IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 49 OF 2014

BETWEEN:	**SALENDRA SEN SINHA**
	Applicant
AND:	**STATE**
	Respondent
Counsel:	**Applicant in Person** **Mr. S. Babitu for Respondent**
Date of Hearing:	22 July 2014
Date of Ruling:	20 August 2014

RULING

1. This is an application for permanent stay of proceedings.

2. The applicant is charged before the Magistrate Court of Lautoka with one count of Resisting Arrest.

3. The particulars of the offences are:

Statement of Offence

RESISTING ARREST: Contrary to Section 247 (b) of the Penal Code, Cap 17.

Particulars of Offence

SALENDRA SEN SINHA f/n **Jagendra Prasad** on the 21st day of January 2009 at Sigatoka in the Western Division resisted the lawful arrest by Detective Sergeant Number 2419 Simione Tui who was acting in the due execution of his duty.

4. The application was filed on 31 December 2013. This is his third stay application. In the first application (HAM 56 of 2011) Hon. Mr. Justice Paul K. Madigan on 13 July 2011 refused the application on the basis that delay of 2 years and 4 months was not unreasonable and it was difficult for the applicant to show that he has been prejudiced. It was directed to fix a hearing date on 18th July 2011. The Resident Magistrate was on leave on that day. On 13th December 2011 the applicant had pleaded guilty to the 1st count against him and was sentenced to 3 months imprisonment. The learned Magistrate had observed that the applicant was in remand for one year and nine months for this case and period in remand is sufficient imprisonment term for the applicant on 11th May 2012.

5. Then hearing dates was fixed on several times. However the case was not taken up for hearing on those dates due to various reasons.

6. The applicant came before this Court again in a stay application (HAM 375 of 2013) and this Court on 31st October 2013 directed the learned Magistrate to conclude this matter as soon as possible. The state was directed to make every endeavor to prosecute the case on 27.11.2013. The learned Magistrate was sitting in Nadi Magistrate Court that day. No hearing date is fixed for the applicant as yet.

7. Both parties have filed written submissions.

8. 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."

9. 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."

10. 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."

11. 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 trail; 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.

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. 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 unreasonable. The learned Magistrate or the prosecution had not taken all reasonable steps to conclude the trial without delay even after two rulings from this Court to conclude the matter without delay.

14. The main witness in this case is abroad and steps to record his evidence via Skype had failed.

15. Applying the above principles, I find merit in the grounds on which the application for stay is founded. The application for permanent stay of the prosecution is, accordingly allowed and proceedings are permanently stayed against the applicant in Lautoka Magistrate Court Case No. 162 of 2009.

Sudharshana De Silva
JUDGE

At Lautoka
20th August 2014

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