

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO.: HAM 61 OF 2016

BETWEEN:

MESAKE LIGAVAI

APPLICANT

AND:

STATE

RESPONDENT

Counsel : **Applicant in person**

Mr. S. Kiran for Respondent

Date of Hearing : **15th July, 2016**

Date of Ruling : **22nd July, 2016**

RULING

1. The Applicant files this notice of motion seeking a permanent stay of proceedings in criminal case No.CF 721 of 2007 in the Magistrates Court at Lautoka. He is charged with one count of Robbery contrary to Section 293(1) (a) of the Penal Code, Cap 17. Particulars of offence are that the Applicant with others on the 13th of September, 2007 robbed the complainant of \$300 cash and other items valued at \$ 930.

Background

2. On the 24th September 2007, Applicant was first produced with two others before the Magistrates Court at Lautoka.
3. Matter was dragged on for nearly 7 years for various reasons. On the 30th of September, 2014, Applicant invoked the jurisdiction of this Court to stay the proceedings of the Magistrates Court.
4. Having considered the said application, my predecessor Justice De Silva had found that there was no unreasonable delay and having dismissed the said application had directed the Magistrate to conclude the matter within 6 months from the 13th April, 2015.
5. Magistrates Court failed even to start the trial within the stipulated timeframe. Being aggrieved by the non compliance of the said Order, Applicant filed this 2nd application on the 4th of March, 2016 on following grounds:
 - a. Unreasonable delay
 - b. Abuse of Process
 - c. Prosecutorial misconduct
 - d. Non-compliance with the previous Order.

The Law on Stay

6. In the case of *Ratu Inoke Takiveikata & Others v. State* [2008] FJHC 315; HAM039.2008 (12 November 2008), Justice Bruce at paragraph 20 stated that “*it is that the source of power of a court such as the High Court of Fiji to make an order of stay of proceedings is found within the inherent power of that court to regulate its own process*”.
7. In the case of *Asesela Tawake v. State* [2009] FJHC 35; HAM 126D.2008 (6 February 2009), Justice Shameem explained the law on stay.

She stated in paragraph 9 that:

“the law has shifted from a position that a stay must be granted once delay is held to be unreasonable, to a position that a stay should be granted where the delay is held to be unreasonable and the accused person is unlikely to get a fair trial. This is a case of chronic post-charge systemic delay”.

8. At common law, a stay was only ordered when there were no other available remedies to the accused and when a fair trial was no longer possible. This was the law as set out in *Attorney-General’s Reference (No. 1 of 1990) (1991) QB 630*. At common law the relevant questions were:

1. *Was the delay unreasonable?*
2. *Has the delay deprived the accused of a fair trial?*
3. *Are there other available remedies to alleviate the prejudice?*

However, it is not to say that this list of considerations set as necessarily exhaustive but under one heading or another it encompasses all the factors that may be regarded as relevant in the present case”. (emphasis mine)

9. In *Seru (2003) FJCA 26 (30 May, 2003)* the Court of Appeal considered all the matters set out in *Martin v. Tauanga District Court [1995] 2 NZLR 419*, where it was said that ‘delays approaching a certain threshold may be regarded as “presumptively prejudicial”’.

Burden and Standard of Proof on Application for Stay of Proceedings

10. In the case of *Ratu Inoke Takiveikata & Others v. State, (Supra)* 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”

Analysis

11. Having analysed the law relating to Stay of Proceedings, I now turn to apply the law to the factual scenario of this case. Since my predecessor had already ruled that there was no unreasonable delay as at 5th March, 2015, I do not delve into the chronology at the magistracy prior to that ruling.

Delay

12. The chronology at the magistracy identifies the length of the delay, almost 9 years from the charge to the second Stay application. Magistrates Court has failed to comply with the direction given by this Court to conclude the matter within six months in the previous ruling. When considered in the context of considerable contribution to the delay by the Prosecution and the Court despite the direction of this Court, it can be said that the delay is unreasonable.
13. Delay is serious in that it ‘was such that the Court should hold that there had been an abuse of the process. To have serious charge hanging over one’s head for almost 9 years, even after a direction of this court, would be prejudicial to the Applicant.
14. The delay occasioned after the previous ruling of this Court is mainly due to 3rd accused not being brought to court or bench warrant not being executed. Applicant had been present in Court right throughout. After sending the case back to the Magistrates Court with the said direction, the case had been called 15 times during the period between 25th May 2015 and 18th April, 2016. Applicant was concerned about the delay and he raised alarm.
15. If the State was unable to execute the arrest warrant or otherwise secure the attendance of the 3rd accused, clear provisions are present both in the Criminal Procedure Decree 2009 [Section 171 (1) (a)], and the Constitution to try the case *in absentia*. Neither the

Prosecution nor the Court took a reasonable effort to give effect to these provisions despite the alarm raised by the Applicant and the direction given by this Court to conclude the matter within six months.

16. I am unable to agree with the contention of the Respondent that this is a case of system failure. The delay caused was not inevitable. The State was supposed to possess all the information pertaining to detainees and, if the 3rd accused was in remand for another matter, his presence could have been secured by the Prosecution through the Court. Even the Court had failed to follow up its own Production Order in a proper manner and to take a proactive action to secure the presence of the 3rd accused in Court.
17. In *Apaitia Seru v. State (2003) FJ.CA.* the question of delay was considered under the 1997 Constitution. The Court held that because there had been a 4 year 10 months delay, prejudice could be presumed.
18. *Seru* was revisited in *Mohammed Sharif Shaim v. State MISC.ACTION No. 17 of 2007*, a decision made before the abrogation of the previous Constitution. The High Court had held that a 5 year' delay after charges had been laid in the Suva Magistrates Court was unreasonable. However, instead of ordering a stay, the High Court had ordered that the trial commence within 40 days.
19. Having considered the Applicant's previous Stay application this Court had adopted the approach taken in *Mohammed Sharif Shaim* by sending the case back to the trial Court with a clear direction to expedite the trial. I can't see why this Court should resort to the same action again when its previous direction had failed to achieve the stated objective.
20. The Courts in Fiji have shown at all levels their respect for the rights of accused persons to a fair trial, that is a trial according to law. This includes the right to trial without delay. Although Fiji has not ratified the International Covenant on Civil and Political Rights, Government of Fiji has shown its willingness to respect the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights by the

promulgation in 2014 of a Constitution with a comprehensive Bill of Rights which incorporates the International Covenant on Civil and Political Rights. Courts in Fiji are bound to give effect to the Bill of Rights of the Constitution and the policy of the government.

21. Applicant positively asserted his right to a speedy trial at the magistracy. Having been aggrieved by the delay, he even filed a stay Application in this Court.
22. I find the delay in this case to be oppressive in all the circumstances so as to hold that there had been an abuse of process. Looking at the sum of the relevant factors discussed in this ruling, I am driven to the conclusion that in the circumstances of this case, the delay which occurred between charge and trial was unreasonable.

Prejudice

23. Respondent submits that Applicant has failed to show as to how he was to be prejudiced by the delay. Applicant is unrepresented and has filed this application in person. He may not be competent to explain to Court the prejudice to be caused by the delay to the extent that a Counsel would do. Given the exceptional circumstances of this case it can be said that delay is presumptively prejudicial to him.
24. In addition to that this Court finds two occasions where Applicant has been prejudiced by the delay. Firstly, as a serving prisoner, he would be denied his entitlement to get a prison term concurrent to the present term he is now serving if he were to be convicted by the Magistrate in the present case. Therefore, the State's proposition that Applicant will not be prejudiced because he is already serving a prison term is not sound.
25. Secondly, the delay caused in contravention of the previous Ruling of this Court has frustrated the Applicant's legitimate expectation. Applicant is entitled to expect that the direction given by this Court is obeyed and complied with by the Magistrate Court. Not only that, it is a matter of public interest. Public is interested in seeing that Orders of higher courts are complied with by lower Courts.

Alternative Remedy

26. High Court is not inclined to satay proceedings at the magistracy when alternative remedies are available to the Applicant. This court had already set a time frame within which the trial shall be concluded by the Magistrate. Magistrates Court and the Prosecution have failed, without a reasonable excuse, to adhere to the time frame set by this Court. Applicant has exhausted all the remedies at his disposal.

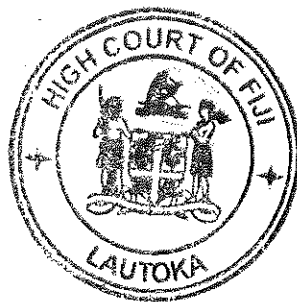
Conclusion


27. In these circumstances, it is appropriate to stay the proceedings.

ORDERS

28. 1. The application for a permanent stay is allowed.
2. Proceeding against the Applicant in criminal case No.CF 721 of 2007 in the Magistrates Court at Lautoka is stayed.

Registry is directed to send this Order to the Magistrates Court at Lautoka and a Copy to the Chief Magistrate.




Aruna Aluthge
Judge

At Lautoka

22nd July, 2016

Solicitors: Applicant in Person

Office of the Director of Public Prosecution for Respondent