

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Misc. No. HAM 101 of 2024

BETWEEN : **AMINIASI SAUCOKO**
APPLICANT

A N D : **THE STATE**
RESPONDENT

Counsel : Ms. M. Narisia for the Applicant.
: Mr. J. Nasa for the Respondent.

Date of Hearing : 02 July, 2024

Date of Ruling : 05 July, 2024

RULING ON APPLICATION FOR STAY OF PROCEEDINGS

APPLICATION

- [1] The applicant by notice of motion dated 9th April, 2024 supported by the affidavit of Aminiasi Saucoko sworn on the same day seeks a permanent stay of proceedings in respect of criminal cases CF. 356 of 2017, CF 357 of 2017, CF 358 of 2017 and CF 359 of 2017 pending at Magistrate's Court, Nadi.

- [2] This application is made pursuant to section 15 (1) and (3) and section 44 of the Constitution of Fiji and the inherent jurisdiction of the High Court.
- [3] The application is opposed by the state, however, no affidavit in reply have been filed. The state relies on the submission of counsel.
- [4] Both counsel filed their written submissions and also made oral submissions during the hearing for which this court is grateful. The primary complaint raised by the applicant is that there has been an unreasonable delay in having the applicant's pending cases determined by the Magistrate's Court.

BACKGROUND INFORMATION

- [5] The applicant at the time of this application had four pending files in the Magistrate's Court, however, on 18th June, 2024 the applicant's counsel informed the court that some progress had been made in the Magistrate's Court. On 19th June the voir dire ruling was supposed to be delivered in CF 356/17, on 6th July the voir dire hearing will begin in CF 357/17, the applicant has been discharged in CF 358/17 due to the death of the complainant and no hearing date has been given in CF 359/17.
- [6] This means there are three files pending in the Magistrate' Court which the applicant wishes to be permanently stayed. In all the files the applicant is charged with one count of burglary contrary to section 312 (1) of the Crimes Act, 2009 and one count of theft contrary to section 291 (1) of the Crimes Act, 2009. The dates of the allegation in these files are February and March, 2017 respectively.

[7] All the files were first called on 24th March, 2017, the applicant pleaded not guilty. This court upon its own volition was able to get the current status of the pending cases from the Magistrate's Court Registry which is as follows:

- i. CF 356/17 – This matter is scheduled for trial proper on 29th August, 2024,
- ii. CF 357/17 – This matter was for voir dire ruling on 3rd July, 2024, however, it has been adjourned to 24th July, 2024.
- iii. CF 359/17 - This matter was also for voir dire ruling on 3rd July, 2024, however, it has been adjourned to 17th July, 2024.

[8] The applicant seeks the intervention of this court on two grounds:

- a) Unreasonable delay in having the matters determined by the Magistrate's Court;
- b) Prejudice caused to the applicant since fair trial is not possible.

LAW

[9] Section 15 (3) of the Constitution of Fiji states:-

“Every person charged with an offence... has the right to have the case determined within a reasonable time.”

[10] The applicant bears the burden of proof of establishing the factual basis on balance of probabilities which would justify the intervention of this court by way of granting a stay of proceedings. The above was stated by Bruce J. in *Ratu Inoke Takiveikata and others - vs. - State, Criminal Miscellaneous Case No. HAM 039 of 2008* at paragraph 12 as follows:-

“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 of 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.”

- [11] In *Mohammed Sharif Shaim vs. State, Miscellaneous Action No. 17 of 2007* the High Court held that a 5 year delay after charges had been laid in the Suva Magistrate’s Court was unreasonable. However, instead of ordering a stay, the High Court ordered that the trial commence within 40 days. On appeal the Court of Appeal held that the governing factor must always be whether an accused can be tried fairly without any impairment in the conduct of his defence and if that question can be answered affirmatively, the prosecution should not be stayed (see paragraph 24 *Tevita Nalawa – vs.- State, Criminal Appeal No. CAV 0002 of 2009*).
- [12] The Supreme Court of Fiji in *Tevita Nalawa* (supra) stated the following factors as relevant to any case in which the question of delay affecting a fair trial is an issue:
- (i) the length of the delay;
 - (ii) the reason for the delay;
 - (iii) whether or not the applicant has asserted his or her right to a speedy trial; and
 - (iv) the extent of any prejudice.

LENGTH OF THE DELAY

- [13] The applicant states that he was charged in March, 2017 and he was promptly produced in the Magistrate's Court, it is after 7 years the cases have not been finalized.

REASON FOR THE DELAY

- [14] The applicant states that he was in custody for nearly two years and therefore it was the duty of the prosecution to seek a speedy trial but they did not.

HAS APPLICANT ASSERTED HIS RIGHT TO SPEEDY TRIAL

- [15] The applicant's argument is that his trial has been unreasonably delayed, however, the question before this court is whether the applicant had during the period of 7 years asserted his right to speedy trial.
- [16] A perusal of the copy records show that the applicant was not in court on several occasions despite being released on bail. The copy records also show that whenever the applicant appeared in court he did not seek a speedy trial.

PREJUDICE CAUSED TO THE APPLICANT

- [17] The applicant's counsel in her written and oral submission states that although the applicant has the advantage of being innocent until proven guilty it is taking the court too long to finally determine his matters. The delay of 7 years is unreasonable. The defence witnesses have either migrated or died or their whereabouts are not known.

[18] Finally counsel stated that the applicant has been prejudiced due to the delay.

DETERMINATION

[19] There is no doubt that every person charged with a criminal offence has the right to have the matter determined within a reasonable time and to receive a fair trial according to law which the courts at all levels respect and apply. What is a reasonable time is a matter of fact and is construed on a case by case basis bearing in mind the history of what has transpired leading to the delay.

[20] The Supreme Court of Fiji in *Tevita Nalawa* (supra) formulated the principles of protecting an accused's right at paragraph 21 as follows :-

“(i) even where delay is unjustifiable a permanent stay is the exception and not the rule.

(ii) where there is no fault on the part of the prosecution, very rarely will a stay be granted.

(iii) no stay would be granted in the absence of any serious prejudice to the defence so that no fair trial can be held and;

(iv) on the issue of prejudice, the trial court has processes which can deal with the admissibility of evidence if it can be shown there is prejudice to an accused as a result of delay.”

[21] Since the applicant first appeared in the Magistrate's Court seven years have lapsed. The applicant is not happy with this delay and he is asking this court to intervene by granting a permanent stay of proceedings. A

perusal of the copy records show that there are several reasons for the delay.

- [22] When the matters were for hearing the applicant was missing a bench warrant had to be issued by the court or he was not brought to court from the remand center. It is also noted that Covid-19 pandemic had been an intervening factor beyond the control of everyone which caused a substantial delay not only to these matters but to all the matters pending in court countrywide. The courts in this country were not performing its functions due to the restrictions in place.
- [23] Looking at the current status of the matters it cannot be said that the matters have not made any substantial progress since initiation. The chronology of the events show the parties have been actively engaged in doing what they were supposed to be doing.
- [24] Despite the delay of seven years one should look at the current status of the matter which has now progressed to voir dire ruling in two files and one file is for trial proper in August, 2024.
- [25] Taking into consideration the progress made I have no hesitation in stating that the delay of seven years from the time the applicant was brought to court is not unreasonable. The matters have taken its course despite all the challenges. It is favourable to the applicant that he has been discharged in one of the files.
- [26] In respect of the prejudice caused by the delay the applicant has not given any particulars about the defence witnesses and /or his defence his mere assertion that the delay has resulted in the non-availability of his crucial witnesses is not good enough. The applicant did not in any of his

appearances in court inform the learned Magistrate about his defence witnesses not being available or assert his right to a speedy trial leads me to the inescapable conclusion that this reason is an afterthought by the applicant.

[27] In *Johnson -vs. - State [2010] FJHC 356, HAM 177 of 2010 (23 August, 2010)* Goundar J. discussed the scope of determination on the issue of prejudice that the applicant would suffer in an application of this nature, where his Lordship at paragraph 13 held that:-

“However, the applicant has not provided particulars of his missing witnesses. Without...the relevance of the unavailable witnesses’ testimonies, I am unable to make a finding on prejudice that the applicant will suffer at trial.”

[28] I am satisfied based on the evidence before me that the applicant will not be prejudiced in his defence and a fair trial is possible. The trial court has processes which can deal with the admissibility of the evidence fairly.

CONCLUSION

[29] Having considered the evidence before this court I am not satisfied that the delay caused in the hearing of the charges filed against the applicant justifies a permanent stay of proceedings. I also find that there is no prosecutorial misconduct or abuse of court process by the prosecution which would convince this court to grant a stay of proceedings.

[30] There is also no evidence of any prejudice caused to the defence which will affect fair trial. The application for stay of proceedings is refused and dismissed.

ALTERNATIVE REMEDY

- [31] Since the applicant has raised an issue of Constitutional breach this court is mandated under section 44 (4) of the Constitution of the Republic of Fiji to consider adequate alternative remedy that is available to the applicant.
- [32] The matters pending before the Magistrate's Court at Nadi falls within its criminal division hence it is important to consider the interest of the complainants and the interest of the applicant. In my view appropriate orders towards an expedited hearing in the Magistrate's Court would be an adequate alternative remedy which will preserve the rights of the applicant and prevent any Constitutional breaches.

ORDERS

- [1] The application for permanent stay of proceedings in respect of criminal case nos. CF 356/17, 357/17 and 359/17 pending at Magistrate's Court, Nadi is refused and dismissed;
- [2] In the interest of justice this court directs the Magistrate's Court to hear and determine the above files as a matter of urgency.



Sunil Sharma
Judge



At Lautoka

05 July, 2024

Solicitors

Messrs Narisia & Associates, Nadi for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.