IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION

MISCELLANEOUS CASE NO. HAM 380 OF 2022

DARSHIKA KIRTIKA CHAND

vs.

STATE

Counsels:

Mr. Maharaj V	-	**for Accused**
Ms. Shameem S	-	**for State**

RULING

1. This application has been filed by the Applicant praying for a permanent stay order against the criminal proceedings pending against her in the **Nasinu Magistrates Court** under the case number **1362 of 2016.**

Background

2. In the Nasinu Magistrates Court case 1362 of 2016 the Applicant had been charged with two counts of Giving False Information to a Public Servant contrary to **Section 201 (a)** of the **Crimes Act 2009**. She had been first produced before the Learned Magistrate on 2nd November 2016. Though this matter had been pending in the Magistrates Court since then, it has not yet been fixed for hearing, yet..

Submissions of the Applicant

3. The Applicant brings to the attention of this Court the provisions of Section 14 (2) (g) of the Constitution of Fiji, where it states as below:

> *"Every person charged with an offence has the right – to have the trial begin and conclude without unreasonable delay."*

In this regard, it is the contention of the Appellant that the facts and circumstances of this case are analogous to that of ***Prasad v State* (2020) FJHC 690,** where an application for the stay of proceedings was allowed by the High Court on the basis that the accused was charged for a summary offence not involving complex issues, where the delay of 11 years to determine the matter was held oppressive and unconscionable. Therefore, the applicant invites this Court to consider the unreasonable delay of 6 1/2 years in this matter on that same line of thinking and grant a permanent stay order.

4. In relation to the attenuate events for the unreasonable delay in this matter on the part of the Court administration and the Prosecution, the Applicant highlight the following:

   - Since 27th April 2022, the system's inability to assign a Magistrate which resulted in various vacation of the matter depicts the justice system's disregard and ineffectiveness to provide the Applicant her right to a fair and speedy trial. No doubt her Constitutional right has already been violated; and

   - The Prosecution has also contributed to the delay. Firstly, because it did not send the relevant file to DPP office from 24th September 2019 and asked for several adjournments thereafter to seek advice from ODPP whether to continue with the proceedings after the death of the main State witness. Secondly, taking about 2 years from 23/1/20 to 17/01/22 just to amend and serve the amended charge to the Applicant.

5. In elaborating the personal circumstance which the Applicant had undergone due to the delay in commencing proceedings in this matter, the Applicant emphasize the following:

   - The fact that this case had been adjourned by the Court Registry, the Applicant's counsel had no opportunity to object or protest to the Court against unnecessary adjournments.

   - The Applicant has been greatly prejudiced by the delay in that she has not been able to secure any permanent employment. The Applicant has made various applications for employment since her graduation in December 2020 and have gone for interviews only to be declined when truthfully disclosing to the prospective employers of her pending criminal charge.

   - The Applicant has been further prejudiced in that for the last 6 years her parents of meagre income have been meeting her legal charges paid to her solicitors. The Applicant is increasingly getting frustrated with the delay and the mental stress that she is going through is enormous which unfortunately continues.

   - The Applicant is charged with a summary offence, yet the case has been ongoing since 2016 which is a matter of grave injustice to the Applicant. The case has been adjourned 14 times without any good enough reason.

6. Referring to the applicable legal provisions in Fiji as per adjournments of proceedings, the Applicant highlights that according to **Section 170(7)** of the **Criminal Procedure Act 2009** a case must not be adjourned to a date later than 12 months after the summons were served on the accused, unless the Magistrate for good cause which is to be stated in the record considers it an adjournment to be required in the interests of justice.

7. Further, it is contended by the Applicant that though the applicable law is as above, in this matter, in the court record no reason had been stated by the Learned Magistrate as to why the case had been adjourned on most days. Therefore, it is asserted by the Applicant that this is in clear breach of **Section 170 (7)** of the **Criminal Procedure Act 2009**.

<u>Submissions of the Respondent</u>

8. It is the position of the Respondent that the law is clear in Fiji on the application of Stay of Proceedings as cited in ***Samshood v State [2021] FJHC 226*** by **His Lordship Justice Hamza** referring to the **UK** case of ***Connelly v Director of Public Prosecutions [1964] AC 1254 at 1301,*** where **Lord Morris** has stated:

> *"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of process and to defeat any attempted thwarting of its process... "*

9. The Respondent contends that the term "abuse of process" was verified in the case of ***Ratu Inoke Takiveikata and 9 Others. v State [2008] FJHC 315,*** where Justice Andrew Bruce held that:

> *"It is common ground that the High Court of Fiji being a supervisor court of record, has inherent jurisdiction to stay proceedings which are determined by the Court to be an abuse of the process of the court. Generally speaking, the circumstances in which this court might consider the imposition of a stay of proceedings are:*
>
> *(1) Circumstances are such that a fair trial of the proceedings cannot be had; or*
>
> *(2) There has been conduct established on the part of the executive which is so wrong that it would be an affront to the conscience of the court to allow proceedings brought against that background to proceed."*

10. Respondent further submits that though there has been a post charge delay of about 6½ years in this matter, the same is not so unreasonable that it does not have an adequate

remedy. Moreover, Respondent asserts that though the delay has breached **Section 14 (2) (g)** of the **Constitution** of **Fiji, Section 44(4)** of the **Constitution** provides for the High Court not to grant any relief in relation to an application for contravention of rights guaranteed under the **Bill of Rights Chapter** if the Court considers that an adequate alternative remedy is available to the person concerned.

11. In this regard, Respondent alludes that Courts in recent times have set time frames to ensure fair trial and to remedy unreasonable delay as an alternative remedy. It is contended that this seems to be the preferred approach in many instances where there is no maternal prejudice caused by delay and where a fair trial can be ensured.

Analysis of Court

12. In considering the rights of an Accused for a trial without an unreasonable delay under the **Constitution of Fiji**, this Court is reminded of the pronouncement made by **His Lordship** the current **Acting Chief Justice** of **Fiji Justice Temo** as a **High Court Judge** (as he was then) in the case of ***Sing v State [2020]***[1], as below:

> *"Before discussing the answers to the problems as contained in the Criminal Procedure Act 2009, it is important to remind ourselves again of the rights of the accused as enshrined in section 14 (2) of the 2013 Fiji Constitution, as it relates to this case. Section 14 (2) reads as follows:*
>
> ***(2) Every person charged with an offence has the right—***
>
> *a)………b)……c)…..d)……e)……f)……*
>
> *g)* ***to have the trial begin and conclude without unreasonable delay; …"***

13. It is well accepted law in Fiji that the High Court has the inherent jurisdiction to stay proceedings following common law tradition. This position was well elaborated by **Justice D. B. Pain** when he pronounced his determination in the case of ***State v. Waisale Rokotuiwai* [1998]**[2], as follows.

> *"It is submitted that this Court has inherent power to make any order to prevent an abuse of its process and this includes an order for permanent stay. That power will be exercised to protect the accused from oppression and prejudice, but its scope is not limited to those considerations. The Court has a duty to secure a fair trial for an accused. Allied to this is a need to protect the integrity and reputation of the judicial system and administration of justice. Infringement of*

[1] Singh v State [2020] FJHC 871; HAA036.2020S (23 October 2020)

[2] [1998] FJHC 196; HAC 0009d. 95S (21 August 1998)

these requirements are proper considerations for the Court in deciding whether a trial should be terminated."

14. In considering the stay of proceedings as requested in this matter for "unreasonable delay" caused by the Judicial System and the State by violating **Section 14 (2) (g)** of the **Constitution** of **Fiji**, this Court would like to consider the purpose for the stipulation of the specific text in **Section 14 (2) (g)** of the **Constitution of Fiji** in considering similar International Legislation under the authority of **Section 7 (1) (b)** of the **Constitution** for interpretation of the **Bill of Rights of Fiji**. In this regard, **Article 6 (1)** of the **European Convention on Human Rights** states of the **"Right to a fair Trial"** as follows:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law……"*

15. In the case of ***Mills v HM Advocate and another [2002]***[3], the **Privy Council** of the **United Kingdom** considered the right to a fair trial under this Convention. In his speech to the **Privy Council Lord Steyn** elaborated the potential pernicious effects in the delay in bring an accused to trial, as below:

> *"It may be of assistance to spell out the rationale of this guarantee as described in the European jurisprudence. Three themes can be identified. First, "in criminal matters, especially, it is designed to avoid that a person charged could remain too long in a state of uncertainty about his fate". Stogmiller v Austria (1969) 1 HER 155, para 5. Secondly, it is recognized that lapse of time may result in the loss of exculpatory evidence or in a deterioration in the quality of evidence generally. Thirdly, it has been said that "the safety of a verdict reached a considerable time after the offence often become(s) the subject of controversy, [and], undermine[s] public confidence in the criminal justice system"…… Even if not exhaustive these underlying themes have a bearing on a proper disposal when there has been a breach of the "reasonable time' guarantee."*

16. Elaborating the impact of an "unreasonable delay" to an Accused person in relation to **Article 6 (1)** of the **European Convention on Human Rights** in the case of ***Attorney General's Reference (No 2 of 2001)***[4], **Lord Rodger of Earlsferry** of the **House of Lords** of the **United Kingdom** stated, as below:

> *"Where any hearing is not held within a reasonable time, however, the violation is <u>irretrievable</u>. By definition, the undue **delay** with its harmful effects occurs by the time the hearing comes to an end. The relevant authorities cannot remedy the situation and give the defendant his due by holding a fresh hearing—this could only involve still greater **delay**,*

[3] [2002] UKPC D2, at [14] 6 (1)

[4] [2004] 1 All ER 1049, [2003] UKHL 68

prolonging the disruption to the defendant's life and so exacerbating the violation of his convention right. But the fact that this particular breach of art 6(1) cannot be cured by holding a fresh hearing is not just some quirk of the convention that happens to put the relevant authorities in a particularly awkward position. On the contrary, it stems from the very nature of the wrong which the guarantee is designed to counteract. If the responsible authorities cannot go back and start again, neither can the defendant. For both sides time marches on. When the authorities ***delay*** *unreasonably, months or years of the defendant's life are blighted. He cannot have them over again; they are gone forever. By signing up to art 6(1) states undertake to avoid inflicting this kind of harm. Since the harm is irretrievable, the European Court of Human Rights (the European Court) is correct to regard this right as being of 'extreme importance' for the proper administration of justice (see Guincho v Portugal (1984) 7 EHRR 223 at 233."*

Delay of Proceedings and the Impact on the Accused

17. In the present matter the charges against the Accused under **Section 201(C)** of the **Crimes Act of 2009** had been initially filed in the **Nasinu Magistrates Court** on the 2nd of November 2016. On 03rd of October 2017 the plea had been taken, where the Accused had pleaded not guilty. Thereafter, charges had been amended and the amended charges had been filed on 23rd of January 2020. From the date of the initial plea to the date the amended charges were filed, this matter had been called in the Nasinu Magistrates Court on 8 occasions and had been adjourned for various reasons, including on 4 occasions for the advice of the DPP to amend the charge. However, this Court has to recognize that the entire world was battling with the Covid-19 pandemic in 2020 and 2021, where the work of institutions came to a standstill. Nevertheless, though from the inception of this matter in 2016 to this date this matter had been called in the Nasinu Magistrates Court over 34 times, as per the case record, only on 6 occasions the case had been adjourned due to the pandemic or in view of new construction of the Court premises.

18. It appears that in this matter in adjudicating a simple issue of a complainant giving false information to a police officer regarding a forced marriage, the matter had been adjourned on over 20 occasions spanning to 6 ½ years mainly due to the unavailability of an adjudicator or due to the Prosecution needing time to amend the charges. This Court cannot overlook the inordinate and unreasonable prorogation of this trial as another usual happening of the much respected and looked up to judicial system of our country.

19. On the part of the Applicant, she is a 27-year-old female who had been contemplating her further studies with a view of creating a better path for her future. The Constitution of our country has accommodated every citizen of our country to pave his or her way for a better future by providing necessary safeguards by chapter 2 on Bill of Rights. Though this Applicant was not incarcerated restricting her physical liberties, one can only shudder to think that having a pending case over your head for over 6 years will not limit your options in life. In this regard, this could affect her employment options, options of getting married and options of living a peaceful family life.

20. Therefore, with the objective of protecting the integrity and reputation of the judicial system and administration of justice of our country, together in providing the assurance to the Applicant that Courts in our country will safeguard the protections provided under the Constitution of Fiji, in exercising the inherent power of this Court, this Court grants this application for a permanent stay order, as prayed by the Applicant.

Orders of Court

21. As per the above analysis, this Court orders a permanent stay of proceedings of the Nasinu Magistrates Court case number 1362 of 2016.

22. Parties have the right to appeal to the Court of Appeal of Fiji as provided by law.

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Hon. Justice Dr. Thushara Kumarage

At Suva
This 30th day of June 2023

cc: *Office of Director of Public Prosecutions*
Office of Legal Aid Commission