that either individually or taken together that they justified a stay of proceedings. The law is NOT that the minute something unconstitutional is established that a stay follows. The possible detentions of some of the accused, if established, obviously violated their right to personal liberty. One incident of that kind I found to be established.

224 However, a sense of proportion has to be kept in these cases. The Court is NOT, repeat,

NOT saying that these acts were acceptable, forgiven, washed away or somehow irrelevant. What *is* being said is that, in the specific circumstances of this case, the fundamental imperative to hold a trial was not overcome by those incidents - whether they are taken individually or together. If these acts were established the civil law provides ample remedies for the vindication of the rights of the accused.

225 Any police officer who might think, based on what I have said, that detention for *only* a few days could not in some circumstances justify a stay then such an officer is plainly a resident of a fool's paradise. If those incidents demonstrate a bias against the accused by "the military" or the "the police" then this is a matter which can be brought out at trial - in evidence or in cross-examination. I pause to note that, on one view, there is no shortage of material in this regard. Testing the reliability of witnesses, including on the basis of bias, is of the very essence of what trials are about.

226 However, the unlawful detention of Mr Khan and the failure to take him before a Magistrate within a reasonable time concerns the fundamental human right of personal liberty. That can be taken away where (as here) arrest is justified. However, if personal liberty is taken away on this basis then there is a fundamental requirement that if the person is to be charged then the control of person's liberty be under the control of the judiciary. If he is not charged, he must be released forthwith. That is a decision which must be made within the time contemplated in the Criminal Procedure Code. What cannot be done and is not acceptable is continued detention. The circumstances here clearly justify a stay. These acts were clearly established in the evidence. They are closely related in time and substance to the events of this case. On the basis of what I have found to be proved on the balance of probabilities, Mr Khan's rights were violated on a sufficiently egregious basis that to countenance such behaviour would indeed bring the system of justice under law in Fiji into disrepute if it was simply left to pass. It seems to me that this was precisely the kind of circumstances that the authorities envisage calls for a stay.

227 The position in relation to the denial of the right to confidential legal advice is more difficult. I cannot determine to the relevant standard how extensive the denial was. Was it once? Was it twice? Was it many times? I suspect I know the answer for that but my suspicion is not enough. In the circumstances if I was able to be satisfied that there were two or more occasions on which confidential legal advice was denied to Mr Khan then I would not hesitate to stay on that ground as a free-standing basis for the stay. As things stand, I am satisfied that this occurred AT LEAST once. I take it into account as a matter reinforcing my decision but I could not say that in these specific circumstances it would justify a stay on a free-standing basis. No one should take from this ruling the proposition that the denial of this right on one occasion is acceptable. It is not.

228 The courts cannot let pass behaviour on the part of the executive of the nature seen in relation to these two topics. That Mr Khan may have other remedies is not to be doubted. However, this conduct is such that any court which is concerned for the maintenance of the rule of law and human rights - especially those rights guaranteed by the constitution - cannot countenance. This is not an issue of compensating Mr Khan for the wrongs that have been or may have been done. This is about maintenance of the rule of law and human rights.

Evidence inadmissible and prejudicial

229 Counsel for Mr Naulago argues that the records that may actually be produced by the State are inadmissible, hearsay and prejudicial. The same could be said for Sgt Waqa's material as well. The evidence would clearly be inadmissible hearsay if it was tendered as evidence of the truth of its contents. It *might* be admissible to explain what these two officers did and why they did it. That would have to be carefully managed at trial. However, I cannot accept that the potential inadmissibility of evidence could form the basis of a stay. This is quintessentially what trial judges have to deal with within a trial. This argument fails.

Disclosure and destruction of evidence

Introduction

230 Each of the accused complains that the State has failed to make disclosure required under the law. The principal complaints concern records in the form of a report said to be made by Cpl Kuli following each of his contacts with some or all of the accused in September/October 2007. Cpl Kuli says in his witness statements that following each of these contacts, he made a report in writing and in duplicate to his "handler". The position of the State is that such reports do not now exist. Further, it is alleged by the accused that Major Narawa must have made written reports to his superiors within the military and to the acting Prime Minister amongst others as he briefed them on the developments of the case.

231 The accused complained of other items which have not been the subject of disclosure. In the scale of things, some of these are comparatively minor. Some of them assume the correctness of the versions of events preceding the arrest put forward by witnesses which I either do not accept or do not find to have established their position to the relevant standard. In this context, I have in mind the assertion by the accused that they were harassed by the military. Some of the accused, so they assert, were even taken to military barracks and, to put it mildly, detained, threatened and other acts of serious misconduct, including criminal misconduct, were said to have occurred. It was argued that there must be records of their attendance at military camps. For reasons which will become apparent, matters such as these by themselves do not take the case for imposing a stay very far at all. In, in the scale of things, they are not sufficient to add any real weight to the complaints in relation to the alleged non-disclosure in connection with Cpl Kuli and Major Narawa.

The obligation to disclose

232 There is an obligation on the prosecution to disclose certain information, whether documentary or otherwise, to the defence in connection with the conduct of a criminal trial. The requirements of the law of disclosure have developed rapidly in the past 20-30 years. In addition to revealing the material upon which the prosecution bases its case, the working definition of that obligation has been stated in different forms in many of the authorities. However, the essence of that obligation is as follows. The prosecution’s duty is to disclose to the defence relevant information which may undermine its case or advance the defence case. The duty is not limited to the disclosure of admissible evidence. Information not itself admissible may lead by a train of

inquiry to evidence which is admissible. Material which is not admissible may be relevant and useful for cross-examination of a prosecution witness as to credit.

233 In *R v Melvin* (unreported), Jowitt J (as he then was) described the scope of what had to be disclosed as follows:

> I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence that the prosecution proposes to use; (3) to hold a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).

This definition was accepted by the House of Lords as correctly stating the law in *R v Brown* [1994] 1 WLR 1599, 1606. There, the House of Lords indicated that the phrase "issue in the case" in the *Melvin* definition had to be interpreted broadly.

234 The *Melvin* definition was accepted as a reasonable working definition by no less an authority than Sir Anthony Mason sitting as a non-Permanent Justice of the Hong Kong Court of Final Appeal in *HKSAR v Lee Ming-tee (No 2)* (2003) 6 HKFAR 336, [2004] 1 HKLRD 513. In that decision, Sir Anthony Mason observed:

> The *Melvin* categories may be accepted as a broad statement of what, on a sensible appraisal by the prosecutor, is subject to disclosure. The *Melvin* formulation and the recognition that the credibility of a prosecution witness is relevant for the purpose of the *Melvin* categories have the consequence that disclosable material relevant to the cross-examination of a prosecution witness cannot be restricted to the three instances of disclosable material relevant to the credibility of a prosecution witness sanctioned by authority and referred to by Steyn LJ in *Brown* [1994] 1 WLR at 1607A-C. It extends to other significant material which a reasonable jury could regard as tending to shake confidence in the credibility of the witness.

235 It is also as well to note the observations of the House of Lords in *R v H & R v C* [2004] 2 AC 134 as follows:

> Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.

236 In *R v Ward (Judith)* [1993] 1 WLR 619, 674 the Court of Appeal held that:

An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial.

237 The obligation to disclose is also recognized in Canada (see: *R v Stichcombe* [1991] 3 SCR 326; *R v Taillefer & R v Duguay* [2003] 3 SCR 307); New Zealand (see: *R v Connell* [1985] 2 NZLR 233; *Wilson v Police* (1991) 7 CRNZ 699; *R v Chignell* [1991] 2 NZLR 257; *R v G* (1992) 8 CRNZ 9.) and Australia (see: *Holmden v Bitar* (1987) 47 SASR 509). In some jurisdictions, such as England and Wales, the obligation is defined by statute. However, regardless of whether the right is statutory or otherwise, it is plainly a right which is an incident of the right to a fair trial - which has already been noted - is guaranteed by section 29 of the Constitution. It need hardly be said that the right to a fair trial is guaranteed by the Constitution. The right to disclosure is encompassed in the right to due process under the Sixth Amendment to the United States Constitution. That right is also guaranteed in constitutional instruments and supra-national instruments such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

238 The importance of a fair trial cannot be understated. In *McKinney v R* [1991] HCA 6; (1991) 171 CLR 468, the High Court of Australia described the right to a fair trial as the central thesis of the administration of justice. In *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 WLR 1, the House of Lords declared it is "axiomatic" "that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all".

239 It is necessary to consider a number of cases in which evidence of importance to a case (be that, as here, written material, physical exhibits or absent witnesses) and how this informs the exercise of the discretion to stay criminal proceedings as an abuse of process.

240 In the context of cases involving a missing witness, the authorities require that court should ascertain the materiality of the witness to the defence case and it may be necessary, in order to make such an assessment to examine the witness statement of the missing witness: *R v Tse Cheuk-suen* [1989] 2 HKC 164; *R v Takeshi Machiya* [1990] 1 HKC 73. In this context, the court may also make some form of assessment of the likely quality and credibility of the witness: *R v Bracknell Justices, ex parte Hughes* (1990) 154 JP 98; *R v Carmelo Profilo* Mag App 611/89. The primary issue is whether, by reason of the absence of the witness, the accused will receive a fair trial: *R v Holgate (No 1)* [1996] 3 HKC 315. In *R v Holgate (No 1),* Yang CJ held that where, as a consequence of a missing witness a stay of proceedings is sought by the accused, the accused must demonstrate that by reason of the absence of the witness he is seriously prejudiced so that he cannot receive a fair trial.

241 The principles and standards that apply to the grant of a stay of proceedings are the same as in other contexts: a stay will only be granted in exceptional circumstances. The court must assess – if it can – the impact of the likely testimony of the missing witness and a stay may only be

granted if the absence of the evidence is so prejudicial to the position of the accused that no fair trial could be held.

242 The same principles apply where a critical exhibit is lost or destroyed: *Holmden v Bitar* (1987) 27 A Crim R 255, 47 SASR 509; *R v Beckford* [1996] 1 Cr App R 94; *R v Lo Tak-kee* Cr App 341/95; *R v Chu Kam-to & Wong Yuk-lan* [1995] 1 HKCLR 179, [1994] 1 HKC 775; *HKSAR v Cheung Wai* [1998] 4 HKC 249; *R v Medway* [2000] Crim LR 415; *Altaf v Crown Prosecution Service* [2007] EWCA (Crim) 691. It is for the accused to demonstrate that his trial will be prejudiced by the loss or destruction of the exhibit. To that end, there must be an assessment of the likely impact of the absence of the missing exhibit. In *HKSAR v Cheung Wai*, the claim was that the prosecution had failed to produce a video tape allegedly taken by a bank security camera of a transaction relevant to the case. In holding that a stay was not appropriate and there was no reason why the case could not proceed to trial, the Court of Appeal observed that there was no evidence as to what the tape contained and no fault could be laid at the door of the prosecution for failing to realise until after the tape was erased that it might have been significant. A similar approach may be seen in *R v Medway* [2000] Crim LR 415.

243 A practical approach must be taken to the loss of physical items the subject of criminal proceedings. For example where an item is of real commercial value it cannot be expected that it be preserved for long periods pending trial just because there is a possibility that the accused may wish to examine the item at some time before trial: *R v Roberts* (1999) 106 A Crim R 67.
244 It is necessary to consider some Canadian authority at this juncture. Although I have already referred to the decision of the Supreme Court of Canada in *R v Taillefer & R v Duguay* [2003] 3 SCR 307, it is appropriate to note that Canada's highest court appears to take a view consonant with authority from other common law jurisdictions. In that case, the court observed:

> This Court has frequently underlined the draconian nature of a stay of proceedings, which should be ordered only in exceptional circumstances. A stay of proceedings is appropriate only "in the clearest of cases", that is, "where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued" (*O'Connor*, *supra*, at para. 82[see [1995] 4 SCR 411, (1996) 130 DLR (4th) 235]). It is a "last resort" remedy, "to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted" (*O'Connor*, *supra*, at para. 77; see also *Tobiass*, *supra*, at paras 89-90 [see [1997] 3 SCR 391]; *Carosella*, *supra*, at paras 52-53 [see [1997] 1 SCR 80]; *Regan*, *supra*, at paras 53 *et seq.*[see [2002] 1 SCR 297]).
>
> In *O'Connor*, *supra*, at para 75, this Court adopted principles to circumscribe the power to order a stay of proceedings. These principles confirm the seriousness of such a decision and the need for a careful and balanced analysis of all the interests at stake — the interests of the accused, of course, but also the interest of the public in crime being punished and in criminal cases being diligently prosecuted. Those principles hold that a stay of proceedings will be an appropriate and fair remedy where:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

(2) no other remedy is reasonably capable of removing that prejudice.

245 In *R v Taillefer & R v Duguay*, the Supreme Court reaffirmed its earlier decision in *R v Dixon* [1998] 1 SCR 244. At paragraph 35 of that decision, Cory J wrote:

. . . an accused who seeks the extraordinary remedy of a stay of proceedings must not only establish, on a balance of probabilities, that the right to make full answer and defence was impaired, but must also demonstrate irreparable prejudice to that right.

246 Against that background, it is necessary to examine *R v Forster* [2005] SKCA 107, a decision of the Court of Appeal of Saskatchewan. Considerable reliance was placed on this case by the accused. In view of that reliance it is useful to recite the facts of the case which I take from the judgment of the Court of Appeal delivered by Sherstobitoff JA:

[3] In August, 2000, Cst Kooiman, an RCMP officer with two years experience, began an investigation of the three respondents in respect of dealings in illegal drugs. He began "building a search warrant" by collecting and recording information on a computer disc. It was the first time he had used this method. He made observations which were variously committed to memory, written on his hands, or written on scraps of paper and ultimately recorded on the disc. Any original notes which were made were destroyed save for notes made respecting the execution of the search warrant which was ultimately obtained, which notes were disclosed to the Crown.

[4] The investigation consisted of obtaining information from confidential informants; from driving by two buildings owned or occupied by the respondents "hundreds of times" and noting vehicles parked there and relating them to the respondents; determining the ownership and occupancy of the buildings and the amount of the electrical usage in the buildings; and using an infrared imaging device to measure heat sources in one of the residences.

[5] Using the information on the disc, Cst Kooiman prepared and swore an Information to Obtain a Search Warrant, and obtained a warrant to search the two buildings on February 2, 2001. He destroyed the disc to "protect his confidential police informants."

[6] Upon execution of the search warrant the police found substantial marijuana grow operations in both buildings. The value of the marijuana found was estimated to be approximately $150,000.

[7] The respondents were charged, and, after a preliminary inquiry in the Provincial Court, were committed to stand trial. The Crown disclosed the notes made by Cst Kooiman respecting the execution of the search warrant and a copy of the Information to Obtain a Search Warrant which had been edited by blacking out information which might have identified the confidential informants upon whom the police had relied. During the preliminary inquiry, Cst Kooiman was questioned by counsel for all parties

respecting his investigation, the notes he made in the course of the investigation, the entry of those notes on to the disc, the creation of the Information to Obtain a Search Warrant on the disc, and the destruction of the disc.

The trial judge held that the right to a fair trial was imperiled and that there were no remedial steps that could be taken to prevent an unfair trial. The prosecution appealed and the Court of Appeal dismissed the appeal.

247 It was submitted by the accused that this decision was clear authority for the proposition that deliberate destruction of evidence violated the right to a fair trial and thus the trial should be stayed. The decision does not go that far. In essence the decision of the Court of Appeal of Saskatchewan is a refusal to interfere with the exercise of discretion by the primary judge. The Court of Appeal observed:

An appellate court cannot reverse such an order merely because it would have exercised the discretion in a different way. It is justified in intervening in a trial judge's discretion to grant such a remedy only if the trial judge misdirected herself as to the law or if, in the exercise of her discretion, she gave no weight, or no sufficient weight, to relevant considerations, or where the decision is so clearly wrong as to amount to an injustice.

248 The decision is simply an application of the established rule in Canada and most other common law jurisdictions which accords a high degree of respect to the decision of the trial judge. Further, the decision of the Court of Appeal applied the approach in *R v Carosella* [1997] 1 SCR 80 which appears to be authority for the proposition that in determining whether the right to a fair trial is breached the court it is not necessary to show how the material no produced would prejudice the accused. The issue of prejudice would appear to arise in determining the remedy for the breach of the right to a fair trial. Canada in the Charter of Rights has an express remedies provision in section 24 of the Charter. The passage quoted by the Court of Appeal in this connection is as follows:

This Court has consistently taken the position that the question of the degree of prejudice suffered by an accused is not a consideration to be addressed in the context of determining whether a substantive *Charter* right has been breached. The extent to which the *Charter* violation caused prejudice to the accused falls to be considered only at the remedy stage of a *Charter* analysis.

249 Thus understood, there is a possible difference between the Canadian approach and what appears to be the position in most other common law jurisdictions as to the method of reasoning in such cases. It is not that prejudice to the accused is not a factor to be considered in Canada. It seems to me that this mode of reasoning is primarily influenced by the fact that the remedy for a breach of the Canadian Charter of Rights is via the express remedy provision.

250 Such a provision does not exist in Fiji and the remedy for a breach of the right to a fair trial

arises at common law. It seems to me that to not consider the issue of prejudice in determining whether the right to a fair trial has been jeopardised but to wait until it has been determined that it has been jeopardised and the only issue remains the remedy is an unnecessarily convoluted process and runs the substantial risk of losing sight of what is at stake in an application for a stay of proceedings. If there is a conflict between the Canadian approach and that in the other authorities to which reference is made then I would unhesitatingly decline to follow the Canadian approach. However, when viewed against decisions such as *R v Taillefer & R v Duguay* (above) and *O'Connor*, (above) I think the difference is more apparent than real.

Duty to preserve

251 It is contended by the accused that the State has violated its duty to preserve evidence by reason of the destruction of the notes. In support of that contention the decision of the Supreme Court of Ireland in *Braddish v DPP* [2001] IESC 45 is cited. Before embarking on a review of that decision and the scope of its impact on the present situation, two preliminary and related points should be made.

252 It is a very good thing that, traditionally, Fijian courts look widely for authority from common law jurisdictions. The obvious benefit is a breadth of thinking about a legal issue and legal principles becomes available. However, the related issue is the risk that without careful evaluation, the statutory, constitutional and even socio-economic context may not be obvious.

253 Further, picking one case out of the range of cases in a particular jurisdiction runs the risk of failing to spot further evaluations or qualifications or amplifications in later cases. If counsel proposes to pick a case out of the range of cases in another jurisdiction they have a positive duty to ensure that the problems to which I have referred are addressed. It is NOT good enough to leave that to an opponent. Even the most casual reading of the cases in Ireland which have considered *Braddish v DPP* would not have failed spot that there is a good deal more to be said on the topic than is said in that case. Further, having examined which might be the range of cases in Ireland which evaluate, qualify and amplify, my concern is that no other common law jurisdiction appears to have enunciated any form of duty to preserve evidence in the terms one sees in *Braddish*.

254 *Braddish v DPP* (above) was concerned with primary evidence of the crime. A video tape of the robbery was allowed to pass out of police hands because the police thought they had enough evidence to convict from the confession attributed to the accused. The Supreme Court of Ireland held:

> It is well established that evidence relevant to guilt or innocence must, so far as necessary and practicable, be kept until the conclusion of a trial. This principle also applies to the preservation of articles which may give rise to the reasonable possibility of securing relevant evidence.

The Supreme Court held that video tape has a clear potential to exculpate as well as to inculpate. Quite why that was so is not explained in the judgment. In the result, the Supreme Court order that the authorities be restrained from further prosecuting Braddish.

255 *Dunne v DPP* [2002] IESC 27 followed *Braddish v DPP* (above). However, the Supreme Court in *Dunne* noted that the principles applied in England were different. The Supreme Court declined to follow *Ebrahim v Felthan Magistrates* [2001] 1 All ER 831 where it was held:
If..... 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.
In *Dunne* the court held:

I believe that that passage is applicable to the present case, bearing in mind that one is dealing with a failure to seek out evidence which, as a matter of probability, existed, rather than with a lengthy delay. In each case, it will normally be impossible to prove conclusively that there would have been evidence available at an earlier date or that the missing video tape would have assisted the Defendant. The real possibility that this is so is the most that can possibly be shown. Thus, I believe the *"real risk"* test is much more realistic, and therefore more just, than the test suggested in *Ebrahim*, which is virtually impossible to meet.

The rejection of the English approach in *Ebrahim v Felthan Magistrates* [2001] 1 All ER 831 must be viewed against the background of the re-affirmation of that approach in *Altaf v Crown Prosecution Service* [2007] EWCA (Crim) 691.

256 It may be that later Irish Supreme Court decisions recognise that the approach in *Braddish v DPP* (above), if taken literally, has the potential to endanger the administration of justice. In *Scully v Director of Public Prosecutions* [2005] IESC 11, it was noted:

If a defendant in criminal proceedings were entitled to force their discontinuance because he could demonstrate any shortcoming in the investigation whereby evidence which might, however theoretically, lead to his exoneration was lost, that would be to alter the thrust of our criminal procedures in the direction of unreality and the frustration of justice.

In answer to this it was noted that the emphasis in *Braddish v DPP* (above) was:
on the need for the obligation to seek out and indeed to preserve, evidence to be *reasonably* interpreted requires, I hope, that no remote theoretical or fanciful possibility will lead to the prohibition of a trial.

257 In *McFarlane v DPP* [2006] IESC 11, the Supreme Court observed:

It is part of ordinary human experience that documents and items, even those of great significance or intrinsic value, are not infrequently lost. The law has taken note of this over many centuries and is not so unrealistic as to consider that the loss of an original document or item of real evidence is fatal to any litigation based on it.

This case involved the loss of an object with fingerprints on it. The fact that there remained photographs of the fingerprints was held not to justify preventing a trial. There seems to be a more realistic approach becoming evident. The so-called duty to preserve was, so it was said, breached. In the case I have consider the primary evidence is still available: Cpl Kuli. The notes are not even secondary evidence of was he saw and heard.

258 As was noted in *Dunne* the Irish approach has not found favour in the United States. The leading decision is *Arizona v Youngblood* [1988] 488 US 51 in the US Supreme Court. Here, there was a thorough going failure properly to pursue the scientific aspect of the investigation of an alleged sexual assault on a young boy. Rehnquist CJ, speaking for the majority of the Court, said that:

> We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute denial of due process of law.

259 That seems singularly unattractive to me. The issue should not be whether bad faith has been established. It should be concerned solely with the right to a fair trial.

260 The English authorities directly on point seem to provide guidance consistent with principle. The requirement is that there is a fair trial. It is necessary to evaluate the absent evidence to see what, if any, impact the absent evidence would have on a fair trial. If the evidence impacts on a fair trial, the court is then enjoined to consider remedial measures to ensure the fairness of the trial. Only if no remedial measures can be taken to ensure the fairness of the trial should a stay be imposed. What I do not accept is that the threshold in *Braddish v DPP* (above); *Dunne v DPP* (above) is appropriate.

261 This part of the application for a stay of proceedings has deeply troubled me.

262 It is common ground that the original notes of Cpl Kuli that he provided to his handler have been destroyed. It is common ground that the critical issue at the trial will be the honesty and reliability of this witness.

263 It is also common ground that had the notes still existed they would be liable to disclosure under the principles outlined above.

264 The explanation for the destruction of these documents given by the State witnesses is that it was done for security reasons. The point is made that until approximately 2 or 3 days before the ultimate interception of those accused who were in the convoy of three vehicles travelling to Suva, this case was perceived to be something which was not a matter of criminal investigation but, in a sense, a matter concerned with the preservation of the State. By the time the police came into the picture, the critical documents would, on the evidence, appear to have been destroyed.

265 It is probably right to say that those directly concerned with the detection and observation of the alleged plot should have realised that, in the event of interception, these notes would be of

some importance. However, it appears to me reasonable to conclude that those persons simply did not think along those lines. The fact that this should have been blindingly obvious in retrospect does not of itself detract from this position but is simply a means of testing the validity of it. Further, I am far from totally convinced that, in reality, security would have been enhanced by the destruction of the notes which were destroyed in the name of security. As I have already noted Lieutenant Colonel Tevita Uluilakeba Mara of the Republic of Fiji Military Forces in an affidavit dated 11 July 2008, deposes to an incident on 6 December 2006 in which Mr Gadekiuba and Mr Namulo were "picked up" and brought to the Queen Elizabeth Barracks. They were spoken to. Lieutenant Colonel Mara said were asked about their involvement concerning the information of the assassination plot, which they both denied. Lieutenant Colonel Mara deposed that he said, "I hope you are not involved in the assassination plan". If Lieutenant Colonel Mara was saying this to two of the alleged conspirators 6 months before the alleged conspiracy began it augurs badly for security and for the perceived need for security. However, Cpl Kuli was not to know that.

266 However, on the evidence which has been presented to me I am not prepared to second-guess those who considered destruction necessary for security nor am I prepared to conclude that the destruction was not in any sense in bad faith or designed to conceal or cover up the real truth. In relation to this latter point it is fair to say that if that had been the motive of those concerned with this case they could so easily have done a much better job of it. Indeed, what remains today as not destroyed rather demonstrates this point. (It also calls into question on an objective basis the need for destruction of Cpl Kuli's notes for security reasons.)

267 In short, with the perfect clarity of vision that hindsight provides, a fair question would be to ask if the documents which actually survived were not equally susceptible to destruction on the same basis. However, the mere fact that reasoning with the benefit of hindsight might have argued for a different approach to the handling of these documents does not persuade me that the destruction was for any improper or sinister reason.

268 The conclusion that the destruction of the documents was not for any improper or sinister reason does not even begin to deal with the real issue that I had to consider under this heading. The real question is whether the destruction of these documents is such as to deny to the accused any realistic prospect of a fair trial.

269 The starting point for any analysis of this issue must be to recall that the notes would not of themselves be admissible evidence of the existence of a conspiracy to murder, the scope of such a conspiracy and the parties to the conspiracy. In the circumstances, the only person who can give that evidence on an admissible basis is Cpl Kuli himself. (Some evidence of the conspiracy may conceivably come from the testimony of Major Narawa but, in the end, the evidence depends almost exclusively on Cpl Kuli.) The notes, had they not been destroyed, might have been available as an *aide memoir* to Cpl Kuli when he testified. That, of course, depends on whether they were made in circumstances which would justify a court giving Cpl Kuli permission to refer to those notes for the purpose of refreshing his memory.

270 Depending on the content of the notes, it is conceivable that they might have been used by the prosecution to rebut a claim on the part of the accused that Cpl Kuli's evidence was the

product of recent invention. Again, depending on the content of the notes, it is conceivable that they might be used by the accused to cross-examine Cpl Kuli if his testimony was inconsistent with those notes. Within this latter rubric, any counsel of any experience would immediately recognise the wide range of possibilities which might arise from subtle inconsistency to more fundamental inconsistency. It is not to be overlooked in this regard that the two principal witness statements of Cpl Kuli were made shortly after those accused who were in the convoy were intercepted.

271 As I understand the position of counsel for the accused in this case, the principal case that they propose to make in respect of this witness is that he is simply not telling the truth. In other words, this is not mainly about the failure of memory or the reliability of observation - although I would expect that would be relevant. Obviously, some qualification must be made as to the latter statement because some of the accused feature less often in the meetings and assemblies said by the witness to have occurred in inception and furtherance of the conspiracy. If I have understood the evidence correctly, perhaps the more extreme example of this is the position of the Mr Baledrokadroka. It would appear to be said by Cpl Kuli that he took some part in one of the meetings.

272 On that basis, an issue about the ability of Cpl Kuli to recall what was said or done at this specific meeting in the presence of this accused and what was said or done by this accused to signify that he had either previously joined the conspiracy alleged or joined such a conspiracy at this particular meeting might be problematic, to say the least. Given the particular meeting at which this accused was present is one of those meetings in respect of which Cpl Kuli does not assign a specific date, the possibility of this accused of providing a defence of alibi is equally problematic. This particular accused is left, it was argued forcefully by counsel on his behalf, in the invidious position of having to somehow work out where he was over a range of dates.

273 The case for the accused is that in the absence of the destroyed material, the degree of cogency of the prejudice caused by its destruction is impossible to gauge but it is clear and relevant that there is at least a reasonable possibility that this destroyed material would have been very helpful to the defence and indeed there is again at least a possibility that this material may have been sufficient to severely impair the credibility of at least the 2 witnesses who destroyed the material. In my view, that it is a possibility. The real problem, as was realistically recognised by counsel for the accused, is that this requires some speculation as to the content of the notes.

274 The position of the State is to recognise the possibility that, depending on the content of the notes, that they might have been material to seek to impeach the credibility of, principally, Cpl Kuli. However, counsel for the State submits, any risk to a fair trial thus created by the absence of the notes can be cured by a combination of cross-examination of Cpl Kuli and proper directions to the assessors.

Evaluation

275 The real issues in this part of the application for a stay of proceedings are:

(1) does the absence of the notes place at real risk the right of the accused to a fair trial?

(2) if the answer to the first question is "yes", is that prejudice capable of being ameliorated by techniques and tools available to the court consonant with a trial according to law?

If the first question is answered "yes" and the second "no" then it seems to me that a stay of proceedings is clearly the only remedy which can do justice as between the accused and the State.

276 As I have already observed, depending on the content of the missing notes, the notes are capable of being material which might be used to test the credibility and reliability of, amongst others, Cpl Kuli. In earlier passages in this judgment, I briefly considered the range of possibilities that might arise depending on the content of the notes. In order to assess the prejudice to a fair trial it seems necessary to make some assumptions about the content of the notes. The position is aptly summarised in the written submissions placed before the court on behalf of Mr Khan where it is noted:

In the absence of the destroyed material, the degree of cogency of the prejudice caused by their destruction is impossible to gauge but it is clear and relevant that there is at least a reasonable possibility that this destroyed material would have been very helpful to the defence and indeed there is again at least a possibility that this material may have been sufficient to severely impair the credibility of at least the 2 witnesses who destroyed the material.

In some respects, I agree with the sentiments behind this proposition. However, the issue is whether the existence of that "reasonable possibility" is enough to found the conclusion that a fair trial is placed in real jeopardy.

277 One of the conceivable ways of attempting to make an assessment of the degree to which the destroyed material might have been of assistance to the accused to provide a basis for cross-examination of, amongst others, Cpl Kuli, is to look at secondary material such as that prepared by Sgt Waqa or Major Narawa. However, there is an obvious danger in doing so because that carries with it the further assumption that they have accurately reflected the content of the missing material. Again, the danger in making such an assumption is such that I am not prepared to go down that line.

278 I am far from convinced that I can make the assumptions implicit in the submissions by the accused as the content of the notes. As I say, looking at the matter in a practical way as any experienced advocate would do, the utility of these notes as a basis for cross-examination depends on the contents of the notes. There is nothing in the evidence I have seen which mandates the conclusion that the notes must provide a basis for cross-examination. All I could say is that they might do so. How realistic is that possibility? That, to me, calls for a degree of speculation which I did not consider appropriate.

279 It follows from this that I conclude that the absence of these notes has probably not been demonstrated to substantially endanger the fairness of the trial. Not without considerable hesitation, I would answer the first question I have posed myself "no".

280 However, even if I had concluded that there was a real danger to the fairness of the trial by reason of the absence of the material, I am firmly of the view that there are sufficient remedies for that potential unfairness available to the court. It has been suggested that in the event that, for example, the PowerPoint slides of Major Narawa were tendered in the trial that it would be virtually impossible to explain to the Assessors that such material was not evidence of the truth of what is contained inside slides but this simply evidence of what was said to all by Maj Narawa to, for example, explain his actions.

281 There are two answers to such submission. The first is that the missing material would not have been, of itself, admissible in any event. The only use that could have been made of it by the prosecution would be as an aide memoir to the witness on the assumption that all the criteria for giving permission to witness to refer to these notes to refresh his memory have been established. On that footing, a direction very much like the one which it is submitted by the accused would be impossible to get across to the Assessors would have to be given. Further, depending on the content of the missing material, it would almost certainly not be admissible in evidence at the hands of the defence except, possibly, to indicate inconsistency between the testimony of the maker of the material and what was written in the material.

282 The second answer to the submission is that such a direction is one which is in use on an almost daily basis in criminal proceedings in Fiji. I have no doubt that provided it was carefully framed, such a direction would more than adequately get across to the Assessors the use that could be made of the material and, more importantly, the use that could not be made of such material.

283 The next thing that would be necessary to get across to the jury is that the absence of the notes is something that they may take into account in assessing the credibility and reliability of witnesses including, amongst others, Cpl Kuli. Of course, the fact that Assessors could take this into account is, by itself, a somewhat meaningless direction unless it is fortified with further directions as to how they might take the material or the absence of that into account. Such a direction would, of necessity, need to make the point that they, like everybody else, are not in any position to say what was in the notes.

284 Further, as the State pointed out, it would be open to the accused to cross examine the relevant witnesses as to how and why the material came to be destroyed. It seems to me that all of these tools are available to the court and would have the effect of ensuring a fair trial. It seems to me that it could be said that there is no shortage of material that could be brought to bear in this regard. As has been pointed out, an example of this is that Sgt Waqa might be understood to be saying that he had conversations with Cpl Kuli which, on his previous statements, he could not possibly have heard. Whether the assessors concluded that these two witnesses were lying, were diabolically negligent or this was perfectly understandable and excusable would be a matter for them.

285 It follows that I would answer the second question I have posed for myself "yes".

286 I would also refuse the application for a stay on this basis.

287 I think it is appropriate to add two further observations on this aspect of the application.

288 The first is that my assessment of the potential prejudice to a fair trial and whether there are sufficient techniques available to the court consonant with a trial according to law has been made on the material presently available to me. It may well be, and it is a commonplace experience of everyone involved to any substantial degree in criminal trials, that the evidence as the trial unfolds may well come out in a different way or be viewed in a different way from how it is viewed at the moment. The same is also true of documents and exhibits which may be tendered at the trial. It probably should go without saying that in such event it would be open to the accused to renew their application for a stay of proceedings in the event that the fairness of the trial was thus jeopardised. Nevertheless that position must be made plain to all concerned. It is open to the accused to keep the issue of the fairness of the trial under review throughout the trial. It will be the duty of the court to do so.

289 The second matter is something which concerns only the 2nd accused Mr Baledrokadroka. It would appear that Cpl Kuli places Mr Baledrokadroka at one meeting of the alleged conspirators. The evidence appears to me to be pretty vague to what, if any, part Mr Baledrokadroka played in this meeting and what he said or what he did to indicate that on a previous occasion he had joined the alleged conspiracy or that on the occasion of the meeting at which Cpl Kuli says he attended that he there and then joined such a conspiracy. This is perhaps more significant given that there seems to be at least a suggestion in the proposed evidence of Cpl Kuli that at one stage this accused was a potential victim of the conspiracy rather than a party to the conspiracy.

290 It is argued by counsel for Mr Baledrokadroka that given Cpl Kuli is not always very specific about dates of meetings (and is certainly not specific about the date of the relevant meeting for the second accused) that a fair trial of the second accused is placed in serious jeopardy because he cannot investigate matters such as a possible alibi. There seems to me to be considerable force in the submissions. Nothing prevents Mr Baledrokadroka from considering alibi from the perspective of a bracket of dates. If, in that bracket of dates there were some in which he was elsewhere and, thus, could not participate in such a meeting, it seems to me that it would be very difficult to resist a submission of no case to answer at the stage of the proceedings where the court is required to consider that issue. Indeed, in my judgement, regardless of the issue of disclosure this seems to me to be capable of being a very cogent submission.

291 It is, of course, absolutely fundamental that it is not open to the court on an application for a stay of proceedings to intervene in the case simply because the evidence against the accused is weak. The powers of the court in that regard commence at the end of the prosecution case. While it may be said that the evidence may unfold in a somewhat different and possibly less advantageous manner to the 2nd accused than appears on the cards at the moment, it seems to me that while it is inappropriate for me to order a stay of proceedings in respect of the case of Mr Baledrokadroka, it seems also appropriate to invite the State to carefully review its position in respect of the second accused.

292 The authorities (see, for example, *Grassby v R* (1989) 168 CLR 1) make the point that one of the reasons that a stay of proceedings should be a wholly and exceptional remedy is because the

court should not be seen to have a part in the initiation and continuation of the prosecution. Thus, I consider in making these observations about the 2nd accused, I have probably travelled to the absolute outer boundaries of what is appropriate for a judge to say in this regard having regard to the injunction in the case to which I refer.

Expense of a major trial

293 It was submitted by the accused that it "would be outrageous for the Interim Government, the defendants and the people of Fiji to be put to the expense of a major trial in such a situation." The "situation" referred to was the combination of direct malice and the fact that critical material has been destroyed. I have not taken into account at all the issue of expense. The imperative in the authorities to which reference has been made is that there must be a trial unless one or other of the major bases for imposing a stay referred to above have been established.

Conclusion and orders

294 Before formally making the orders I consider appropriate, I must thank all counsel for their assistance in this matter. The written and oral submissions, the former having been delivered to the Court against somewhat demanding timetables, were of immense assistance. In any legal system, Fiji's legal system being no exception, in addition to their duty to their clients, Counsel play an important part in the preservation and the advancement of the rule of law. In my judgment, counsel in this case discharged their duties admirably.

295 For the reasons contained in paragraphs 131 - 156, 157 - 174, and 219 - 227 (Conclusions), there shall be a permanent stay of the trial of the information in HAC 9 of 2008 which Mr Khan faces.

296 The application for a permanent stay of the trial of the charges against all other accused is refused.

DATED the 12th day of November 2008, Suva

Andrew Bruce
JUDGE OF THE HIGH COURT