

IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

MISCELLANOUES CASE NO. HAM 199 OF 2016S

BETWEEN : AHMAD RIAZ UD DEAN

APPLICANT

AND : THE STATE

RESPONDENT

Counsels : Ms. S. Vaniqi for Applicant  
Ms. S. Navia and S. Tivao for Respondent

Hearings : 17 March 2017, 15 and 26 June, 2018

Judgment : 28 December, 2018

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## JUDGMENT

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1. The applicant presently faces the following charges in the Suva Magistrate Court:

**FIRST COUNT**

**Statement of Offence**

**KEEPING A BROTHEL**: Contrary to Section 170 of the Penal Code, Cap. 17.

**Particulars of Offence**

AHMAD RIAZ UD DEAN f/n Gutlam Ali between the 1<sup>st</sup> day of January, 2008 to the 31<sup>st</sup> day of December, 2008 at Suva in the Central Division, managed a brothel.

**SECOND COUNT**

**Statement of Offence**

**KEEPING A BROTHEL:** Contrary to Section 170 of the Penal Code, Cap. 17.

**Particulars of Offence**

AHMAD RIAZ UD DEAN f/n Gutlam Ali between the 1<sup>st</sup> day of January, 2009 to the 31<sup>st</sup> day of January, 2010 at Suva in the Central Division, managed a brothel.

**THIRD COUNT**

**Statement of Offence**

**KEEPING A BROTHEL:** Contrary to section 233 (a) of the Crimes Decree No. 44 of 2009.

**Particulars of Offence**

AHMAD RIAZ UD DEAN f/n Gutlam Ali between the 1<sup>st</sup> day of February, 2010 to the 19<sup>th</sup> day of February, 2011 at Suva in the Central Division, managed a brothel.

2. The prosecution had provided the following chronology of events:

<u>DATE</u>	<u>EVENT</u>
	<u>2011</u>
	<u>Pre-Filing of Charges</u>
21 <sup>st</sup> February 2011	Charged for the offence of Managing a Brothel at the Major Crimes Unit. The accused was bailed by police to appear in the Suva Magistrates' Court on 3 <sup>rd</sup> March 2011. No record of whether the charge was filed in the Suva Magistrate's Court.
	<u>2015</u>
	<u>Filing of Charges</u>
10 <sup>TH</sup> September 2015	Charge and summons against the accused was filed at the Suva Magistrates' Court by ODPP. The same was served to the accused on 5 <sup>th</sup> October 2015. The accused was to appear in the Suva Magistrates' Court on 9 <sup>th</sup> October 2015.

9<sup>th</sup> October 2015

1<sup>st</sup> Call

Case called before RM George, the charge was read out to the accused and he was given his legal right. The accused wishes to engage a counsel. State sought time to prepare disclosures. The matter was adjourned to 2/12/2015. Bail was extended.

2<sup>nd</sup> December 2015

Mention

The accused was served with full disclosures. Right to counsel was again given to the accused. He informed the court that he will peruse the disclosures and see if he needs a lawyer. He also informed the Court that he will be writing to ODPP as police had charged him differently from ODPP. State informed the Court that police had charged the accused and released on bail; however, the charges were never filed in court. The file was sent to ODPP for sufficiency of evidence. The ODPP found that there was sufficient evidence to proceed and also there were sufficient evidence to charge the accused for other charges; therefore, proceeded with it. RM George explained to the accused that ODPP have the right to change the charges against him. The accused still maintained that he will write to ODPP. The matter was adjourned to 4/2/16 for plea and check on the representation of the accused.

04<sup>th</sup> February 2016

Mention

Case called in court before RM George. Mr Bulisea appeared for the accused on instructions of Vaniqi Lawyers. The accused informed the court that he had made representation to ODPP on 18/1/16.



The State asked for further time to consider the same. The matter was adjourned to 29/3/16. Bail extended.

29<sup>th</sup> March 2016

Mention

The accused was present with his counsel, Ms. Vaniqi. State sought further time to confirm its position on the representation made by the accused. RM George warned the State to finalise their position. The matter was adjourned to 29/4/16. Bail was extended.

29<sup>th</sup> April 2016

Mention

Case adjourned to 24/5/16 for Mention. Accused was not present. Bench Warrant issued.

02<sup>nd</sup> May 2016

Returnable Date of Bench Warrant

Case called before RM George. The accused was present. The State informed the court that they have considered the representation made by the accused and confirmed that they will continue with the matter. The accused took his plea. He pleaded not guilty to all the three counts. The matter was adjourned to 28/11/16 for mention to fix a trial date. Bail extended.

28<sup>th</sup> November 2016

Mention

Case called before RM George. Ms. Vaniqi informed the court that they have filed an application for Stay in the High Court. Trial date could not be fixed due to the application made in the High Court. The matter was adjourned pending the High Court application".

3. On 21 November 2016, the applicant filed a notice of motion in court, asking for an order that Suva Magistrate Court Case CF 1548 of 2015 be permanently stayed on the grounds contained in the affidavit of the Applicant.

4. The Applicant's affidavit stated the following:

- "1. THAT I am the abovenamed Applicant.
2. THAT I have been charged with three counts of keeping a Brothel contrary to section 170 of the Penal Code and section 233 (a) of the Crimes Decree.
3. THAT I have entered a plea of Not Guilty and my case is currently pending in Suva Magistrates Court 4.
4. THAT I was caution interviewed by the police at CID Headquarters, Toorak, Suva on the 19<sup>th</sup> February, 2011 in regards to the above allegation (Count 3) which I denied.
5. THAT after my caution interview, the police did not formally charge me until 10<sup>th</sup> September, 2015. This was a delay of 4 yrs 7 mths.
6. THAT according to the charge, the particulars of offence states that the allegations occurred from:
  - 1<sup>st</sup> January 2008 till 31<sup>st</sup> December 2008 for Count 1,
  - from 1<sup>st</sup> January 2009 till 31<sup>st</sup> January, 2010 for Count 2,
  - and between 1<sup>st</sup> February 2010 till 19<sup>th</sup> February, 2011 for Count 3.
7. THAT given the first count relates to matters in 2008, me being charged in 2015 means a delay of seven years.
8. THAT after I was interviewed by the police in February 2011, I subsequently closed down the massage parlour that was the cause of the allegation against me.
9. THAT all of the female masseurs that were providing services at the massage parlour have since left and some of them are now married with children. The women involved have moved on with their lives

and I also tried to move on with mine. However, I always lived with the uncertainty and this issue has been constantly on my mind as I received no indication from either the police or the prosecution as to if this case would proceed or not.

10. THAT I was surprised and disappointed when after so much time had passed since the investigation, that the prosecution decided to proceed with the case against me in 2015.
11. THAT I have been appearing in the Suva Magistrates Court since January, 2016. During this time I had written letters to the Office of the DPP asking them to consider dropping the charges against me given the lengthy delay in bringing this case to court. Filed herein and marked as annex "A" is a copy of my letter to the ODPP dated 14<sup>th</sup> January, 2016 confirming the same. [not included].
12. THAT on 24<sup>th</sup> May, 2016 I was informed that the prosecution had decided to proceed with my case.
13. THAT I am seeking redress now and ask that the court permanently stay the proceedings in the Suva Magistrates Court given the lengthy delay and prejudice I am suffering as a result.
14. THAT because of this false allegation against me, I have lost many female clients who have heard about the criminal investigation and charges against me and my reputation as a medical practitioner has been affected.
15. THAT if indeed these allegations had any merit, surely the Fiji Medical Council would have been notified and disciplinary charges for unprofessional and unethical practices would have been filed against me.
16. THAT to date I have not had any allegations of misconduct or unprofessional practices against me in my 29 years as a medical doctor. However this pending case has adversely affected my reputation and the unreasonable delay is inexcusable.



17. THAT since the investigation by the police in February, 2011 there has been no new evidence against me other than the same statements of the six women who used to work at the massage parlour.
18. THAT there are no statements from any clients receiving the alleged services or evidence of monies exchanging hands for alleged services.
19. THAT the case against me is not complicated nor does it require extensive investigation. As such, the delay from caution interview in February, 2011 till charging me on 10<sup>th</sup> Sept, 2015 is an abuse of process.
20. THAT the prolonged delay from investigation to charging and producing me in court has meant I have lived for 4 yrs 8 mths with the uncertainty of not knowing if and when these false allegations would be finalized.
21. THAT aside from the delay affecting my life, this case being pursued some 4 yrs 8 mths later will also cause embarrassment and shame to the six women who gave statements to the police. In 2011, some of these women were single with no children. They are now living respectable lives as wives and mothers with their families not aware of the allegations they are involved in. To drag all this up after so much time has passed will also affect and prejudice these ladies and their families.
22. THAT my reputation and medical practice has also been prejudiced because of these criminal charges and the unreasonable delay. The only remedy is for a permanent stay to be ordered to protect me against this abuse of process”.

5. On the law of the stay of criminal proceedings, I cite with approval what His Lordship Mr. Justice Priyantha Fernando said in Manasa Salabula v State, Miscellaneous Case No. HAM 272 of 2010, High Court, Suva:

“ In R v Derby Crown Court, exp Brooks [1984] 80 Cr. App. R. 164, Sir Roger Ormrod said:

"The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of processes 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 a technicality, or (b) on the balance of probability the defendant has 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".

The inherent power to stay criminal proceedings to prevent abuse of process has long been recognised in common law. But it should only be employed in exceptional circumstances (State v Waisale Rokotuiwai HAC 009 of 1995).

In case of Director of Public Prosecutions v Jackaran Tokai and others (Trinidad and Tobago)[1996] (12<sup>th</sup> June 1996) Privy Council Appeal No. 53 of 1995 (Judgment delivered on 12<sup>th</sup> June, 1996).

Their Lordships said:

"However, we remind ourselves of the principles outlined earlier in this judgment and the observation of Lord Morris of Borth-y-Gest in Connelly v Director of Public Prosecutions [1964] A.C.1254,1304, that:

'generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment, and where either demands a verdict a judge has no jurisdiction to stand in the way of it'.

Stays 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 Brennan 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 actions of the defendant himself should never be the foundation for a stay.**

**In answer 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 words, 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 whether 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 factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict.”.**

6. I have read and carefully considered all the papers filed by the parties in Court. I have also carefully listened to and considered their verbal submissions. I have read the disclosure papers tendered in the Magistrate Court. The prosecution's case was based largely on the written statements of alleged sex workers. The applicant said he was a doctor of more than 30 years standing, and had no previous convictions. As with most criminal trials, the same will be decided on the credibility of the opposing parties' version of events.

7. In my view, the trial process will adequately address the applicant's challenges against the charges against him. He is presumed innocent until proven guilty beyond reasonable doubt in a court of law. If he considers the admissibility of some evidence prejudicial to him, he can apply to the court to have the same excluded. Also with the passage of time, the witnesses' memory of events will have faded, and this would be to his advantage, if his legal team know what to do. If the witnesses do not want to give evidence because they had moved on in life, this is a matter that the prosecution will have to solve. Without telling the defence how to run its case, in my view, a stay proceeding is not the answer to the applicant's complaint, but a trial is the best option for him. The trial process has a lot of avenues to resolve his concerns and complaints.
8. Given the above, I dismiss the applicant's application for a stay of proceeding, and direct he be tried as soon as possible early next year.
9. This file is sent to the learned Chief Magistrate to order a trial as soon as possible.



  
**Salesi Temo**  
**JUDGE**

**Solicitor for Appellant** : **Vaniqi Lawyers, Suva**  
**Solicitor for Respondent** : **Office of DPP, Suva.**