IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBM 69 of 2016

BETWEEN : **JOSHUA BENJAMIN ROGERS**

APPLICANT

AND : **DIRECTOR OF PUBLIC PROSECUTION**

FIRST RESPONDENT

AND : **THE ATTORNEY GENERAL OF FIJI**

SECOND RESPONDENT

AND : **SOLICITOR GENERAL OF FIJI**

THIRD RESPODENT

Counsel : **The Applicant – In Person**
Mr. S. Vodokisolomone for the 1st Respondent
Ms. Pranjivani R. for 2nd and 3rd Respondents

Dates of Hearing : **25th November, 2016**

Date of Judgment : **27th January, 2017**

JUDGMENT

INTRODUCTION

1. The Applicant who is an inmate in the prison made this application by way of Motion supported by an affidavit seeking an early date for hearing of his appeal. This is an application seeking Constitutional Redress for alleged breach of Sections 14(2)(g) and 15(3)of the Constitution of the Republic of Fiji. The Applicant states that there is an unreasonable delay in the hearing of his appeal and this is a breach of Sections 14(g) and 15(3) of the Constitution of the Republic of Fiji. So he seeks an early hearing of his appeal in the Court of Appeal. The Applicant is seeking an order from this court in order to prevent unreasonable delay.

FACTS

2. According to the affidavit in support of the Application following facts are revealed.

   i. The Applicant was convicted by a Magistrate exercising extended jurisdiction of the High Court, upon a plea of guilty on 14th September, 2010.

   ii. The Applicant made a leave to appeal against the sentence and the leave was granted by the Court of Appeal in 2013 by a single judge of court of appeal.

   iii. Since then no call over date was assigned for the said appeal.

3. The affidavit filed by the 1st Defendant states as follows

   i. The Applicant was sentence for 8 years for Robbery with Violence on a guilty plea on 14th September,2010 by Magistrate's Court exercising extended jurisdiction of the High Court.

   ii. The Applicant had appealed against the sentence in Criminal Appeal No AAU 0032 of 2011 and the leave to appeal was heard on 22nd March, 2013 and the ruling was delivered on 28th March, 2013 granting leave to appeal by a single judge against the sentence imposed to him. The parties await listing of the hearing of the said appeal.

   iii. The Applicant had also filed an application seeking extension of time for leave to appeal against the conviction and sentence in HAC 081 of 2011. This application seeking leave to appeal was filed after 2 years and 7 month delay and this was dealt by a single judge of Court of Appeal and the leave was refused on 25th July, 2014.(see Annexed 2 to the affidavit of 1st Defendant filed on 8th November, 2016.

4. The Motion seeking Constitutional Redress sought following orders (in the said motion these are stated as grounds)

   a. "That a hearing date should be set as soon as possible.
   b. That my appeal should be heard without unreasonable delay.
   c. That an order should be imposed on the issue to prevent the delay."

5. Considering the said reliefs it can be safely deduced that the Applicant is seeking Constitutional Redress in order to obtain an early hearing (i.e to expedite) of his appeal against the sentence. It is the only pending matter before the Fiji Court of Appeal. It should also be noted that at the hearing, neither party indicated to me substantive or procedural law that support such an application for expedited hearing of an appeal in the Fiji Court of Appeal. It is a sine qua non for such a relief if it can be granted by this court or any other court by way of Constitutional Redress or any other manner.

ANALYSIS

6. Section 14(2) (g) of the Constitution of the Republic of Fiji (The Constitution) states as follows

> *'(2) Every person charged with an offence has the right*
> *(a)...*
> *(b)..... (f)*
> *(g) to have the trial begin and conclude without* ***unreasonable*** *delay.'* (emphasis added)

7. The Section 14(2) the Constitution deals with rights of an accused. At the first impression the said right to conclude the trial without unreasonable delay is a right of an accused to have a fair trial. It is one of the ingredients of impartial and fair trial. In ***Martin v Tauranga District Court*** 1995 2NZLR 419 at page 423 Cooke P cited with authority following the passage from the judgment delivered by Lord Templeman [1]

> *"The right to trial 'within a reasonable time' secures, first, that the accused is not prejudiced in his defence by delay and secondly, that the period during which an innocent person is under suspicion and any accused suffers from uncertainty and anxiety is kept to a minumu."*

8. The trail of the Applicant had concluded with the plea of guilty by the Applicant who was also represented by a legal practitioner and sentencing by the Resident Magistrate exercising an extended jurisdiction. The Applicant's allegation is not regarding the time taken for the trial to conclude. There is no allegation that there was an unreasonable delay in the court of first instance. So on the material before me there is no violation of Section 14(2)(g) of the Constitution of the Republic of Fiji (the Constitution) hence no Constitutional Redress could be obtained on the basis of violation of Section 14(2)(g) of the Constitution.

9. Apart from the said Section 14(2)(2)(g) of the Constitution Section 15(3)of the Constitution reiterate the right of parties before a court not to delay in 'determination' by courts and states as follows

> *'Every person charged with an offence and every party to civil dispute has the right to have the case determined within a reasonable time'*

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[1] Mungroo v R [1991] 1 WLR 1351 at p 1352

10. In my judgment 'every person charged ... has a right to have the case determined within a reasonable time' should be interpreted to include not only the time period for trial but also any appellate process that a person is entitled under the law as well.

11. In the case of ***Martin v Tauranga District Court*** 1995 2NZLR 419 at page 420 Cooke P stated in obiter the scope of the Bill of Rights relating to delay in litigation and stated that time period starts with 'the first official accusation' and 'no doubt extends to appeal process'.

12. It will end with the determination of highest court in Fiji (The Fiji Supreme Court, if leave granted in accordance with the law). In my judgment it would not include plethora of applications for review of the Supreme Court's determination. It would be an abuse of process to make such review applications to the Supreme Court one after another and to expect all such applications to be dealt swiftly. It would be unreasonable to use the limited resources of highest court (Fiji Supreme Court) endlessly relating to one matter.

13. It should be borne in mind that word 'unreasonable' in the Section 15(3) of the Constitution should be interpreted taking in to consideration factors affecting delay in litigation. Some of the factors are directly or indirectly related to the available resources. So, if a person makes number of similar applications to the same court it would not only be an abuse but it would also aggravate delay.

14. It is impossible to prevent 'lag time' or 'delay' in any process when there is a complete termination of one process and a new beginning starts in a different process.

15. In this case the plea and sentencing was before a Resident Magistrate, but appellate process was in the Court of Appeal as it was an exercise of extended jurisdiction. Since it was an appeal from a plea of guilty the leave against sentence was granted by single judge of the Court of Appeal and the hearing of appeal against sentence would be in the full court of the Court of Appeal. At each stage there is a termination of the process with a determination by a judicial officer with a fresh start in a different process. All these

changes of processes will invariably incur delay, but whether it is unreasonable or not needs careful consideration.

16. In the case of ***Martin v Tauranga District Court*** 1995 2NZLR 419 at page 424(Cooke P) cited (a decision of Supreme Court of Canada) following paragraph of Soinka J's judgment[2] (at p 13)

> *'The general approach to a determination as to whether the right has been denied is not by 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 delay. As I noted in [R v] Smith [(1989) 52 CCC(3d) 97], '[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable' (p105). 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;*
>
> *1. The length of the delay;*
> *2. Waiver of time periods;*
> *3. The reasons for the delay, including*
> *i. Inherent time requirements of the case;*
> *ii. Actions of the accused;*
> *iii. Actions of the Crown;*
> *iv. Limits on institutional resources, and*
> *v. Other reasons for delay, and*
> *4. Prejudice to the accused."*

17. Though the list is not exhaustive and not based on a local authority, these factors can be imported to local jurisdiction with due recognition of local factors. Special recognition is required as there is no continuous full court sittings in the Fiji Court of Appeal as in the jurisdictions such as in NZ or Canada were said factors were recognized. Even in those jurisdictions I could not find a case where a person was given an opportunity to make an application to appellate court to expedite the matter. If such applications are allowed such a process would also result in further aggravation of the delay than resolving the issue of delay, as such applications will add to the existing backlog.

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[2] R Vs Morin [1992] 1SCR771, (1992) 71 CCC(3d) 1 at p 13

18. The Applicant's trial had concluded without delay with a plea or guilty and the sentencing, in the Magistrate's Court. The leave to appeal was granted in 2013 by a single judge of the Court of Appeal, and since then there was no hearing of the said appeal. The hearing of the appeal against the sentencing would be before Full Court of the Court of Appeal.

19. The Sections 14 and 15 of the Constitution are relied in this application for Constitutional Redress, are included in the Chapter 2 of the Constitution which deals with the Bill of Rights. The enforcement of the said rights could be made in terms of Section 44 of the Constitution and it states as follows;

> *'44. (1) If a person considers that any of the provisions of this Chapter has been or likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detailed person), then that person (or the other person) may apply to the High Court for redress.*
>
> *(2) The right to make application to the High Court under sub-section (1) is without prejudice to any other action with respect to the matter that the person concerned may have.*
>
> *(3) The High Court has original jurisdiction-*
>
> *(a)to hear and determine applications under subsection(1) ; and*
> *(b) to determine questions that are referred to it under subsection(5),*
>
> ***And may make such orders and give such directions as it considers appropriate.***
>
> *(4) The High Court may exercise its discretion not to grant relief in relation to any application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.'* (emphasis added)

PRELIMINARY ISSUE

20. Both counsel for the Respondents relied on a decision of High Court Case No HBM 40 of 2016 delivered on 7th April, 2016 (Unreported) (***Solomoni Ourivs Vs DPP et al***) and

stated that this application for an early hearing of the appeal needs to be made in the Court of Appeal.

21. In the said case it was held that it would be improper for the High Court

> *'to make any directions regarding the conduct of the case and fixing of any dates as this may compromise the independence of the Court before which the matter currently is. The presiding judge in Court of Appeal will be in best position to weigh all the factors I have identified to consider when the matter should be listed for hearing.'*

22. I fully agree with the said findings by the judge. As stated in the case of ***Martin v Tauranga District Court*** 1995 2NZLR 419 at page 424(Cooke P) simply taking only the time factor into consideration, this court would not be in a position to consider whether there was an unreasonable delay.This is more so in a case as the present one where the Applicant had pleaded guilty and upon conviction made more than one attempt to appeal to the Court of Appeal.In the first attempt he had sought leave to appeal from the Court of Appeal, against the sentence only and the leave was granted by a single judge of the Court of Appeal in 2013.

23. In the second attempt in ***Rogers v State*** [2014] FJCA 129; AAU118.2013 (decided on 25 July 2014) (unreported) the Applicant after more than 2 years and 7 months delay made an application seeking leave to appeal against the conviction and sentence.[3] It would be a an abuse of process on the part of the Applicant to seek leave to appeal out of time from the Court of Appeal against sentence, when he had already made an application for leave against sentence. This application seeking extension of time was rejected by a single judge of the Court of Appeal in 2014. This might have complicated the matter that was already before the Court of Appeal as there is now an order rejecting extension of time for leave against sentence, which is obviously superfluous.

24. Section 44(4) of the Constitution states as follows;

> *'(4) The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it*

[3] . see the decision of Gounder JA in ***Rogers v State*** **[2014] FJCA 129; AAU118.2013 (decided on 25 July 2014) (unreported)**

considers that an adequate alternative remedy is available to the person concerned'

25. In terms of the above provision if the court considers that there is an adequate alternative the discretion of the court can be exercised against the applicant. For this there should be adequate remedy and the counsels for the Respondents were unable to indicate any alternative remedy for the Applicant.

26. In the case of ***Solomoni Qurivs Vs DPP et al*** High Court Case No HBM 40 of 2016 delivered on 7th April, 2016 (Unreported) the following orders were made

(i)....
(ii) I order that any such application for hearing date should properly be made in the Court of Appeal for its proper consideration.'

27. The contention of the Respondents that this application for Constitutional Redress should be dismissed is based on the said order (ii) quoted in the above paragraph. Neither counsel could direct me to any provision in the Court of Appeal Act (Cap12) or in the Court of Appeal Rules or any other law that is applicable in Fiji that allows such application by a party to the Court of Appeal seeking an early hearing. One should also be mindful the limited resources that the Court of Appeal and even if a fraction of the Appellants make applications to expedite matters it would invariably result in further delay and might even flood the Court of Appeal with additional applications seeking early hearings. So, with respect I do not think that I can direct the Applicant to make an application to the Court of Appeal for early hearing,unless there is some law supporting such an application applicable to Fiji.

28. The Court of Appeal Rule 7 has made application of the practice and procedure in England at the time of making of the said rules, regarding Civil and Criminal matters applicable to Fiji when there is 'no other provision is made by the Rules (Court of Appeal) or by any other enactment ...'. At the hearing this was not dealt by the parties.

29. The Applicant is making this application seeking an order to expedite his appeal against the sentencing where the leave was granted in 2013 and if there is an alternate remedy under said Rule 7 of the Court of Appeal Rules it can be made. It should be borne in mind

the Constitutional Redress is without prejudice to any other right a party may have under the law and this is no way affected by this application.

30. Upon materials submitted to this court at this hearing including the case of ***Solomoni Qurivs Vs DPP et al*** High Court Case No HBM 40 of 2016 delivered on 7th April, 2016 (Unreported) the Court of Appeal Act and the Rules does not provide for any matter to be taken priority over other, hence no application can be made to the Court of Appeal nor this court can give any order in a Constitutional Redress to seek such application in the Fiji Court of Appeal.

31. It is entirely an administrative matter how the appeals are listed for full court in the Court of Appeal.

32. In ***Martin v Tauranga District Court*** 1995 2NZLR 419 at page 425 (Cooke P) held 'Generally speaking, it seems better to prevent breaches of rights than to allow them to occur and then give redress.'

33. The Applicant's appeal against the Sentence for which leave was granted by a single judge of the Fiji Court of Appeal on 28th March, 2013 was not heard. There is considerable time period lapsed since 2013. Whether there is an unreasonable delay in the Applicant's Appeal AAU0032 of 2011 can be determined with the back log and procedure adopted in the listing of the matters in the Full Court of the Court of Appeal. On the material before me I could not come to a conclusion as to whether there was unreasonable delay. The Applicant had made an application seeking extension of time to appeal against the sentence and the conviction which was dismissed as late as 2014. When considering whether there is unreasonable delay, every case will require consideration on its own facts.

34. In ***Martin v Tauranga District Court*** 1995 2NZLR 419 at page 430 Hardie Boys J in his concurring decision held,

> *'...there is tension between the individual right and the interest of the community in the detection and conviction of offenders. An overenthusiastic assertion of the former to the detriment of the latter can*

only lead to a destructive diminution of community respect for the law, its institutions and the administration of justice……'

After giving examples of overenthusiastic decision and its consequences Hardie Boys J further held,

'The Bill of Rights Act was not enacted in a vacuum, but in the social and economic climate of 1990, Section 25(b) was not designed to secure any mass jail delivery, but rather to insist that all those responsible for the administration of criminal justice should henceforth ensure that unreasonable (an apt synonym for "undue") delay does not occur. ……"

35. A declaration is granted that appeal AAU 32 of 2011 should be heard without unreasonable delay, as it is a right enshrined in the Constitution in Chapter 2 – Bill of Rights.

36. Considering the facts and circumstances of this case it is appropriate to make a direction in terms of Section 44(3) of the Constitution to the Registrar of the Court of Appeal (Section 8 of Court of Appeal Act – Cap 12) to take all available and necessary steps to prevent unreasonable delay in Applicants Appeal No AAU 32 of 2011. This should not be considered as direction to give priority over any other appeal, but to prevent unreasonable delay.

FINAL ORDERS

a. The order for a hearing as soon as possible is denied.
b. A declaration is granted that the appeal should be heard without unreasonable delay.
c. An order to prevent delay is also denied.
d. A direction to the Chief Registrar for necessary action as the Registrar of the Court of Appeal (i.e in order to take all necessary actions to prevent unreasonable delay in the appeal against the sentencing in AAU 32 of 2011) in term of Section 44(3) of the Constitution.

Dated at Suva this 27th day of January, 2017

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Justice Deepthi Amaratunga
High Court, Suva