

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 15 OF 2014 & HAM 16 of 2014

BETWEEN: SAINIVALATI NAVOTI
IOWANE NAIO
Applicants

AND: STATE
Respondent

Counsel: Applicant in Person
Mr. S. Babitua for Respondent

Date of Hearing: 7 May 2014
Date of Ruling: 12 May 2014

RULING

1. These are applications for permanent stay of proceedings.
2. The applicants were charged before the Magistrate Court of Lautoka with others on one count of Burglary and three counts of Larceny in Dwelling House.
3. The particulars of the offences are:

First Count
Statement of Offence

BURGLARY: Contrary to Section 299 of the Penal Code.

Particulars of Offence

IOWANE NAIIO, PITA SOROVAKARUA, MANASA VOLAU and SENIVALATI NAVOTI, on the 16th day of August 2008 at Lautoka in the Western Division broke and entered the dwelling house of **RAM NARAYAN SHARMA** with intent to commit a felony there in namely Larceny.

Second Count

Statement of Offence

LARCENY IN DWELLING HOUSE: Contrary to Section 270 of the Penal Code Cap 17.

Particulars of Offence

IOWANE NAIIO, PITA SOROVAKARUA, MANASA VOLAU and SENIVALATI NAVOTI, on the 16th day of August 2008 at Lautoka in the Western Division stole USD\$1600.00, FJD\$3625.00, a Nokia brand mobile phone valued \$350.00, AUD coins \$200.00, 1 x asthma machine valued \$250.00, 4 bottles x 1 litre whisky, Rum valued \$600.00, all to the total value of \$6625.00 the property of **RAM NARAYAN SHARMA**.

Third Count

Statement of Offence

LARCENY IN DWELLING HOUSE: Contrary to Section 270 of the Penal Code Cap 17.

Particulars of Offence

IOWANE NAIIO, PITA SOROVAKARUA, MANASA VOLAU and SENIVALATI NAVOTI, on the 16th day of August 2008 at Lautoka in the Western Division stole 7 x gold chains valued \$2000.00, 7 pairs of 22ct gold bangles valued \$3000.00, 16 x 22ct gold bangles valued \$1000.00, 1 x kangan valued \$600.00, 4 x wrist watches valued \$300.00, silver set valued \$200.00 cash \$600.00 pearl set valued \$400.00 and 1 Ruby ring valued \$200.00 all to the total value of \$8300.00 the property of **DHURGA DEVI SHARMA**.

Fourth Count

Statement of Offence

LARCENY IN DWELLING HOUSE: Contrary to Section 270 of the Penal Code Cap 17.

Particulars of Offence

IOWANE NAI0, PITA SOROVAKARUA, MANASA VOLAU and SENIVALATI NAVOTI, on the 16th day of August 2008 at Lautoka in the Western Division stole a Motorola mobile phone valued \$550.00, 1 x Hitachi camera valued \$1300.00 and cash \$550.00 all to the total value of \$2400.00 the property of **HIRDESH SHARMA**.

4. These applications were filed on 27 January 2014 on the basis on unreasonable delay, although they were ready for trial on four times the prosecution was never ready for trial.
5. State had filed written submissions.
6. The principles for stay of prosecution are settled in Fiji. In ***Mohammed Sharif Sahim v. State***[2007] FCA 17/07, the Court of Appeal when reviewing the law on criminal trial delay held that:

*"...it was well settled since ***Apaitia Seru and Anthony Fredrick Stevens v. The State Crim. App. AAU 0041/42 of 1995 S*** that where the delay was unreasonable, prejudice to the accused could be presumed. This court in that case adopted the approach of the majority of the Supreme Court of Canada in ***R v. Morqan*** [1992] 1SCR and New Zealand court of appeal in ***Martin v. District Court at Tauranga*** [1995] 2 NZLR 419 that stated:*

" The general approach to a determination as to whether the right has been denied is not the application of a mathematical or administrative formula bur rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of the delay. As I noted in Smith (R v Smith (1989) 52 CCC (3D) 97), (I)t is axiomatic that some delay is inevitable. The question is, at which point does the delay become unreasonable? ...While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

- (i) *The length of delay*
- (ii) *Waiver of time periods*
- (iii) *The reasons for the delay, including*
 - (a) *Inherent time requirements of the case;*
 - (b) *Actions of the accused;*

- (c) *Actions of the Crown;*
- (d) *Limits on institutional resources, and*
- (e) *Other reasons for the delay, and*
- (iv) *Prejudice to the accused."*

7. In **Johnson v State** [2010] FJHC 356;HAM 177.2010 (23 August 2010), Hon. Mr. Justice D. Goundar stated:

*"...The circumstances in which abuse of process may arise are varied. In **R v Derby Crown Court, exp Brooks** [1984] Cr. App. R.164, Sir Roger Ormrod identified two circumstances in which abuse of process may arise:*

"...It may be abuse of process if either

- (a) *The prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or*
- (b) *On the balance of probability the defendant had been, or will be, prejudiced in the prosecution of or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused or to genuine difficulty in effecting service."*

8. His lordship further quoted Justice Pain's remarks from **State v Rokotuiwai** [1998] FJHC 196 identifying the factors which needs to be considered in deciding whether delay is reasonable or not:

".. The length of the delay, the reasons for the delay, the actions of the defendant, the actions of the prosecutor, availability of legal and judicial resources, the nature of the charge and prejudice to the defendant may be relevant."

9. Hon. Mr. Justice Paul Madigan in **Tafizal Rahiman v State** [2011] FJHC 298 at paragraph 7 stated that:

*"The facts to be considered when assessing whether delay is unreasonable or not are expounded in the Privy Council decision in **Flowers v The Queen** [2007] WLR 2396. The board held that the Court should take into account:*

- (i) *The length of delay;*
- (ii) *The reason for delay;*
- (iii) *Whether or not the defendant has asserted his rights to a speedy trial; and*
- (iv) *The extend of prejudice."*

Stay in this case was refused even though the delay was 5 years because they were not brought to court which was a system failure and not an unreasonable delay.

10. The State in their submissions has submitted that the trial dates were vacated due to the fact one or more accused being not present on these trial days. Careful perusal of the copy record confirms this position. Trial was vacated once on 11.5.2010 as prosecution witnesses have not been summoned. On the next three trial dates the trial was vacated due to non appearance of one or more of the accused.
11. Therefore it is clear that although there is delay of 5 years the co-accused had contributed to the delay in most of the instances.
12. In ***Nalawa v State*** CAV 0002/09 (13 August 2010) the Supreme Court of Fiji laid down the following principles may now be stated as basic to common law.

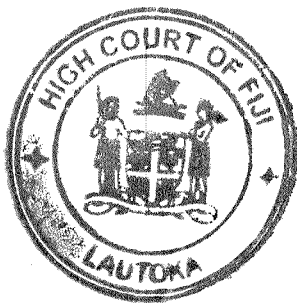
- "(i) even where delay is unjustifiable a permanent stay is the exception and not the rule*
- (ii) where there is no fault on the part of prosecution, very rarely will a stay be granted.*
- (iii) No stay should be granted in the absence of any serious prejudice to the defence so that no fair trial can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

13. The applicants have failed to show on balance of probabilities that due to delay he would suffer serious prejudice to the extent that no trial could be held.
14. A stay proceeding is an exceptional remedy, and will only be used if other remedies are not available to deal with the justice of the case. Considering all above, the delay in this case is not unreasonable.

15. Applying the above principles, I do not find merit in any of the grounds on which the application for stay is founded. The case is to be mentioned on 13.5.2014 in the Magistrate Court. The application for permanent stay of the prosecution is, accordingly, disallowed and dismissed.

16. Considering the date of filing of the charge, I direct the learned Magistrate to give priority to this case and conclude this matter within 6 months from 13.5.2014. Further I request both parties to co-operate with the learned Magistrate to conclude this matter within that time frame.

17. Copy of this ruling to be send to the learned Magistrate.




Sudharshana De Silva
JUDGE

At Lautoka
12th May 2014

Solicitors : Applicant in person
Office of the Director of Public Prosecutions for Respondent