IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO: HAM 169 OF 2014

BETWEEN : **VILITATI VASUCA**

Applicant

AND : **STATE**

Respondent

Counsel : **Applicant in Person**
Mr. Semi Babitu for Respondent

Date of Hearing : **24 February 2015**
Date of Ruling : **27 February 2015**

RULING

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

2. The applicant was charged before the Magistrate Court of Lautoka with two counts of Robbery with Violence contrary to Section 293 (1) (b) of the Penal Code and one count of Assault with intent to Rob. The date of offence is 21st September 2008.

3. This application was filed on 4th July 2014. The ground for application is:

   (i) Delay

4. This is his first stay application to this Court.

5. Both parties have filed written submissions. I have carefully considered those.

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 but 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 extent 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 given the chronological order of events at the Magistrate Court. This case was pending in this Court till 21.1.2014. The delay in this Court was due to non-appearance of the accused. After extended Jurisdiction was given this case was first mentioned on 28.1.2014. The Magistrate was not available till 16.6.2014 as he was sitting in Nadi Court.

11. On 21.7.2014 the case was fixed for voir-dire hearing. However, the applicant had moved for a copy of disclosures. The applicant was not present in Court till 26.1.2015 as he was not produced. The next mention date is 10.3.2015.

12. 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.

13. The case in now to be mentioned on 10.3.2015 and a date for voir-dire hearing could be fixed on that date. As both accused in this case are now serving prisoners there could be no delay in future for non-appearance of the accused.

14. 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*

15. 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.

16. Applying the above principles, I do not find merit in the ground on which the application for stay is founded. The application for permanent stay of the prosecution is, accordingly, disallowed and dismissed.

17. 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 10.3.2015. Further I request both parties to co-operate with the learned Magistrate to conclude this matter within that time frame.

18. Copy of this ruling to be sent to the learned Magistrate.

HIGH COURT OF FIJI LAUTOKA

Sudharshana De Silva
JUDGE

At Lautoka
27th February 2015

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