IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO.: HAM 17 OF 2016

BETWEEN: **ERONI VAQEWA**

APPLICANT

AND: **STATE**

RESPONDENT

Counsel	:	**Applicant in Person** **Ms. Sherlyn Kiran for Respondent**
Date of Hearing	:	**11th May, 2016**
Date of Ruling	:	**1st June, 2016**

RULING

Background

1. The Applicant, Eroni Vaqewa with others, is charged with 1 count of Robbery With Violence contrary Section 293 (1)(a) of the Penal Code, Cap 17 and 1 count of Warehouse Breaking Entering and Larceny contrary to Section 300 of the Penal Code, Cap 17.

2. Particulars of offence are that the Applicant with others on the 17th of November 2008 robbed Sailasa Koroi of $680.00 cash and at the time used violence on him. For the 2nd count the Applicant with others on the 17th of November 2008 broke and entered into Makan's Drugs warehouse and stole cash and items worth $2070.00.

3. By way of an application dated 25th January 2016, the Applicant made application for permanent stay of proceeding in this matter which is pending before the Lautoka Magistrates Court.

Law on Permanent Stay

4. Sections 14(2) and 15(3) of the Constitution of the Republic of Fiji provide as follows:

> *14 (2) Every person charged with an offence has the right –*
>
> *(g) to have the trial begin and conclude without reasonable delay;*
>
> *15 (3) Every person charged with an offence and ... has the right to have the case determined within a reasonable time.*

5. It is now established that a party affected by delay can invoke inherent jurisdiction of the High Court. In the recent decision of ***Karunaratne v State [2015] FJHC 849; HAM 150.2015*** (4 November 2015) Justice Madigan stated:

> *"Stay of Proceedings in criminal matters is granted in the rarest of circumstances where there has been undue delay in bringing proceedings against a party, or alternatively where there is undue delay in the conduct of proceedings already brought. Additionally and more importantly it is an inherent power of the High Court in cases of clear*

6. In ***Abdul Ahmed Ali, Uma Dutt & Roshni Devi v. The State*** (Appeal No. AAU0075 of 2007, 14 April 2008) the Court of Appeal, affirming Justice Shameem's Ruling, quoted the following part from her Ladyship's Ruling:

> *"The right to have a criminal case determined in a reasonable time must be determined by reference to the right of the individual to a fair trial process leading to a just result. In considering any such application the court will consider whether the delay is such as it is likely to prevent a fair trial. That will depend on various factors such as the length of delay, the reasons for the delay, the nature of the charge and the evidence to be called by either to a fair trial process leading to a just result. Whether considerable delay occurs*

in the trial itself, the effect of the court's ability properly to access the evidence at the conclusion will also be a relevant factor. In some cases, the delay will be such that the court may consider it has reached the threshold at which it will be 'presumptively prejudicial'

Shameem, J. went on to say that the case before her was one of 'great seriousness'. None of the delays there, apart from one in the Magistrates Court, had been caused by the Prosecution. A number were caused by the accused, with an election for an oral Preliminary Inquiry, then a change of mind on that point, and change of Counsel. However, many were systemic – including no Judge being located permanently in Labasa for criminal trials 'for almost four years', (perhaps) Legal Aid Commission Counsel 'shifting their position in relation to representing' the accused, the trial's being unlikely to proceed until October 2007. The Court Record contradicted a submission by Defence Counsel that the Prosecution was not ready for the Preliminary Inquiry. In all the circumstances, Her Ladyship said she did 'not consider that a Stay of proceedings will be justified'. The Court of Appeal agreed:" at para [28].

7. The Court of Appeal emphasized that it is not the rights of accused persons alone which are at issue in a criminal trial: The public, represented by the state, has an important right in seeing that justice is done both to accused persons and to the public represented by the State: *at para [29].*

8. In ***Johnson v State*** *[2010] FJHC 356; HAM 177.2010 (23 August 2010),* Justice D. Goundar in setting the principle in such cases 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 Armrod 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 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."

9. 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."*

Burden and Standard of Proof on Application for Stay of Proceedings

9. In the case of ***Ratu Inoke Takiveikata & Others v. State***, [2008] FJHC 315; HAM039.2008 (12 November 2008) Learned Justice Bruce at paragraph 12 stated as follows:

> *"Before a stay of proceedings could be considered, there must be a factual basis for that consideration. 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 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"

Grounds of Application

10. The applicant makes this application on the following grounds

(i) Post Charge delay and or inordinate delay

(ii) Abuse of process

(iii) Prosecutorial misconduct

(iv) Substantial prejudice

Chronology

11. It is pertinent at this stage to examine the chronology at the Magistracy as submitted by the Respondent, having referred to copy record of the Lautoka Magistrates Court File No. 72/10,

Date	Particulars	Party caused delay
9/2/2010	Case No. 891/08 and 913/08 amalgamated into CF 72/10 Accused 3 on Bench warrant. Accused 1 and applicant wants to engage counsel – LAC and private respectively.	
23/2/2010	Bench warrant on Accused 3 extended. Applicant remanded with consent.	
10/3/2010	Bench warrant on Accused 3 extended. Applicant not produced.	
11/3/2010	Bench warrant on Accused 3 extended. Applicant further remanded.	
25/3/2010	Bench warrant on Accused 3 extended. Applicant not produced – PO issued.	
7/4/2010	Bench warrant on Accused 3 extended – pending since Sept 2009. Applicant further remanded.	
21/4/2010	Adjourned.	
4/5/2010	Applicant not produced – reference to CF 562/09.	
18/5/2010	Bench warrant on Accused 3 extended.	

	Applicant further remanded.	
1/6/2010	Bench warrant on Accused 3 extended. Applicant not produced – PO issued. Bench warrant issued on Accused 1 as well.	
2/6/2010	Accused 1 appeared and informed that he was confused about dates – BW cancelled. PO for Applicant.	
8/7/2010	Bench warrant on Accused 3 extended. PO issued for Applicant – not produced.	
16/9/2010	Bench warrant on Accused 3 extended. Applicant further remanded.	
28/10/2010	Bench warrant on Accused 3 extended. Applicant further remanded.	
16/12/2010	Accused 3 appeared whilst Accused 1 and applicant did not appear – BW on Accused 1 and PO for Applicant and Accused 3.	
29/12/2010	Accused 1 surrendered to court – released on $100.00 cash bail.	
20/1/2011	Accused 1 and Accused 3 not present – cash bail for Accused 1 confiscated. PO for Accused 2.	
21/1/11	Bench warrant cancelled for Accused 1.	
7/4/2011	Bench warrant on Accused 3 extended. Applicant further remanded.	
16/6/2011	Prosecution made application to withdraw charges against Accused 3 – accordingly he is discharged. PO issued for Applicant – not produced.	
1/7/2011	Accused 1 wants to challenge Caution Interview and gave his rounds orally. Applicant also wants to challenge caution interview and gave his grounds orally.	
12/8/2011	Applicant not produced – PO issued. Accused 1 present.	
21/10/2011	Applicant not produced – PO issued. Accused 1 present.	
25/11/2011	Fixed for *voir dire* on 19/4/2012. Accused states he lost his disclosures – prosecution ordered to serve another copy on same day.	

19/4/2012 *(voir dire)*	**At 12.35 Prosecution informed that disclosures will be served in 2 weeks.**	**Prosecution**
10/5/2012	Disclosures served – *voir dire* hearing fixed for 13 July 2012.	
13/7/2012 *(voir dire)*	**Full disclosures to be served. Photocopy to be made in the registry.**	**Prosecution**
30/7/2012	*voir dire* hearing on 24th September 2012.	
24/9/2012 *(voir dire)*	**Accused persons to file written *voir dire* grounds. LAC on record for Applicant.**	**Court/defence**
15/10/2012	RM on leave.	
3/12/12	Grounds filed – *voir dire* hearing on 15th May 2013.	
15/5/2013 *(voir dire)*	**Applicant not produced, applicant serving in Naboro – adjourned.**	**Applicant/Court**
13/8/2013	Applicant produced later – *Voir Dire* hearing fixed for 31st March 2014.	
31/3/2014 *(voir dire)*	***Voir Dire* hearing on 6th May 2014.**	**No clear – no reasons provided.**
6/5/2014 *(voir dire)*	**RM not sitting adjourned to 20 May 2014 for trial.**	**Court**
20/5/2014 *(voir dire)*	**Applicant not produced. Adjourned to 22 July 2014 at 12 noon for *voir dire*.**	**Applicant/Court**
22/7/2014 *(voir dire)*	**Adjourned – Accused 1 present, Applicant not present.**	**Applicant/Court *Appears RM was not sitting as well.**
11/8/2014	Adjourned – Accused 1 not present, Applicant present.	
18/8/2014	RM only sitting for another *voir dire* hearing – matter adjourned. Accused 1 and Applicant not produced.	
8/9/2014	*Voir Dire* hearing on 22 October 2014.	
22/10/2014 *(voir dire)*	**Prosecution applies to start part-heard as only 3 witnesses are present. Others were involved in robbery investigation that occurred previous night. LAC for applicant wants station diary, cell book, police attendance. Prosecution informed that cell book disclosed but station diary cannot be located. Accused 1 wants to file *voir dire* grounds. Adjourned.**	**Accused 1/LAC/Prosecution**

3/11/2014	Adjourned – RM not sitting.	
1/12/2014	Applicant not present – adjourned. RM not sitting.	
19/1/2015	Prosecution informed disclosures have been served but Applicant not present – PO issued.	
26/1/2015	Applicant not present – PO issued.	
17/2/2015	*voir dire* hearing fixed for 24/8/2015.	
24/8/2015 *(voir dire)*	**RM is sick.**	**Court**
5/10/2015	Applicant withdrew from LAC representing him and made application for acquittal – refused. Adjourned to fix *voir dire* hearing.	
25/1/16	VD disclosures served – *Voir Dire* hearing on 15th February 2016. Applicant made application for speedy trial.	
15/2/2016 *(voir dire)*	**All prosecution witnesses present. Adjourned as court file sent to High Court.**	**Court.**
5/4/2016	Adjourned.	

Analysis

12. This Court must find that the delay was unreasonable so as to constitute an abuse of process and secondly that there is evidence showing that the accused would be prejudiced in the conduct of his own defence. The Court must be satisfied that because of the delay and the prejudice Applicant would not be accorded a fair trial and a permanent stay is the only option available to ensure justice.

(i) Post Charge Delay

13. Delay is somewhat considerable in this case. Charges have been amalgamated in 2010 but the Applicant had originally been charged in 2008. No material is available in the record about proceedings from the original charge to the amalgamation. Now the Court

has to examine whether the delay of nearly eight years is unreasonable in all the circumstances of this case.

14. Delay to a greater extent was due to Applicant (2nd accused) or his co-accused not being present in court when the matter was taken up. Applicant is a serving prisoner and production orders had been issued on numerous occasions for him to be produced in Court. One of the co-accused was on bench warrant for a considerable period. On eleven occasions, *voir dire* inquiry had to be postponed due to various reasons and the Applicant had been partly responsible for some of the postponements.

15. Prosecution on the other hand has caused hearing to be vacated on two occasions because 2nd set of disclosures could not be served on time. Applicant is partly responsible there also. Accused had been served a set of disclosures as of right but they had lost it. Prosecution was required to serve them a second set of disclosures. It appears that the Police Prosecution who was handling the matter did not have resources to make copies for the 2nd set of disclosures and therefore Court ordered them to be coped at the Court registry. Hearing would have commenced if not for those reasons.

16. *Voir dire* hearings fixed on at least 8 occasions after the first two adjournments triggered by the Prosecution were vacated either because the Applicant was not produced, the Resident Magistrate was on leave and/or sick or the Accused wanted something more as part of disclosures.

17. Therefore, delay was not substantially caused by the Prosecution but by other stakeholders involved including the Applicant and the Court. Delays caused by accused not being brought to court and court restrains are system failures. Delays caused by such failures can hardly be regarded as unreasonable.

(ii) Abuse of Process and Prosecutorial Misconduct

18. Applicant has not shown as to how the process had been abused. There is no evidence of prosecutorial misconduct either. Without the Applicant's submissions, it is difficult to comprehend as to how the abuse of process occurred and what the prosecutorial misconduct was. It appears that Applicant is asserting that the prosecution is responsible for the delay and that tantamount to abuse of process and prosecutorial misconduct. However, Prosecution was not alone causing the delay but it was substantially caused by accused, court or just as a result of system failure.

(iii). Whether Applicant asserted his right for a speedy trial

19. The Applicant had failed to assert his right to a speedy trial at the magistracy. Except on one occasion he had not recorded his opposition to postponements. He asserted his right only on the same day as he filed this application.

(iv). Prejudice

20. The Applicant submits that the delay caused will prejudice him as he will not get a fair trial. He has failed to explain as to how the alleged prejudice is caused. He has to prove on a balance of probability that there are some serious prejudices will be caused that will deny him a fair trial. However he has failed to show or prove any prejudice that will be caused to him in conducting his defence or in asserting his fair trial guarantees. Just saying that he will be prejudiced is not sufficient. There is no justifiable reason to stay the proceedings.

21. Moreover, there is another accused in this matter and he also must have been affected by the delay. He has not asserted his right to a speedy trial or sought a stay in this Court. Hence a stay of proceedings would not be just or fair.

22. Applicant has been a serving prisoner for several years now. Hence the delay has not caused considerable prejudice to his right to liberty. The issue of prejudice, if any, caused by delay can be raised at the trial and at the sentencing stage. The trial magistrate is bound to consider the delay and prejudice thereby caused to the Applicant.

23. The burden is on the prosecution to prove the charges beyond reasonable doubt; the Applicant does not have to prove anything. Therefore no prejudice will be caused to the Applicant on account of non- availability of witnesses or their memory loss caused over time. Applicant has not explained his defence and how it is going to be affected by the delay.

(v). Alternative Remedy

24. In fact, there should not be any prejudice at all because a fair trial is still possible. ***Nalawa v. State*** (Supra). Without any doubt, the court can still hold a *voir dire* enquiry to test the admissibility of the caution interviews and further also have a fair hearing of the substantive matter. Ultimately, the prosecution must prove the offence against him beyond reasonable doubt.

25. The applicant in ***Sinha v. State*** [2013] FJHC 562; HAM 355.2013 (25 October 2013), had made several application for stay of proceeding of the charges which were pending since 2008 but every time court sent the matter back to the Magistrate to finish trial because delay was caused by all parties involved and the charges were of public interest.

26. High Court is not inclined to satay proceedings at the magistracy when alternative remedies are available to the Applicant. This court can set a time frame within which the trial shall be concluded by the Magistrate. Apart from that right of Appeal is available to the Applicants in the event he is being found guilty in a trial which had dragged on for years. As was held in ***Seru*** Crim App. AAU.0041/42 0f 1995, the ground of delay alone is sufficient to quash a conviction and sentence if prejudice thereby caused is proved.

27. It is important to note the provision of Section 44(4) of the Constitution where it is provided:

> *"The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this Section if it considers that an adequate alternative remedy is available to the person concerned.*

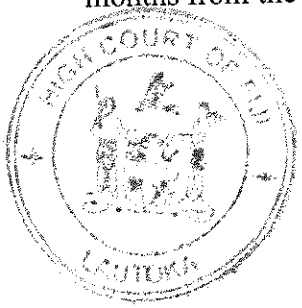
(vi). Conclusion

28. I am not persuaded that a fair trial is not possible. Nor am I persuaded that it would otherwise be unfair to try the Applicant. Applicant is entitled to a fair trial at the magistracy, and to raise all those matters he has raised in this application in the course of it. In that circumstance, it is not appropriate to stay the proceedings. The public interest in final determination of criminal charges requires that a charge should not be stayed, because the alternative of trial expedition is just and appropriate in all the circumstances.

29. On the 15.02.2016, all Prosecution witnesses were present in Court and the Prosecution was ready to proceed with the hearing. Still the learned Magistrate was not inclined to take up the matter for hearing because of this Stay application. Mere filing of a stay application in the High Court should not be a good ground to grant an adjournment unless there is a Stay Order. Therefore following orders are made:

Orders

1. The application for a stay is refused.
2. The Learned Magistrate at Lautoka hearing the case is directed to conclude the *voir dire* proceedings, if any, and trial proper within three months from the date he has received this Order.



Aruna Aluthge
Judge

At Lautoka
1st June, 2016

Counsels: **Applicant in Person**
Office of the Director of Public Prosecution for Respondent