

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 07 OF 2014

BETWEEN : GUSTON FREDRICK KEAN

Applicant

AND : STATE

Respondent

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

Date of Hearing : 29 July 2014

Date of Ruling : 31 July 2014

RULING

1. This is an application for permanent stay of proceedings.
2. The applicant was charged before the Magistrate Court of Lautoka with others on one count of Robbery with Violence contrary to Section 293 (i) (b) of the Penal Code.
3. The particulars of the offences are that the applicant with others unknown to the prosecution robbed Suresh Chauhan on 12th February 2007 and the total value of the items robbed is \$39,950.00.
4. This application was filed on 15th November 2013. The grounds for application are:
 - (i) Post charge delay and inordinate delay
 - (ii) Abuse of process
 - (iii) Prosecutorial misconduct.
5. He had filed an earlier stay application (HAM 136 of 2011) and Hon. Justice Priyantha Nawana had refused the same on 20th April 2012. His Lordship had held:

"The case for the applicant has been pending before the magistrate's Court from 23 February 2007, as the proceedings remained adjourned from time to time due to applications made both by the prosecution and by the applicant. Perusal of the record shows that both parties have equally been responsible for adjournments of the proceedings resulting in delay. There is nothing to indicate that any of such applications had ever been made unjustifiably. Instead, each and every application appears to have been made for the reasons recorded; and, the adjournments had been granted by the learned Magistrate upon consideration of the matters objectively at relevant points of time."

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. Morgan** [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:

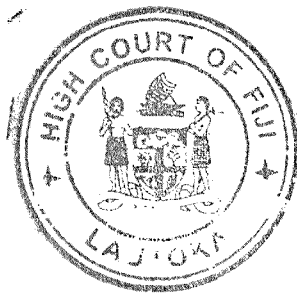
- (i) The length of delay;*
- (ii) The reason for delay;*
- (iii) Whether or not the defendant has asserted his rights to a speedy trial; and*
- (iv) The extend of prejudice."*

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 applicant had submitted the Judgment of R v F (TB) [2011] 2 Cr. App. R.13 where a permanent stay was granted in a sexual offences case in which complaints were made 35 - 40 years later. This case is clearly distinguishable from that case.

11. The applicant has 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.
12. Since the last stay application the case was taken for hearing and now the case is fixed for Judgment on 19.8.2014.
13. 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.
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 now fixed for Judgment 19.8.2014 in the Magistrate Court. The application for permanent stay of the prosecution is, accordingly, disallowed and dismissed.
16. Copy of this ruling to be send to the learned Magistrate.




Sudharshana De Silva
JUDGE

At Lautoka
31st July 2014

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