IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

HAM NO. 201 OF 2015

BETWEEN : TARIQ SHAH

Applicant

AND : STATE

Respondent

Counsel : Mr Iqbal Khan for Applicant
Ms. Fatiaki for Respondent

Date of Hearing : 17th of March 2016
Date of Ruling : 24th of May 2016

RULING ON STAY OF PROCEEDINGS

Introduction

1. The Applicant files this notice of motion seeking following orders inter alia that;

   i) The hearing of Applicant's / Accused's criminal case No 515 of 2005 at Magistrate's court, Lautoka be permanently stayed,

   ii) The time of service of this motion be abridged,

2. The notice of motion is being supported by an affidavit of the applicant, stating the grounds for this application. The Respondent filed an affidavit of D/C Salen

Kumar, objecting to this application. The Applicant then filed his affidavit in response. The matter was then set down for hearing on the 17th of March 2016, where the learned counsel for the both parties agreed to have the hearing by way of written submissions. I accordingly directed the parties to file their respective written submissions, which they filed as per the direction. Having carefully considered the respective affidavits and written submissions of the parties and the copy of the record of the proceedings in the Magistrate's court, I now proceed to pronounce my ruling as follows.

Background

3. The Applicant has been charged in the Magistrate's court for one count of Unnatural Offence contrary to Section 175 (a) of the Penal Code. He was first produced in the Magistrates' court on the 16th of August 2005. Subsequent to series of adjournments, mainly on the applications made by the counsel of the Applicant, the Applicant pleaded guilty for this offence on the 2nd of November 2006. The Applicant was convicted and sentenced for seven years of imprisonment on the 3rd of November 2006. The Applicant appealed to the High Court against the said sentence. Justice Govind in his judgment dated 1st of December 2006, set aside the said conviction and sentence of the learned Magistrate and ordered a retrial before another Magistrate. Since then, this matter has been pending in the Magistrates' court in a lumbering speed.

4. The Applicant in his affidavit in support stated the brief chronological background of the proceedings up to his conviction and subsequent sentence in 2006. The Appellant then deposed that the delay of taking the matter to its conclusion has caused him many sufferings including in his personal life. The

Applicant further deposed that many of the witnesses of the prosecution are now not available. His two witnesses which he intends to call for his defence have now been deceased and another two witness of his defence has now been migrated. He claims in his affidavit that those four witnesses are crucial for his defence. The Applicant further stated that he wishes to call certain witnesses of the prosecution, if the prosecution opted not to call those witnesses for the prosecution. He deposed that those witnesses of the prosecution are also presently not available. Having deposed these grounds, the Applicant claims that he would potentially be prejudiced in this proceedings in the Magistrates court if the matter is proceeded irrespective of this long and protracted delay.

5. Detective Corporal Salen Kumar in his affidavit stated that the delay of this proceedings was mainly due to the conduct of the Applicant. He stated that the court has already been fixed this matter for hearing on eleven occasions. However, seven of those occasions, the Applicant has made an application to vacate the hearing on various grounds, such as non-availability of his counsel, change of his plea and change of his objection to the admissibility of the caution interview in evidence etc. D/C Kumar further deposed that all the witnesses for the prosecution are available and ready to proceed with the hearing.

6. In his affidavit of response, the Applicant merely repeated the contents of his previously filed affidavit.

7. Having briefly discussed the chronological background of the proceedings in the Magistrates' court and the submissions of the parties in this application, I now draw my attention to discuss the applicable laws pertaining to an application of this nature.

The Law

8. Section 15 (3) of the Constitution of Fiji states that;

"every person charged with an offence has the right to have the case determined within a reasonable time".

9. The approach of the jurisdiction of Fiji on the issue of stay of proceedings on the ground of delay has been developed in parallel with the approaches adopted in main common law jurisdictions.

10. The Fiji Court of Appeal in **Apaitia Seru v State (2003) FJCA 26; AAU0041.99S & AAU0042.99S (30 May 2003)** having adopted the principles enunciated in leading authorities in the jurisdictions of Canada and New Zealand, found that, where the delay is unreasonable, prejudice to the accused person could be presumed. The Fiji Court of Appeal in **Seru (supra)** held that;

"We take the view however that the delays are of an order where the presence of prejudice may be inferred. In any event we agree with Casey J (Martin at 430) that if prejudice or its absence is regarded as the dominating factor, the purpose behind s29(3) of ensuring the speedy disposal of charges is deflected. Likewise Bell v Director of Public Prosecutions [1985] AC 937, a Privy Council decision under the Jamaican Constitution, recognised the accused's rights may be infringed notwithstanding he is unable to point to any specific prejudice.

In any case, prejudice is not limited to fair trial considerations. Any defended prosecution necessarily takes time for its proper disposal but to have serious, high profile charges hanging over one's head for more than 4 years, with the ultimate specter of a

possible prison sentence, is in itself prejudicial. These considerations apply even more strongly to a person such as Seru who had occupied a prominent public position. As Lamer J said in Morin (at 33) there may be stigmatisation of the accused; loss of privacy; and stress and anxiety from a multitude of factors, including possible disruption of family, social life and work, legal costs, and uncertainty as to the outcome and sanction"

11. The approach adopted in England prior to the enactment of Human Rights Act of UK in 1998 has concisely discussed in **Attorney General's reference (No 1 of 1990) (1992) Q.B 630 at 643-644** , where Lord Lane CJ held that;

"Stay imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust. We respectfully adopt the reasoning of Bernnan J in Jago v District Court of New South Wales (1989) 168 C.L.R.23.

In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the action of the defendant himself, should never be the foundation for a stay,

In answering to the second question posed by the Attorney- General, no stay should be imposed unless the defendant 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

word, that the continuance of the prosecution amounts to a misuse of the process of the court. In assessing whether there is likely to be prejudice and if so where it can properly be described as serious, the following matters should be borne in mind; first, the power of the judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence, secondly, the trial process itself, which should ensure that all relevant issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the power of the judge to give appropriate direction to the jury before they consider their verdict".

12. Lord Lane CJ having carefully considered the competitive nature of the interests of public and the interests of the accused person in criminal proceedings found that the proceedings should be stayed on the ground of delay only in the most exceptional circumstances. If there are evidence that the accused is so prejudiced in the conduct of his defence and that a fair trial is no longer possible, then the remedy of stay is available. Other forms of hardship created by delay could be considered as a mitigating factor.

13. The enactment of the Human Right Act of UK in 1998 has not significantly changed the approach enunciated by Lord Lance in **Attorney General's reference (supra)** . Lord Bingham of Cornhill in **Attorney General's Reference No 2 of 2001 (2003) UKHL 68)** expounded the approach of the courts in England on the issue of stay of proceedings on the ground of delay in more elaborative manner, where his lordship found that;

"If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded

such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of condition (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing.

If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgment of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.

14. In conclusion, Lord Bingham of Cornhill goes on to state that;

"Criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in article 6 (1) of the Convention only if (a) a fair hearing is no longer possible, or (b) it is for any compelling reason unfair to try the defendant"

15. The Fiji Court of Appeal in **Mohammed Sharif Sahim v State (Misc Action No 17 of 2007)** has decided to revisit the principle enunciated in **Seru v State (supra).** Having comparatively reviewed the approaches of the jurisdictions of New Zealand, Canada, England and European Court of Human Rights, the Fiji Court of Appeal found that the governing principle in an application of this nature must always is to consider whether an accused person can be tried fairly without any impairment in the conduct of his defence. If the court finds an affirmative conclusion for that question, the prosecution should not be stayed on the ground of unreasonable delay only. The Fiji Court of Appeal held that;

In an earlier decision of this court, of Seru and Stephens, prejudice was presumed because of the length of delay and the history of the case. What the court did not address was the availability of alternative remedies in the absence of proof of actual prejudice.

The correct approach of the court must therefore be two pronged. Firstly, is there unreasonable delay and a breach of Section 29 (3) of the Constitution? In answering this question, prejudice is relevant but not necessary where the delay is found to be otherwise oppressive in all the circumstances. The second question is if there has been a breach what is the remedy? In determining the appropriate remedy, absence of prejudice becomes relevant. Where an accused person is able to be tried fairly without any

impairment in the conduct of the defence, the prosecution should not be stayed. Where the issue is raised on appeal, and the appellant was fairly tried despite the delay, his or her remedy lies in the proportionate reduction of sentence or in the imposition of a non-custodial sentence"

16. The Fiji Court of Appeal in **Mohammed Sharif Sahim (supra)** went further and held that the above stated approach would preserve the rights stipulated under Section 29 (3) of the Constitution (Presently Section 15 (3) of the Constitution of 2013) without taking an excessive and an exorbitant step of terminating the proceedings in criminal actions.

17. The Supreme Court of Fiji in **Nalawa v State (2010) FJSC 2; CAV0002.2009 (13 August 2010)** upheld the approach enunciated in **Mohammed Sharif (Supra)** and found that;

"That right has been expressed in numerous cases at Common Law and the following principles may now be stated as basic to the 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 the 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

iv) On the issue of prejudice, the trial court has processes which can deal with the admissibility of evidence if it can be shown there is prejudice to an accused as a result of delay,

18. Justice Goundar in **Johnson v State [2010] FJHC 356; HAM177.2010 (23 August 2010)** found that the stay of proceedings on the ground of delay is granted only if there is prejudice that the accused person could no longer capable of having a fair hearing. His lordship held that;

"While I accept that there is some delay caused by the prosecution, the burden lies with the applicant to prove that it is so extreme that he cannot have a fair trial (AG's Reference (No. 1 of 1990) (1991) QB 630). Stay of prosecution will only be granted on the ground of delay if there is prejudice of a kind that is incapable of being dealt by suitable directions from the trial court (Mohammed Sharif Sahim v. The State Misc. Action No. 17 of 2007).

In principle the court must weigh the interests of the accused in having a fair trial against the legitimate expectation of the community that those who commit serious crime are prosecuted. When an accused is prejudiced in having a fair trial by the delay, the proceedings can be stayed if there is no alternative remedy for the prejudice".

19. In view of the principle enunciated in **Mohammed Sharif Sahim (supra)** and **Nalawa (supra),** it appears that the applicable approach in determining of stay of proceedings on the ground of delay constitutes two main components. The first component is to determine whether the delay is unreasonable. If the court is satisfied that the delay is unreasonable, the court is then required to consider what is the appropriate and available remedy for such unreasonable delay. If the

court is satisfied that the accused person is still able to be tried fairly without any impairment in the conduct of his defence, the court should not stay the proceedings.

Analyses

20. Having being guided with the above discussed applicable judicial precedents and legal principles pertaining to the issue of stay of proceedings, I now turn onto this instant application. The Applicant's application for stay of proceedings is founded on the following grounds that;

    i) Non-availability of the material witnesses of the defence,

    ii) Non-availability of the witnesses of the prosecution,

    iii) Effect of the memory of the witnesses through the passage of time,

21. Justice Bruce in **Takiveikata v State [2008] FJHC 315; HAM039.2008 (12 November 2008)** found that the burden of proof in an application of this nature is on the Applicant and the standard of proof is balance of probability. Justice Bruce held:

    "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.

22. I now proceed to consider whether the delay as claimed by the Applicant is unreasonable and unjustifiable. Justice Goundar in **Johnson v State (supra)** has discussed the applicable consideration in order to determine the issue of unreasonable delay, where his lordship held that;

"In considering whether the delay is unjustifiable or unreasonable, the court must weigh a number of factors. In State v Rokotuiwai [1998] FJHC 196 Pain J identified a variety of factors to be considered, such as:

> *".... 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."*

Further Pain J said:

> *"They are not exhaustive list of considerations. Each case must be considered by the court on its own facts and circumstances, balancing the competing factors to determine whether the delay is unreasonable. If it is, a permanent stay may be the appropriate remedy, but that is not the only redress available [see Martin Tauranga District Court (supra) and R v B (supra)."*

23. Taking the chronological background of this instant case into consideration, the stages of the proceedings can be divided into two main phases. The first phase as the pre-retrial period and the second phase as the post - retrial period.

24. There had been eighteen (18) adjournments during the pre-retrial period. The Applicant was first produced in the Magistrate's court on the 16th of August 2005. Subsequently, the matter was adjourned on four occasions for the service of

disclosures. The matter was first set down for hearing on the 19th of January 2006. On the date of the hearing, the learned counsel for the Applicant, Mr. I. Khan made an application to recuse the learned Magistrate from hearing the matter on the ground that his law firm has issued judicial review proceedings against the learned Magistrate. The learned Magistrate had correctly and appropriately dismissed the said application. The learned counsel then withdrew from representing the Applicant. He admitted that he only informed the Applicant about his difficulty to represent him on the morning of the hearing date. The learned Magistrate has reprimanded the counsel for his unprofessional conduct. The matter had to adjourn for the Applicant to arrange another lawyer. He then retained the service of Mr. Shah.

25. The matter was then fixed for the hearing on 6th of April 2006. However, Mr. I. Khan appeared in court on the 3rd of April 2006 and informed that he was representing the Applicant again and was not available for the hearing on 6th of April 2006. The hearing on 6th of April 2006 was vacated accordingly. The matter was then fixed for hearing on the 1st of June 2006. The hearing was vacated again on the ground of the absence of Applicant as he was sick. The Applicant informed the court that the he wishes to change his plea when the matter was taken for hearing on 28th of July 2006. Accordingly it appears that either the Applicant or his counsel was responsible for the vacation of the hearing on six occasions during the pre-retrial period. The Applicant or his counsel has then sought six further adjournments to enter his plea of guilt. On 2nd of November 2006, the Applicant eventually entered his plea of guilt.

26. According to the copy of the record of the proceedings in Magistrate's court, it appears that the matter has been adjourned seventy-one (71) occasions during post-retrial period starting from the 15th of January 2007.

27. During the post- retrial period, starting from 15th of January 2007, the matter has been fixed for hearing on eleven occasions. Seven of those eleven occasions, the hearing has been vacated due to the applications or request made by the Applicant. The hearing date of 27th of September 2007 was vacated due to the sickness of the learned Magistrate. On 15th of January 2008, the hearing was vacated on the ground that the grounds of voir dire submitted by the Applicant was vague and not appropriate. I find that the learned Magistrate had reprimanded the prosecution for it. However, it is my opinion that it was the responsibility of the Applicant or his counsel to provide specific and accurate grounds for the voir dire hearing. Subsequently, the matter was set down for hearing on 10th of June 2008. However, the Applicant informed the court on 29th of April 2008, that he will change his plea and sought to vacate the hearing date of 10th of June 2008.

28. Subsequently, the matter had been adjourned to an unprecedented eighteen occasions just to enter the plea of guilt of the Applicant since the 29th of April 2008. It is regrettable to find that the learned Magistrate has simply ignored to record the reason for the adjournments on most of those eighteen adjournments. It appears that seven occasions of those eighteen adjournments, the matter had been adjourned on the request of the Applicant. Subsequent to this unprecedented and protracted adjournments, the Applicant did not enter plea of guilt as he informed the court on 29th of April 2008. Instead of that, he pleaded not guilty for the offence on 19th of June 2009.

29. The matter has then been fixed for eight more occasions for hearing. The Applicant has made applications to vacate the hearing on five of those eight occasions. On two of such occasions, that was 5th of June 2015 and 11th of November 2015, the Applicant has sought to vacate the hearing dates on the ground that the Applicant was intending to file an application to stay of proceedings in the High Court. The learned Magistrate had vacated these two hearing dates on the ground of his conclusion that the Applicant has merits to make such an application to stay of proceedings. The learned Magistrate was not available on two of those eight occasions. The copy record has not specifically stated the ground for the vacation of the hearing on one occasion that was on the 16th of September 2011. Moreover, it appears that this matter had been adjourned on numerous occasions in between those eight hearing dates without recording any ground for such adjournments.

30. In view of the above outlined chronological background of the proceedings, it appears that the conduct of the Applicant and his counsel, and the lack of judicial responsibility and management by the learned Magistrates who presided over this matter over the period of eleven years have effectively and adversely contributed to this protracted delay of taking the matter to its conclusion.

31. On 29th of April 2008, the Applicant has sought to vacate the hearing on the ground that he wishes to change his plea. However, on the 19th of June 2009, that was after more than a year and eighteen adjournments, he changed his position and pleaded not guilty to the offence, instead of plea of guilt as he informed to the court on 29th of April 2008. The Applicant has not provided any explanation or reason for changing his position.

32. Likewise, the Applicant advised the court on 9th of June 2014, that he wishes not to challenge the admissibility of his caution interview in evidence. Accordingly the hearing of voir dire was vacated on the 9th of June 2014. It appears that the Applicant has now deposed in his affidavit in response that he has already filed his ground for voir dire as he now intends to challenge the admissibility of his caution interview in evidence. Once again the Applicant has failed to provide any explanation or reason for changing his position in respect of the admissibility of his caution interview in evidence.

33. In the absence of any such explanation or reasons by the Applicant, it appears that the Applicant has been changing his position in time to time in order to prolong the proceedings. The conduct of the counsel of the Applicant, neither positively contributed nor shown any enthusiasm to take this action to its conclusion. Many occasions the matter had to adjourn on the ground of the unavailability of the counsel of the accused person.

34. It appears that this matter has been handled by seven learned Magistrates. Having given all due respect to the commitment and capabilities of these learned Magistrates, it is regrettable to find that apart from Resident Magistrate Mr. Wimalasena, all other learned Magistrates were generous in granting adjournments, sometimes even without recording the reasons for such adjournments.

35. Accordingly, it is my opinion that the delay of eleven years, though it is long and protracted, could not be presumed as unreasonable and unjustifiable. The conduct of the Applicant and his counsel have been the main adverse contributors of this protracted delay in this proceedings. Hence, I do not find that

the delay is systematic and contributed by the prosecution in order to impede the interest of the Applicant. I accordingly conclude that this delay of eleven years has not been an abuse of process.

36. I now turn onto the issue of non-availability of the defence witnesses as claimed by the Applicant. The Applicant in his affidavit in support deposed that two witnesses of defence namely Kulsum Bi and Ashik Hussain, who were present on the day of this alleged incident have now been deceased. He further deposed that another two witnesses of his defence namely Rakib Shah and Shan Ali have now been migrated. The Applicant claims that these witnesses are crucial witnesses in his defence.

37. Neither the affidavits of the Applicant nor his written submissions has specifically stated the nature of the evidence that those non-available witnesses were supposed to give and it's material relevancy to his defence.

38. Justice Goundar in **Johnson v State (supra)**, has discussed the scope of determination of the issue of prejudice that the Applicant would suffer in an application of this nature, where his lordship held that;

"However the applicant has not provided particulars of his missing witnesses. Without offering the relevance of the unavailable witnesses' testimonies, I am unable to make a finding on prejudice that the applicant will suffer at trial

39. In the absence of the information and particulars of the those unavailable witnesses of the defence and the nature of their supposed testimonies, the court could not properly assess the relevancy of the evidence of those witnesses and it impact on the defence of the Applicant. It is the onus of the Applicant to provide

such particulars. It is not sufficient to merely state in his affidavit that these witnesses are crucial to his defence and are not available for the hearing. Hence, I find that the Applicant has failed to satisfy the court on balance of probability that those unavailable witnesses are crucial to his defence and the continuation of the hearing in the absence of those witnesses potentially prejudice him in his defence.

40. The Applicant claims in his affidavit in support that some of the witnesses of the prosecution are now not available for the hearing. He further stated that he intends to call certain witnesses of the prosecution for his defence, if the prosecution opted not to call those witnesses for the prosecution. However, the Applicant has only mentioned it in his affidavit, but failed to provide any particulars of those unavailable witnesses of the prosecution and their relevancy to his defence. On other hand, the Respondent claims that all of their material witnesses are available and ready to adduce evidence in court. Hence, I do not find that this ground of the Applicant has any merit.

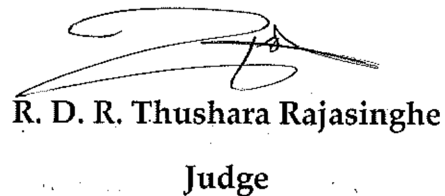
41. Apart from stating that this delay might affect the memory of the witnesses, the Applicant failed to provide any detailed information about the nature of the evidence and how this delay could affect the memories of the witnesses and their testimonies. It is my opinion that the issue of memory due to the delay could be more appropriately addressed by the learned Magistrate in his evaluation of evidence.

42. Accordingly, it is my opinion that this delay of eleven years is not unreasonable and also not unjustifiable. I further find that the Applicant is not prejudiced in the conduct of his defence and a fair trial is still possible.

43. Having considered the interest of public in criminal proceedings and the interest of the Applicant, it is my opinion that an expedient hearing would be an appropriate remedy, which is capable of preserve the rights of the Applicant as stipulated under Section 15 (3) of the constitution and also the rights of public. Hence, I refuse this application to stay of proceedings and dismiss it accordingly.

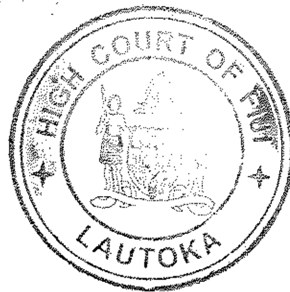
44. Though I am mindful of the fact that the cause list of the Magistrates' court is full of other prioritised cases, I still find that highest priority should be given to this instant matter as there has been a protracted delay. Hence, I direct the learned Magistrate to conclude the hearing of this matter within thirty (30) days of this order.

45. Further I direct the Deputy Registrar to serve a copy of this ruling to the relevant Learned Magistrate of Lautoka and to the Hon Chief Magistrate for their information forthwith.



R. D. R. Thushara Rajasinghe

Judge



At Lautoka

24th May 2016

Solicitors : **Messrs Iqbal Khan and Associates for Applicant**

Office of the Director of Public Prosecutions for Respondent