IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO.: HAM 104 OF 2023

(Nadi Magistrates Court Criminal Case No. 345 of 2009)

BETWEEN **SAINIVALATI TUIVUNIMOLI**

APPLICANT

AND

STATE

RESPONDENT

Counsel: Applicant in person
Mr. T. Tuenuku for Respondent

Date of Hearing: 27 September 2023
Date of Ruling: 08 November 2023

RULING

1. The Applicant seeks a permanent stay of proceedings in criminal case No. 345 of 2009 pending in the Magistrates Court at Nadi. The Applicant and three others are jointly charged with one count of Robbery with Violence, contrary to Section 293(1) (b), one count of Larceny contrary to Sections 259 and 262 and one count of Shop Breaking contrary to Section 300 (a) of the Penal Code, Cap 17.

Background

2. The alleged offences were committed on 10 April 2009. The Applicant and his co-accused were first produced in the Magistrates Court at Nadi on 20 April 2009. The

matter dragged on for nearly 10 years for various reasons when the Applicant filed his first Permanent Stay Application invoking the inherent jurisdiction of this Court.

3. Having considered the said application, Madigan J found that the delay of nearly ten years is serious, but not unreasonable given that the Applicant substantially contributed to the delay. His Lordship dismissed the application and directed the Magistrate to take steps within its powers to expedite the hearing of the matter.

The Law on Stay

4. The law on permanent stay has its origin in common law and continues to be governed by common law and, with the advent of the Human Rights Law regime, is closely associated with the right to a fair trial and trial within reasonable time without delay. Its common law origin can be traced back to the case of **Connelly v Director of Public Prosecution** [1964] AC 1254 at 1301 where Lord Morris observed:

> 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 powers.

5. At common law, a stay was only ordered when there were no other available remedies to the accused and when a fair trial was no longer possible. This was the law as set out in **Attorney-General's Reference (No. 1 of** 1990) (1991) QB 630. The relevant questions to be answered are:

> I. Was the delay unreasonable?
> II. Has the delay deprived the accused of a fair trial?
> III. Are there other available remedies to alleviate the prejudice?
>
> However, it is not to say that this list of considerations set as necessarily exhaustive but under one heading or another it encompasses all the factors that may be regarded as relevant in the present case".

6. The law on permanent stay is settled in Fiji. In the case of **Ratu Inoke Takiveikata & Others v. State** [2008] FJHC 315; HAM039.2008 (12 November 2008), Justice Bruce at [20] stated that:

> [i]t is that the source of power of a court such as the High Court of Fiji to make an order of stay of proceedings is found within the inherent power of that court to regulate its own process.

7. In **Asesela Tawake v. State** [2009] FJHC 35; HAM 126D.2008 (6 February 2009), Shameem J observed [9] that:

> the law has shifted from a position that a stay must be granted once delay is held to be unreasonable, to a position that a stay should be granted where the delay is held to be unreasonable and the accused person is unlikely to get a fair trial...

8. In **Ratu Inoke Takiveikata & Others v. State**, *(Supra)* Bruce J [12] further stated:

> Before a stay of proceedings could be considered, there must be a factual basis for that consideration. It is common ground that the accused bear the burden of proof of establishing the facts which might justify the intervention of this court by way of stay proceedings. It is also common ground that the standard of proof which must be attained is proof to the civil standard. The facts must be established by evidence which is admissible under the law.

9. In **Seru** (2003) FJCA 26 (30 May 2003) the Court of Appeal considered all the matters set out in **Martin v Tauanga District Court** [1995] 2 NZLR 419, where it was said that 'delays approaching a certain threshold may be regarded as "presumptively prejudicial"'.

10. In **Karunaratne v State** [2015] FJHC 849; HAM 150.2015 (4 November 2015) Madigan J held that the jurisdiction of the High Court to stay proceedings is found within the Constitutional Redress jurisdiction under Section 44 of the Constitution. His Lordship observed as follows:

> The Constitution (2013) by section 44 provides for the right to apply for redress to a party who considers the Bill of Rights to have been contravened to his prejudice. That right is to be exercised by the High Court which has the original jurisdiction to hear and determine applications and to make such orders and give such directions as it considers appropriate (section 44(3)). A direction to stay proceedings in the Magistrates Court could in proper circumstances be such an appropriate order.

Analysis

11. I would now proceed to analyse the application in light of the law relating to Permanent Stay of Proceedings.

Delay

12. As per the copy record, the length of the delay is unimaginably long. From the charge to this second stay application, the delay is approximately 14 years. The Magistrates Court has failed to comply with the direction given by this Court in its Ruling dated 12 December 2018 to 'take steps within its powers to expedite the hearing' and conclude the matter. According to the said Ruling delivered by Madigan J, the Applicant and his co-accused had employed 'cat and mouse tactics' by their non-appearance in Court thus substantially contributing to the delay.

13. However, a careful examination of the copy record reveals that the Applicant had either been in remand or the correction facility as a serving prisoner during a considerable part of that period. Several Production Orders had been issued because the correction service failed to produce the Applicant in Court.

14. I examined the copy record to get a slight idea as to what caused the delay after the Ruling was issued by the High Court on 12 December 2018. It appears that the Applicant had been in remand for some time before the matter was finally taken up for *voir dire* hearing on 31 May 2019. During that period the matter has been called eight times in court. After PW.1 concluded his evidence, the *voir dire* inquiry was adjourned on seven occasions due to various reasons, prominent of which had been that either the Applicant or his co-accused were not produced in court. These adjournments led to the Applicant failing to show up in court on 1 November 2019 for which a bench warrant was issued. However, he appeared late on the same day and the bench warrant was cancelled. On the next hearing date, which was 6 February 2020, an adjournment was sought by the prosecution to check on a witness statement.

15. After the controversy over the inadequacy of disclosures, the court work was disrupted due to the COVID-19 pandemic and when the case was called in court on 24 August 2020, the Applicant had been present on three occasions consecutively until he failed

to appear on 12 March 2021 thus resulting in a bench warrant being issued. After that, the court work was again disrupted due to the pandemic and the Applicant re-appeared on 07 July 2022. That was after the case was mentioned in court four times in his absence. The bench warrant was cancelled without any reason being mentioned in the record. He continued to appear in court thereafter on four consecutive occasions, but the court had not resumed the *voir dire* hearing either due to the non-availability of the Applicant's co-accused or inadequacy of disclosures. It appears that complete *voir dire* disclosures had not been served by the State to the accused before the inquiry started, causing further delays.

16. The Applicant again failed to appear on 03 February 2023 upon which a bench warrant was issued. The same was extended on 31 March 2023 to be returnable on 25 May 2023. On 25 May 2023, the trial *in absentia* was ordered against the Applicant for 29 June 2023, on which day, the *voir dire* inquiry could not proceed due to the non-availability of the Applicant's co-accused. These explain the sequence in the Magistracy up to the time of this application.

17. In the circumstances which I summarised above, can the State merely blame the Applicant's non-appearance as the major cause for the delay? I do not think that was the case. It is the State's responsibility (both prosecution and court) to ensure a speedy trial once an accused is brought to court on an allegation of committing a crime.

18. There is a historical Latin maxim which says, 'Delay defeats justice'. I believe it is upon this maxim that the right of an accused to a trial without unreasonable delay has been entrenched in our Constitution. Temo J (as he then was) in **Sing v State** [2020] FJHC 871; HAA036.2020S (23 October 2020), emphasised as follows:

> 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—
>
> .....g) to have the trial begin and conclude without unreasonable delay; ...

19. It is to give effect to this constitutional right that Section 170 of the Criminal Procedure Act has been enacted so that the adjournments of proceedings of the magistracy could

properly be controlled. At this stage, it is apposite to remind ourselves of what the law of this country says about adjournments:

> 170 (1) During the hearing of any case, the magistrate must not normally allow any adjournment other than from day to day consecutively until the trial has reached its conclusion, unless there is good cause, which is to be stated in the record.
>
> (2) For the purpose of sub-section (1) "good cause" includes the reasonably excusable absence of a party or witness or of a party's lawyer.
>
> (3) An adjournment under sub-section (1) must be to a time and place to be then appointed and stated in the presence and hearing of the party or parties, or their respective lawyers then present.
>
> (4) During the adjournment of a case under sub-section (1), the magistrate may —
>
> *(a)* permit the accused person to leave the court until the further hearing of the case; or
>
> *(b)* commit the accused to prison; or
>
> *(c)* release the accused upon his or her entering into a bond (with or without sureties at the discretion of the magistrate) conditioned for his or her appearance at the time and place to which the hearing or further hearing is adjourned.
>
> (5) If the accused person has been committed to prison during an adjournment the adjournment may not be for more than 48 hours.
>
> (6) If a case is adjourned, the magistrate may not dismiss it for want of prosecution and must allow the prosecution to call its evidence or to offer no evidence on the day fixed for the adjourned hearing, before adjudicating on the case.
>
> (7) A case must not be adjourned to a date later than 12 months after the summons was served on the accused unless the magistrate(for good cause which is to be stated in the record)considers such an adjournment to be required in the interests of justice.

20. According to this Section, the Magistrate must not normally allow any adjournment other than from day to day consecutively until the trial has reached its conclusion unless there is **good cause, which is to be stated in the record;** 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 (Emphasis mine).

21. The current matter has been adjourned in clear violation of this provision over the past 14 years. In the court record, many instances can be found where no reason, not to mention reasonable cause, had been stated by the Learned Magistrates who had

presided over the matter (8 in number) as to why the case had to be adjourned. The delay in this case, which the Applicant labels as the 'oldest criminal case in Nadi', is overwhelming and alarming.

22. The impugned case no doubt signifies a clear breach of the right guaranteed to the Applicant under Section 14 (2) (g) of the Constitution and the procedure laid down in Section 170 of the Criminal Procedure Act 2009 (CPA). Apart from those legal obligations, the responsibility cast upon the Learned Magistrates to ensure a speedy trial was exceptionally high given the previous order of this court to expedite the trial. When considered in the context of considerable contribution to the delay by the Prosecution and the Magistrates Court, despite the direction of this Court, the delay is unreasonable.

23. According to Section 6 of the Constitution, both the Judicial and the Executive arms of the Government are bound to uphold the Bill of Rights in the Constitution. Section (6) provides:

> (1) This Chapter binds the legislative, executive and judicial branches of government at all levels, and every person performing the functions of any public office.
>
> (2) The State and every person holding public office must respect, protect, promote and fulfil the rights and freedoms recognised in this Chapter

24. While the prosecutors as the officers of the Executive branch are required to manage their part of the prosecution efficiently, the courts or the Judiciary are expected to play a proactive role in managing the cases effectively to give effect to the rights and in achieving the desired result- justice. In the modern right-based approach, the judicial officer is no longer a mere passive umpire of a conventional adversarial court but an active participant in the management of the cases when the prosecutions are brought before the court. This responsibility must be discharged in such a way as to ensure that the right to a fair trial is guaranteed efficiently and effectively while protecting the interests of the victims and those of the public.

25. It was stated in **Seru** and **Martin** (supra), that 'delays approaching a certain threshold may be regarded as "presumptively prejudicial". This case no doubt has reached that threshold. An unreasonably protracted trial can by no means be a fair trial. Delay 'was

such that the Court should hold that there had been an abuse of the process which justifies an exercise of inherent powers of this Court and the powers entrusted in this Court by Sections 44 and Section 100 (6) of the Constitution.

26. In the matter under review, the Learned Magistrates who had presided over the case have failed to manage the case before them effectively. When the court is convinced that the accused or the counsel are up to the delaying tactics, in Madigan J's words, 'cat and mouse game', the courts must thwart those attempts by using rules of procedure and law.

27. It appears that in the present case, no effective follow-up action was taken when the remandees were not produced in court on the dates assigned. When an accused with a tendency to abscond is in court, he/she must be kept in remand until the trial is concluded while ensuring at the same time a speedy trial. There are four accused in the present case, and they have taken turns in absconding. The court has taken a lenient approach by not dealing with them appropriately when they failed to show up in court. Bench warrants have been cancelled with no reasons being recorded- encouraging them to play the 'cat and mouse game'. The delay caused was not inevitable.

28. If the State were unable to execute the arrest warrant or otherwise secure the attendance of an accused in court, there are clear provisions both in the CPA [Section 171 (1) (a)], and the Constitution [Section 14 (2) (h) to try the case *in absentia*, certainly, when the court is satisfied that the accused is deliberately absconding. Neither the Prosecution nor the Court took a reasonable effort to give effect to those provisions until 25 May 2023 to resume the trial.

29. The responsibility to ensure the right to a speedy and fair trial is on the Prosecution and the Court and not on the accused and the laws and rules of procedure are meant for that. Having conceded that in certain cases the delay may be justified and held to be reasonable if the accused has significantly contributed to the delay or where the case is exceptionally complex, I would not put this case under that category given the court's failure to manage the case appropriately.

30. As was said in **Connelly v Director of Public Prosecution** (supra), a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to

act effectively within such 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 powers.

31. I find the delay in this case to be oppressive in all the circumstances and hold that there had been an abuse of process. I am driven to the conclusion that, in the circumstances, the delay which occurred between the charge and the trial was unreasonable.

Fair Trial

32. As was stated in **Asesela Tawake v. State** (supra) the law has shifted from a position that a stay must be granted once the delay is held to be unreasonable, to a position that a stay should be granted where the delay is held to be unreasonable **and** the accused person is unlikely to get a fair trial...Therefore, even when the delay is unreasonable, the court may not grant a stay if it is satisfied that a fair trial is still possible.

33. Let me explore if a fair trial is still possible if the proceedings are not stayed in this case. The Respondent, despite the challenge mounted by the Applicant in this court, has failed to reveal to this Court how strong the Prosecution case is and what pieces of evidence they are in possession to prove the charges against the Applicant. The Court is kept in the dark on whether the delay is due to the complexity of the preparation of the prosecution case or on any other legitimate ground.

34. The victims are defiantly prejudiced by the delay so are the accused. It is highly unlikely that the events that took place and property stolen 14 years ago are still fresh in the witness's memory. In the circumstances, I am not convinced that a fair trial is possible if a stay is not granted.

Prejudice

35. To have serious charges hanging over one's head for almost 14 years, in Applicant's own words- '*hanging over the head like a cloud of doom*', even after the direction of this court to expedite the trial, would be highly prejudicial to the Applicant.

36. The Applicant is unrepresented and has filed this application in person. He had been a serving prisoner at the early stages of the proceedings. He has already been denied the

opportunity to be considered for a prison term concurrent to the term he was then serving if he were to be convicted. The Applicant is entitled to expect that the directions given by this Court will be obeyed by the Magistrate Court. The delay caused in contravention of the previous Ruling must have frustrated the Applicant's legitimate expectation. Not only that, the public is interested in seeing that the culprits are brought to book after a speedy trial and the orders of higher courts are complied with. On the balance of probability, the Applicant has been and will be prejudiced in the conduct of his defence by delay on the part of the State which is unreasonable.

Alternative Remedy

37. The High Court will not grant a stay of proceedings if alternative remedies are available to the Applicant. In his first stay application, this court, without granting a stay, had already ordered a speedy trial by the Magistrates Court only to be complied in breach. The Applicant has exhausted all the remedies at his disposal.

A Brief Overview of Decided Cases

38. In **Seru** (supra), the question of delay was considered under the 1997 Constitution. The delay was 4 years and 10 months. The court held that, because of the inordinate delay, prejudice could be presumed.

39. **Seru** was referred to in **Mohammed Sharif Shaim v. State** MISC.ACTION No. 17 of 2007, a decision made before the abrogation of the previous Constitution. The High Court held that a delay of 5 years after the charges had been laid was unreasonable. However, instead of ordering a stay, the High Court ordered the Magistrate to commence trial within 40 days.

40. In **Chand v State** [2023] FJHC 435; HAM380.2022 (30 June 2023), in adjudicating a simple issue of a complainant giving false information to a police officer regarding forced marriage, the matter had been adjourned on over 20 occasions spanning 6 ½ years mainly due to the unavailability of an adjudicator or due to the prosecution needing time to amend the charges. Having stayed the proceedings, Kumarage J observed at [20] as follows:

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.

Conclusion

41. Jurisdiction to stay proceedings 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 [**Jago v District Court of New South Wales** [1989] HAC 46 ;(1989)168 C.L.R.23)]. No stay should be imposed unless the Applicant 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. [**DPP v Jackson Tokai and others** (Privy Council Appeal No 53 of 1995 (12 June 1996)]. On these tests, the circumstances of the present case warrant a permanent stay of proceedings.

42. **Orders**

1. The application for permanent stay of proceedings is allowed.

2. Proceedings against the Applicant in the Nadi Magistrates Court Criminal Case No. 345 of 2009 are permanently stayed.

HIGH COURT OF FIJI
LAUTOKA

Arina Aluthge
Judge

8 November 2023

At Lautoka

Solicitors: Applicant in Person

Office of the Director of Public Prosecution for Respondent