IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL MISC NO. HAM 019 OF 2020
Navua Magistrates Court No: 144 of 2017

BETWEEN	:	**FINIASI CAKACAKA**
AND	:	**STATE**
Counsel	:	Applicant in Person Ms N Ali for State
Date of Hearing	:	**15 June 2022**
Date of Ruling	:	**1 July 2022**

RULING

Nature of application

[1] This is an application for stay of criminal proceedings in the Magistrates' Court on the grounds of unreasonable delay and abuse of process.

Factual background

[2] On 6 June 2017, the State initiated criminal proceedings against the applicant through Summons under section 81 of the Criminal Procedure Act. The Summons commanded the applicant to appear before the Magistrates' Court at Navua on 28 July 2017 to answer a charge of theft contrary to section 291 (1) of the Crimes Act.

[3] On 28 July 2017, the case was called in court without an appearance from the applicant. The court record is silent regarding whether the learned magistrate made any enquiry regarding the applicant's whereabouts. Thereafter, the learned

magistrate called the case in court on four occasions and extended the service of the Summons on the applicant.

[4] On 23 January 2018, the police prosecutor sought a production order for the applicant to be produced in court after informing the learned magistrate that the applicant was in State's custody in Natabua Prison. The learned magistrate issued an order for the applicant to be produced before the Navua Magistrates' Court on 2 February 2018.

[5] On 2 February 2018, the applicant was not produced in court and the learned magistrate issued another order for him to be produced in court on 9 February 2018.

[6] On 9 February 2018, the applicant was eventually produced in court. He waived his right to counsel and pleaded not guilty to the charge. The case was adjourned to 23 February 2018 for mention to fix a hearing date.

[7] On 23 February 2018, the applicant was not produced in court. The case was adjourned to 3 April 2018 and the production order was extended.

[8] On 3 April 2018, the applicant was not produced in court and the production order was further extended. Thereafter, the case was adjourned on sixteen occasions and the production order extended,

[9] Eventually, on 25 October 2019, the applicant was produced in court for the second time. He indicated to the court that he maintained his not guilty plea and wished to contest the charge. The case was fixed for trial on 3 February 2020.

[10] On 3 February 2020, the applicant was present and ready for his trial. However, the police prosecutor applied for an adjournment saying that they need to obtain fresh instructions from the Director of Public Prosecutions as two of the prosecution witnesses had migrated overseas. The learned magistrate adjourned the trial to 9 April 2020 and extended the applicant's production order.

[11] On 9 April 2020, the trial did no proceed due to Covid-19 pandemic. Thereafter, the case had been adjourned fourteen times without hearing of the trial.

[12] On 1 February 2022, the applicant filed this application for stay claiming that his constitutional right to be tried within reasonable time had been breached and that the delay is oppressive and amounts to an abuse of process.

Legal Principles

[13] The right to a speedy trial is a constitutional right accorded to every person charged with an offence. Section 14(2)(g) of the 2013 Constitution states:

> Every person charged with an offence has the right to have the trial begin and concluded without unreasonable delay.

[14] Previous Constitutions accorded similar protection to an accused. International instruments such as the Covenant on Civil and Political Rights and European Covenant on Civil and Political Rights also guarantees a right to a hearing within a reasonable time.

[15] In *Sahim v State* [2008] FJCA 124; Miscellaneous Action 17 of 2007 (25 March 2008) the Court of Appeal construed the right to trial without unreasonable delay under the 1997 Constitution as follows:

> The correct approach of the courts must therefore be two-pronged. Firstly, is there unreasonable delay and a breach of section 29(3) of the Constitution? In answering this question, prejudice is relevant but not necessary where the delay is found to be otherwise oppressive in all the circumstances. The second question is if there has been a breach what is the remedy? In determining the appropriate remedy, absence of prejudice becomes relevant. Where an accused person is able to be tried fairly without any impairment in the conduct of the defence, the prosecution should not be stayed. Where the issue is raised on appeal, and the appellant was fairly tried despite the delay, his or her remedy

lies in the proportionate reduction of sentence or in the imposition of a non-custodial sentence. (at [29]).

[16] The factors to be considered in deciding whether the delay is unreasonable are as follows:

(a) The length of the delay;

(b) The reasons for the delay (including on the part of the accused, the judiciary, the prosecution or legal aid);

(c) The inherent time requirements of the case;

(d) The limitations on institutional resources (including the judiciary, the prosecution and legal aid);

(e) Any waiver by an accused of his rights;

(f) Acquiescence to delay by an accused;

(g) The effect of delay on the fairness of a trial;

(h) Any prejudice to the accused caused by the delay. (*Nalawa v State* [2010] FJSC 2; CAV0002.2009 (13 August 2010), at [27]).

[17] The delay in the present case is post charge. From the date of the charge to the date the application for stay was filed (6/6/17-1/2/22), the length is 4 years and 7 months. The delay is mainly due to the applicant not being produced in court while he was in custody on remand in other unrelated cases. His first appearance in court was 8 months after he was charged. His second appearance in court was 1 year 8 months later. Thereafter, the court faced a similar predicament when either the prosecutor was not ready for the trial or the applicant was not produced in court.

[18] The charge is a summary offence. It does not involve any complicated issues of law. The delay is not caused by resource limitations. The case was adjourned more than 40 times to allow the State to produce the applicant in court to answer the charge against him. The prosecution did not provide any reasons why the applicant was not being produced in court despite an order from the court. During the entire period, the applicant did not waive his right to a speedy trial and was not at fault.

[19] Although the delay of more than 4 years is unreasonable to hear a simple charge of theft, the applicant is not able to point to any specific prejudice if the case proceeds to trial. But the matter does not end there.

[20] The courts have power to prevent misuse of its procedure in a way which is manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people (*Connelly v DPP* (1964) A.C. 1254, *DPP v Humphrys* [1976] 2 All ER 497). Lord Salmon in *DPP v Humphrys [1976] 2 All ER 497* at 527-528 elaborated on the scope of that power:

> ... a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene.

[21] The circumstances which may give rise to abuse of process may vary in each case. It may arise from the methods used to investigate the offence (*R v Heston-Francois* [1984] 1 ALL ER 785). It may arise on the allegation that the accused is being prosecuted more than once for what is in effect the same offence (*Connelly v DPP*, supra). It may arise from misuse of the process of the court to escape statutory time limits (*R v Brentford Justices, ex p Wong* [1981] 1 ALL ER 884). It may arise from prejudice due to delay in prosecution (*R v Derby Crown Court, ex p Brooks* (1985) 80 Cr. App. R 164.)

[22] In *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; (1994) 74 A Crim R 462 (28 September 1994) the High Court of Australia while recognizing the categories of abuse of process are not closed, said the cases may fall into one of three categories:

(1) the court's procedures are invoked for an illegitimate purpose;

(2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or

(3) the use of the court's procedures would bring the administration of justice into disrepute.

[23] Since the applicant was in State's custody, it was the State's responsibility to produce him in court whenever required to do so in compliance with the production order. Section 96 of the Criminal Procedure Act states:

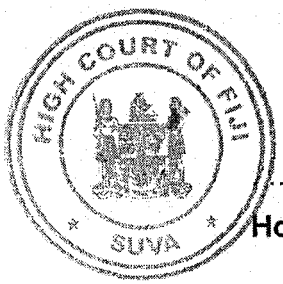
> (1) Where any person for whose appearance or arrest a court is empowered to issue a summons or warrant is confined in any prison the court may issue an order to the officer in charge of the prison, requiring the prisoner to be brought in proper custody and at a time to be named in the order before the court.
> (2) On receipt of an order under sub-section (1), the officer in charge of the prison shall act in accordance with the terms of the order, and shall provide for the safe custody of the prisoner during his or her absence from the prison in accordance with the order.

[24] In *Uate v State* [2020] FJHC 378; HAM276.2019 (1 June 2020) the accused was in the State's custody while facing a summary offence. The court issued several orders for the accused to be produced in court but the accused was not produced without any justifiable reasons. The High Court permanently stayed the proceedings saying that the defiance of the court's order to produce the accused in court to answer the charge against him was unjustifiably oppressive to the accused and would bring the administration of justice into disrepute. The court held that in these circumstances it is an abuse of the court process to allow the prosecution to continue.

Conclusion

[25] Based on these principles, to allow the prosecution to continue in the circumstances of this case, would be an abuse of the process.

[26] The proceedings in the Magistrates' Court are permanently stayed.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Applicant in Person