IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO.: HAM NO. 169 OF 2016

BETWEEN: JOSEFA LUTUNATABUA

Applicant

AND: STATE

Respondent

Counsel : Applicant in Person

Ms. S. Kiran for Respondent

Date of Hearing : 02nd March, 2017

Date of Ruling : 10th March, 2017

RULING

Introduction

1 The Applicant files this Notice of Motion for permanent stay of proceedings in the Criminal Case No. CF 412 in the Magistrates Court at Lautoka on following grounds:

I. Delay

II. Abuse of process

III. Prosecutorial Misconduct

2. The Applicant with two others is charged in the Magistrates Court at Lautoka with four counts of Robbery with Violence contrary to Section 293(1) (b) of the Penal Code.

3. The Applicant was formally charged on 16th July 2009 and the case has been pending for nearly eight years without final resolution.

The Law

4. In **Attorney General's reference** (No 1 of 1990) (1992) Q.B 630 at 643-644) CJ Lord Lane discussed the principles applicable in stay of proceedings on the ground of delay, where His Lordship observed;

> *"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 then 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".

5. The Supreme Court of Fiji in ***Nalawa v State*** **[2010] FJSC 2; CAV002.2009 (13 August 2010)** adopted the common law approach and held;

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.*

6. In view of aforementioned observations, the Applicant is required to establish 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 words, that the continuance of the prosecution amounts to a misuse of the process of the court.

7. There can be no doubt that a delay of nearly eight years is not justifiable in the absence of apparent complexities in the case. According to the chronology at the Magistracy, all the stake holders of the criminal justice system, the Prosecution, the Defence, the Court and the Correction Service have been responsible for the delay. Up to 2014, a major part of the delay had been due either because the accused were on bench warrant or not produced in court.

8. It appears from the record of the Magistrates Court that *voir dire* proceedings had been terminated before Resident Magistrate, Ms. Girihagama on 14th October, 2014 and the matter had then been fixed for ruling on 23rd February, 2015. However, the Ruling was not delivered as scheduled. Then the proceedings were taken over by Resident Magistrate Mr. Wimalasena whereupon, the accused had agreed to a ruling being given on the basis of evidence already lead before Ms. Girihagama.

9. Ruling on *voir dire* has eventually been pronounced on the 8th November, 2016 whereby the confession made by the Applicant to police has been made inadmissible in evidence. It appears that the delay in delivering the Ruling has been mainly due to non production of the accused in Court.

10. Therefore, it cannot be concluded that the main culprit of the delayed prosecution of the case was either the Prosecution or the Court. Defence has contributed considerably to the delay. Furthermore, there is no evidence that

the Applicant had asserted his right to a speedy trial at the Magistracy. Under these circumstances, I find no prosecutorial misconduct or abuse of process by the Prosecution.

11. I now turn to the issue of serious prejudice. The Applicant has not shown any prejudice, not to mention serious prejudice, being caused to him by the delay.

12. In view of Section 44(4) of the Constitution, 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. Apart from that right of Appeal is available to the Applicants if he is found guilty in a trial which had dragged on for years. As was held in *Seru* Crim App. AAU.0041/42 0f 1995, that the ground of delay alone is sufficient to quash a conviction and sentence if prejudice thereby caused is proved.

13. It appears from the record that the *voir dire* proceedings had been started midway while the trial proper was in progress. Number of Prosecution witnesses had already concluded their evidence. The Ruling on *voir dire* has now been pronounced. If the Defence is consenting, the trial can be continued on the evidence already lead and be concluded within a very short period.

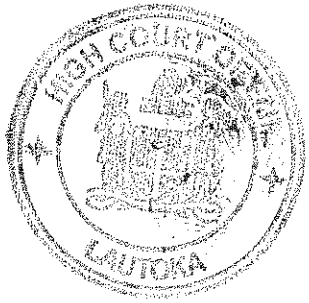
Conclusion

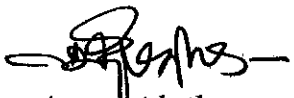
14. I am not persuaded that a fair trial is not possible despite the delay to which the Applicant has also contributed. It is not appropriate to stay the proceedings. The public interest in final determination of criminal charges requires that a charge should not be stayed, because the alternative of trial expedition is just and appropriate in all the circumstances of this case.

Therefore, following orders are made:

15. Orders

1. The application for a stay is refused.
2. The learned Magistrate at Lautoka hearing the case is directed to conclude the trial within six months from the date he has received this Order.
3. I direct the Deputy Registrar to send a copy of this Ruling to the Resident Magistrate forthwith with a copy to the Chief Magistrate.





Aruna Aluthge
Judge

At Lautoka
10th March, 2017

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