## MOHAMMED SHARIF SAHIM v STATE (HBM32 of 2006)

HIGH COURT — CIVIL JURISDICTION

WINTER J

26, 30 March 2007

**Criminal law — adjournment — application for permanent stay of proceedings — delay of trial because of several adjournments for no reason — whether right of Applicant for a fair trial would be breached — systematic delay caused by prosecution and Applicant — Applicant had burden of proving his case — Applicant was unable to provide evidential basis for delay and to provide evidence of unavailability of witnesses — no direct evidence of prejudice to Applicant's fair trial rights — unreasonable delay in bringing charges against Applicant — delay was primarily a failure of court system to manage Applicant's case — both parties contributed to delay — Constitution ss 29(3), 41 — Criminal Procedure Code s 2 — Magistrates Courts Act ss 20, 46 — Penal Code (Cap 21) s 309(a).**

The Applicant held himself out as a visa specialist. He made false representations about his ability to arrange visas to the US to each of the complainants. Each complainant paid cash to the Applicant ranging from $3900 to $11,200. The total amount taken was $62,450. The State charged the Applicant with 10 counts of obtaining money by false pretences. The case was brought before the court. The case against the Applicant took over 6 years because of delay from several adjournments for no reason. The Applicant sought a permanent stay of proceedings in respect of the charges against him on the ground that the delay between the charging and the trial was so great that the Applicant's right to a fair trial would be breached if hearing continued.

**Held** — (1) There has been a systematic delay caused by the prosecution and the Applicant. The delay was unreasonable. In order to obtain a stay remedy, the Applicant should demonstrate, on the balance of probabilities, that some prejudice flowed from the delay. The Applicant had the burden of proving his case. The Applicant was unable to provide evidential basis for the delay and to provide evidence of the unavailability of witnesses. The Applicant was also unable to demonstrate actual prejudice and failed to provide satisfactory responses.

(2) The court accepted the comment in the case of *Mohammed Riaz Shameem v State* [2007] FJCA 19 that the defence would be wise to provide particulars to support its contention. The defence was not obliged to reveal its evidence before calling it in a criminal trial. The fact remained that there was no direct evidence of prejudice to the Applicant's fair trial rights.

(3) There was a strong public interest in the prosecution and punishment of crime and in this case, the appropriate course was to declare the delay unreasonable, to provide some guidance and encouragement to avoid such delays in the future and to direct that the trial proceed at the earliest opportunity.

(4) It was appropriate to declare that there had been unreasonable delay in bringing charges against the Applicant, the delay was primarily a failure of the court system to manage the Applicant's case to a hearing and that both parties contributed to the delay. The Chief Magistrate was directed to ensure that the trial would be heard by a resident magistrate within the next 40 days.

Application dismissed.

**Cases referred to**

*Eliki Lasarusa v State* HBM 27D/2005; *Taylor v Attorney-General* [1975] 2 NZLR 675, applied.

*Apatia Seru and Anor v State* AAU 0041&42/1999S; *Re Attorney-General's Reference (No 2 of 2001)* [2004] 2 AC 72; [2004] 1 All ER 1049; [2004] 2 WLR

1; [2003] UKHL 68; *Boolell v Mauritius* (2006) 26 BHRC 552; [2006] UKPC 46; *Du v District Court and Anor* [2006] NZAR 341; (2005) 22 CRNZ 505; [2005] NZHC 276; *Jonetani Rokoua v State* [2006] FJSC 16; *Martin v Tauranga District Court* [1995] 2 NZLR 419; (1995) 12 CRNZ 509; 1 HRNZ 186; *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42; [1993] 3 All ER 138; [1993] 3 WLR 90; *R v Morin* (1992) 71 CCC (3d) 1; [1992] 1 SCR 771; *R v West London Magistrate; Ex parte Anderson* 80 Crim App Rep 143; *Rahey and Anor v United States* (1973) 412 US 434; [1973] USSC 133; *Rahey v R* [1987] 1 SCR 588; (1987) 33 CCC (3d) 289; *Singh v Director of Public Prosecutions* AAU0037/2003S; *State v Josefa Nata* AAU0010/1995S, cited.

*Eliki Mototabua v State* AAU0021/2006S; *Connelly v Director of Public Prosecutions* [1964] AC 1254; [1964] 2 All ER 401, considered.

*Mohammed Riaz Shameem v State* [2007] FJCA 19, related.

*M. Raza* for the Plaintiff

*R. Gibson* for the State

**[1] Winter J.** As a result of complaints made in November 2000 the State charged the Applicant on 10 July 2001 with 10 counts of obtaining money by false pretences, contrary to s 309(a) of the Penal Code (Cap 21).

**[2]** It is alleged that the Applicant held himself out as a visa specialist and made false representations about his ability to arrange visas to the United States of America to each of the 10 complainants. It is alleged by the State that each complainant paid cash to the Applicant ranging in amounts from $3900 (Ravi Shalenta Lal) to $11,200 (Michael Chotken). The total amount taken is some $62,450.

**[3]** The Applicant filed a notice of motion supported by an affidavit (on 24 July 2006) applying for a permanent stay of proceedings in respect of these charges pending before the Magistrates Court at Suva under Criminal Action No 2311 of 2001. This application is made pursuant to ss 29(3) and 41 of the Constitution of the Fiji Islands, the High Court Constitutional Redress Rules 1998 and the inherent jurisdiction of the court.

**[4]** The grounds disclosed in the affidavit and perfected by counsels submissions are in summary that the delay between charging and trial of this matter is so great that the Accused's rights to a fair trial (constitutional and or common law) will be breached if the hearing is allowed to continue.

**[5]** In his written submissions counsel for the Attorney-General urged a summary dismissal of this application or at least that part of it that relies on constitutional redress. Counsel reasoned that as there is an alternate remedy available within the criminal trial process then this application was premature. He submitted the court should exercise its discretion under the Constitution (s 41(4)) to refuse a remedy.

**[6]** In oral submissions before me, however, counsel conceded that this matter is so old that to sweep aside the application on technical grounds would not provide a just result. In those circumstances he joins with the submissions of the Director of Public Prosecutions by submitting that even if I find there was a delay in bringing this matter to trial that is not in the circumstances such an abuse of process that stay is the only and inevitable remedy.

**Curial history**

**[7]** The matter has clearly languished before the court. There is some dispute as to whether or not the Accused contributed to any of the delay over the last 6 years. It is accordingly necessary for me to summarise the curial history.

| *Date* | *Magistrate* | *Action* |
|---|---|---|
| 27 July 2001 | Chief Magistrate, Salesi Temo, Esq | First appearance a plea of not guilty. |
| 10 August 2001 | Chief Magistrate | Further adjournment no reasons. |
| 28 September 2001 | Chief Magistrate | Further adjournment no reasons. |
| 10 December 2001 | Chief Magistrate | Further adjournment no reasons. |
| 27 March 2002 | Chief Magistrate | Further adjournment no reasons. |
| 24 July 2002 | Chief Magistrate | Further adjournment no reasons. |
| 25 September 2002 | Chief Magistrate | Prosecution ready for hearing but do not oppose adjournment. Adjournment granted. Accused counsel overseas for medical treatment. |
| 4 October 2002 | Chief Magistrate | Further adjournment no reasons. |
| 18 November 2002 | Chief Magistrate | Further adjournment no reasons. |
| 27 March 2003 | Resident Magistrate, Eroni Sauvakacolo, Esq | Further adjournment no reasons. |
| 14 April 2003 | Resident Magistrate, Salesi Temo, Esq | Prosecution requests a fixture of 21st and 22nd August. Defence does not oppose that application. Adjourned for hearing 12 August 2003 |
| 12 August 2003 | Resident Magistrate, Salesi Temo, Esq | Further adjournment no reasons. |
| 26 September 2003 | Resident Magistrate, Salesi Temo, Esq | Further adjournment no reasons. |
| 2 October 2003 | Resident Magistrate Salesi Temo, Esq | Further adjournment no reasons. |
| 18 November 2003 | Resident Magistrate, Salesi Temo, Esq | Further adjournment no reasons. |
| 12 March 2004 | Resident Magistrate Salesi Temo, Esq | Prosecution ready for hearing but no objection to adjournment. Defence asks for a firm fixture. Adjourned for hearing. Prosecution witnesses who attended court warned to be available for next hearing date. |
| 20 September 2004 | Resident Magistrate N Lomaiviti | Fixture vacated. Accused sick. Medical certificate tendered and sighted. |
| 15 October 2004 | Resident Magistrate, Aminiasi Katonivualiku, Esq | Further adjournment no reasons. |
| 13 December 2004 | Resident Magistrate A Katonivualiku, Esq | Defence asks for April date. Further adjournment. |
| 3 February 2005 | Resident Magistrate, N Lomaiviti | Further adjournment no reasons. |
| 15 March 2005 | Resident Magistrate, N Lomaiviti | Firm fixture 16 June 2005. |

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|---|---|---|
| 16 June 2005 | Resident Magistrate, V D Nadakuitavuki | Prosecution ready to proceed. However witnesses not summoned as Mr Raza involved in a High Court matter and counsel had earlier agreed to adjournment. |
| 6 July 2005 | Resident Magistrate, Viliame Nadakuitavuki, Esq | Further adjournment no reasons. |
| 7 September 2005 | Resident Magistrate, John Semisi, Esq | Defence seeks adjournment as Mr Raza is in High Court. Prosecution does not oppose adjournment. Adjournment granted with reasons. |
| 16 September 2005 | Resident Magistrate, Viliame Nadakuitavuki, Esq | Further adjournment no reasons. |
| 30 September 2005 | Resident Magistrate, Viliame Nadakuitavuki, Esq | Prosecution absent. Accused and counsel present. Further adjournment no reasons. |
| 26 October 2005 | Resident Magistrate, John Semisi, Esq | Further adjournment no reasons. |
| 20 December 2005 | Resident Magistrate, John Semisi, Esq | Further adjournment no reasons. |
| 10 January 2006 | Resident Magistrate, Aminiasi Katonivualiku, Esq | Prosecution witnesses present. Accused's counsel seeks a hearing at the end of April. Prosecution asks for hearing at the end of July as April date not suitable. Hearing fixed for the 26th and 27th of July 2006. Case adjourned to that hearing date. |
| 26 June 2006 | Resident Magistrate, John Semisi, Esq | Prosecution present. Accused absent. Warrant for his arrest issued. |
| 26 July 2006 | Resident Magistrate, John Semisi, Esq | Prosecution absent. Accused counsel advises he has applied for stay of prosecution in the High Court. |

**[8]** Thereafter the matter was adjourned pending a decision in this court. The notice of motion for permanent stay of proceedings was filed on 24 July 2006. I then called for the Magistrates Court record in July, September, November and December. The record was finally provided on 18 January of this year. Counsel requested and were granted an opportunity to file written submissions. The last reply was received on 9 March. The hearing proceeded on 26 March 2007.

**[9]** I find the curial history of this matter appalling. It does absolutely no credit to counsel engaged for the Accused or the prosecution. I can only echo the words of the Court of Appeal most recently uttered on Friday 23 March 2007 in the decision of *Mohammed Riaz Shameem v State* [2007] FJCA 19 (*Shameem*). As in *Shameem* this case demonstrates a shocking failure of our trial system.

**[10]** The Magistrates Court is especially designed to administer swift summary justice. It is for that reason that provisions such as s 202 of the Criminal Procedure Code (as amended) provide that only short adjournments might be justified and then only for good cause such as a reasonable and excusable absence

of a party or witness or legal practitioner. The failure of the learned magistrates to manage this case to a hearing is cannot be justified.

**[11]** During the course of these submissions before me Mr Raza withdrew the Applicant's bold statement that the delay was never caused by the Applicant at all. Bearing in mind the curial history of the matter that was an appropriate concession to make.

**[12]** The litigation clerk for the Director of Public Prosecutions at least attempts to explain from his records the basis for some of these adjournments (see para 5 affidavit dated 27 July 2006). However, even taking these matters into consideration it appears that the Accused, prosecutors and the learned magistrates must all share in the responsibility for the delays in bringing this matter on for hearing.

**[13]** In *Shameem* the court observed at [21]:

> The rights under Section 29 are personal to every person charged with a criminal offence. Where he has caused the delay by his own actions, the court will not easily be persuaded that it is unreasonable. However where, as is all too clearly the case in the present appeal, the delay is principally and overwhelmingly the result of a failure of the court to conduct the trial, the court will more readily accept it is unreasonable. Of course Fiji has limited resources but this was not the cause of this delay. It was suggested to us that the failure to bring the magistrate from Labasa any earlier was the result of lack of resources. There is no evidence to support that contention and we consider it highly improbable. Overall, the case follows a pattern, all too common in the Magistrates' Courts, where adjournments appear to be given far too easily and for no apparent proper reason.

**[14]** The control of delay in a court case begins and ends with the judge but it requires the utmost diligence and co-operation of both the prosecution and the defence. This and other cases such as *Shameem* demonstrate that we can and must do better to ensure that justice particularly in our summary courts is delivered swiftly. Justice delayed is justice denied. Denied not only to an accused who is presumed innocent and has no burden to prove that innocence but also denied to complainants left waiting for their day in court. Almost 7 years after they were allegedly duped out of significant sums of money and had their hopes of a fresh start in a new country dashed these complainants still have not seen justice in a court of law. That is shameful.

**Improvement — Magistrates Courts powers**

**[15]** In this case all counsel urged upon the court the need for guidance on the jurisdiction of a magistrate to consider abuse of process applications.

**[16]** Just as this matter was reaching the point of hearing in the Magistrates Court counsel was instructed to make an application that the proceedings be stayed as the delays in bringing the case to trial were unreasonable. In deference to the common perception that the High Court was the only venue in which such an application could be made the learned magistrate effectively adjourned the substantive hearing until such a time as this ruling could be given.

**[17]** A review of the court record will then provide a good example of the further delays intrinsic in such an approach. It would have been impossible to properly deal with this application until such time as the Magistrate Court records were received. These were called for almost as soon as the application was filed back in July of last year. It took until January of this year some 6 months later for those records to arrive and then be distributed to counsel. Naturally counsel

wanted the opportunity to then provide their submissions. Another month went by. The matter was then listed for hearing before me at the first available opportunity.

**[18]** This information does not provide a reason why a magistrate should have jurisdiction to hear abuse of process applications. It does, however, demonstrate that in the course of properly managing summary cases to a hearing it would be more efficient if all matters relating to a particular case were determined by the presiding magistrate exercising ancillary powers to their statutory jurisdiction.

**[19]** I immediately acknowledge the limited statutory jurisdiction of a Magistrates Court. I accept the wisdom of comments from earlier decisions that a Magistrates Court as a creature of statute is without original jurisdiction and so has only that jurisdiction given to it by any enabling legislation.

**[20]** The Magistrate's Court derives its power from the Magistrate's Court Act and such other statutes as may be applicable.

*Section 20 of the Magistrates' Courts Act provides:*

> Every Magistrate shall have power to — make such decrees and orders andexercise such powers judicial and administrative in relation to the administration of justice as shall from time to time be prescribed by any Act, or by rules of the court, or, subject thereto, by any special order of the Chief Justice.

*Section 46 goes on to say:*

> The jurisdiction vested in the Magistrate shall be exercised (so far as regards practice and procedure) in the manner provided by this Act and the Criminal Procedure Code, or by such rules and orders of court as may be made pursuant to this Act and the Criminal Procedure Code, and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the country courts and courts of summary jurisdiction.

**[21]** Section 202 of the Criminal Procedure Code says magistrates ought not to have entertain any adjournments beyond a 12-month time limit. Section 202(7) provides:

> 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 on the record, considers that such an adjournment to be required in the interests of justice.

Clearly this amendment was intended to prevent unreasonable delay in the hearing of criminal cases.

**[22]** In so far as the power of a Magistrate's Court to consider an abuse of process application there is no further assistance from the enabling statute.

**[23]** Section 46 of the Magistrates' Court Act provides that in default of any rules or legislation, jurisdiction regarding the practice and procedure of the courts shall be exercised "in substantial conformity with the law for the time being observed in England in the county courts and courts of summary procedure".

**[24]** In England, the House of Lords in *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42; [1993] 3 All ER 138; [1993] 3 WLR 90 (*Ex parte Bennett*), said that magistrates had the power to stay criminal proceedings for abuse of process but that such power should be strictly confined to matters relating to the fairness of the trial including delay or the unfair manipulation of court procedures. I find the jurisdiction to consider an abuse of process application in the Magistrates Court comes from substantial conformity with the law observed in England. There is however another reason for this assumption of ancillary powers.

**[25]** The New Zealand Court of Appeal in *Taylor v Attorney-General* [1975] 2 NZLR 675, had this to say:

> But when one speaks of the "inherent jurisdiction" of the Court to make orders of the kind now in question the problem really becomes one of powers ancillary to the exercise by the Courts of their jurisdiction in the primary sense just described. Many such ancillary powers are conferred by statute or rules of Court, but in so far as they are not conferred then they can only exist because they are necessary to enable the Courts to act effectively within their jurisdiction in the primary sense.

**[26]** I adopt that proposition. When a magistrate considers an abuse of process application he or she is simply acting effectively within the jurisdiction they have been given.

**[27]** The issue of an inferior court's exercise of those ancillary powers has received some indirect comment in recent times starting with the Court of Appeal decision in *State v Josefa Nata* AAU0010/1995S (*Nata*) relevantly between pp 3 and 7.

**[28]** In *Nata* the court approved the comments of Lord Morris in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1301; [1964] 2 All ER 401 at 409 where his Lordship said:

> 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 abuses of its process and to defeat any attempted thwarting of its process.

**[29]** As the Court of Appeal cautioned the exercise of such ancillary powers has limitations but there seems to be no reason why a first instance court cannot exercise a power to control the hearing process thereby encouraging swift justice. Swift justice is after all the prime goal of a Magistrates Court.

**[30]** Mr Gibson for the prosecution referred to the more recent decision of the Court of Appeal in *Eliki Mototabua v State* AAU0021/2006S. At [18] their Lordships seem to imply that a magistrate might have the power to determine a stay on the grounds of delay. The difficulty is that so far this power has remained elusive, implied and its exercise not directly encouraged.

**[31]** I am satisfied that despite the limited statutory jurisdiction of a Magistrates Court an individual magistrate does indeed have the ancillary power to act effectively within his or her jurisdiction. That must include the power were appropriate to entertain an application for abuse of process on the basis of delay. Such applications involve the exercise of the courts ancillary powers. The court could consider the constitutional jurisprudence for such applications but would of course only exercise ancillary powers in coming to a decision.

**[32]** These observations are not to be taken as in any way limiting an accused's right in appropriate circumstances to bring a pure constitutional redress application that would lift the matter out of the Magistrates Courts jurisdiction altogether. Application for such a redress of rights even in criminal matters has to be made to the High Court in its special constitutional jurisdiction (see *Singh v Director of Public Prosecutions* AAU0037/2003S, a decision of the Court of Appeal dated 16 July 2004).

**[33]** Practically, however, attempts by accused or their counsel to frustrate swift justice by the employment of such devices would be easily recognised by the High Court. A meritorious application would survive scrutiny, a tactical or frivolous application may not.

**[34]** Frivolous cases will no doubt be confronted by the same principles employed in the decision of *Eliki Lasarusa v State* HBM 27D/2005 by my learned brother Singh J where His Honour observed:

> … to use the constitutional redress processes as a substitute for normal procedure is to devalue the utility of this constitutional remedy. The applications under the redress rules are not a short cut or a system to bypass existing mechanisms on law.

**[35]** Frivolous cases will run the risk of summary dismissal under s 41(4).

**[36]** Accordingly I find that it is proper to bring an abuse of process application before the presiding magistrate as part of the trial process. This will have two advantages. First it will tend to avoid the further delays associated with the transfer of such pre-trial applications to the High Court. Second, it will encourage swift justice as the one judicial officer will consider the entire case including pre-trial rulings. This will also provide a more precise and focussed case for appellate review while not restricting an accused's constitutional rights to apply for redress in extreme and meritorious cases where constitutional redress is the only effective remedy of true utility and value.

**Delay**

**[37]** The law on criminal trial delay in Fiji is well settled. In *Apatia Seru and Anor v State* AAU 0041&42/1999S. Charges were laid in November 1994 in relation to alleged offending 2 years earlier on 17 September 1992. Committal to the High Court did not occur until April 1997. The trial was held between July and September 1999. The Court of Appeal observed that the delay was systemic and found the court did not hear the case in a reasonable time. To determine what was unreasonable delay the court adopted the approach taken by a majority of the Supreme Court of Canada in *R v Morin* (1992) 71 CCC (3d) 1; [1992] 1 SCR 771 (*Morin*) and the New Zealand courts in *Martin v Tauranga District Court* [1995] 2 NZLR 419; (1995) 12 CRNZ 509; 1 HRNZ 186 (*Martin*).

**[38]** In holding the delay to be unconstitutional their Lordships commented (at 9) that the constitutional right was designed to protect both individual and societal rights. The former were the right to security of the person, the right to liberty, and the right to a fair trial. The latter, was that prompt trials enhanced the confidence of the public in the judicial system and that there was a societal interest in bringing to trial those accused of offending against the law. The right was held to be a qualified right, to be balanced with the victim's interests. Pre-charge delay is certainly relevant in considering whether a stay should be granted. Any prejudice caused to the accused by the delay is a critical factor however the lack of it does not necessarily mean that the application is bound to fail.

**[39]** The Canadian approach was stated by Sopinka J in *Morin* at CCC (3d) 12–13:

> The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably led to delay or are otherwise the cause of delay. It is axiomatic that some delay is inevitable. The question is, "at what point does the delay become unreasonable"?
>
> While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:
>
> 1. The length of the delay;
> 2. Waiver of time periods;

3. The reasons for the delay including — inherent time requirements of the case;
4. Actions of the accused;
5. Actions of the Crown;
6. Limits on institutional resources, and
7. Other reasons for delay.
8. Prejudice to the accused.

**[40]** The Supreme Court in a judgment delivered on 19 October 2006, *Jonetani Rokoua v State* [2006] FJSC 16, discussing delay commented upon the caution to be exercised when construing the Fijian constitution alongside the constitutional rights jurisprudence of other more developed nations. Their Lordships observed that Fiji is not comparable to a western (European) country and so foreign decisions will only ever aid constitutional interpretations not supplant them. When considering delay in the context of the criterion of reasonableness contained in s 29(3) of the Constitution, the court went on to say, this had to be read with regard to the resources available in Fiji for the administration of justice. However, in my view, the courts of Fiji cannot ignore the "regard" that must be had to public international law in the interpretation of all our rights detailed in Ch 4. (see s 43(2)) and the trusted common law principles preserved by our Penal Code. This was underscored recently in *Shameem*.

**[41]** Accordingly, great caution must be exercised in reading down delay rights on an affordability argument. The risk is that a focus on the availability of resources as the sole yard stick of reasonableness will inevitably lead to the acceptance of otherwise intolerable delays. The right is in the Constitution to be recognised. Clarity in these cases comes from recognition of delay and the application of judicial technique to find appropriate remedies for it; not artificial interpretation or restriction of the right to avoid an unpleasant consequence.

**[42]** In *Morin*, two of the judges Lamer and Wilson JJ, took the view that a finding of undue delay goes to the jurisdiction of any court to put the Accused on trial or to continue with the charges against him (compare *Rahey v R* [1987] 1 SCR 588; (1987) 33 CCC (3d) 289 at 306.) In both Canada and the United States a permanent stay or dismissal of the case follows a breach of the right to be tried without undue delay: (compare *Rahey and Anor v United States* (1973) 412 US 434; [1973] USSC 133). In *R v West London Magistrate; Ex parte Anderson* 80 Crim App Rep 143 it was held that where the prosecution caused substantial delay by its own inefficiency, and as a result the accused was prejudiced, a stay should be ordered. This largely correlates to the Fijian jurisprudence so far.

**[43]** The issue for Fiji is whether that strict approach can possibly prevail in such an overworked and under resourced criminal justice system where in reality the stakeholders are not free to make there own choices over the allocation of scarce resources. The risk being that greater and greater delays will be tolerated on resource issues alone without an effective remedy being provided to frustrated Applicants.

**[44]** In my view while there is no reason to refuse a stay in a case where the delay was of the prosecution's making or where the delay is systemic it must always be remembered that a stay is not the only remedy available and is never automatically applied.

**[45]** The British courts have considered this issue. Their right to a speedy trial is given legislative recognition by incorporation of EU Convention rights through their Human Rights Act. They have a "speedy" trial right as opposed to our "reasonable" one.

**[46]** In *Re Attorney-General's Reference (No 2 of 2001)* [2004] 2 AC 72; [2004] 1 All ER 1049; [2004] 2 WLR 1; [2003] UKHL 68 (*Re Attorney-General's Reference*) the Attorney-General for England and Wales sought clarification from the English Court of Appeal as to whether a permanent stay of proceedings was the required result where the speedy trial right had been breached. The question was referred to the House of Lords. For the majority Lord Bingham of Cornhill while acknowledging the "powerful argument" that if a public authority causes or permits unreasonable delay to occur then a stay might be appropriate none the less rejected stay as the only remedy. In Fiji with limited resources and scarce hearing time his Lordships reasons seem relevant.

**[47]** Lord Bingham at AC 89; All ER 1060:

> The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances.

**[48]** His Lordship went on to say there may be cases where the delay is of such an order, or where a prosecutor's breach of professional duty is such as to make it unfair that the proceedings against a defendant should continue. *Martin* in New Zealand is an example of such a situation.

**[49]** The issue was revisited last October by the Privy Council in *Boolell v Mauritius* (2006) 26 BHRC 552; [2006] UKPC 46 (*Boolell*). The Appellant Prakash Boolell was on 24 March 2003 convicted by the Intermediate Court of Mauritius on one count of swindling and sentenced to 6 months' imprisonment.

**[50]** His appeal to the Supreme Court of Mauritius was dismissed on 20 May 2004. He appealed as of right to the Judicial Committee of the Privy Council against the judgment of the Supreme Court.

**[51]** The charge arose out of a transaction entered into by the appellant, a barrister, on 12 September 1990. There was an extended curial history of the case following a similar pattern whereby hearings would be commenced and then have to be adjourned or vacated as the appellant barrister made a number of applications in the course of trial, some without notice to the prosecution or the court, many of them redundant or vexatious.

**[52]** However, despite delay caused by his litigation technique there were also systemic delays in hearing the case due largely to an under resourced justice system. For example, on no occasion during trial was evidence taken on successive days and on the only two occasions when the case was listed on successive days the proceedings were merely mentions. The Privy Council was informed that the intermediate court in Mauritius was not geared to hearing a case of any length.

**[53]** Section 10(1) of the Constitution of Mauritius, contains a guarantee in familiar terms that where a person is charged with a criminal offence "the case should be afforded a fair hearing within a reasonable time by an independent and impartial court established by law".

**[54]** Their Lordships considered that the following proposition should be regarded as correct in the law of Mauritius:

> i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.
>
> ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone unless the hearing was unfair or it was unfair to try the defendant at all.

**[55]** Although relating more to our s 29(3) rights, I none the less respectfully adopt their Lordships reasoning and in particular their approval of Lord Bingham's judgment in *Re Attorney-General's Reference*, to the effect that a stay is an extraordinary remedy in a criminal trial available in extremely limited circumstances.

**[56]** In New Zealand Her Honour Justice Winkelman discussed these very issues in *Du v District Court and Anor* [2006] NZAR 341; (2005) 22 CRNZ 505; [2005] NZHC 276 (*Du*). Her honour noted competing academic commentary on the issue and referred to the dean of the Auckland law school in an article entitled: "Affirming the Nation's Fundamental Values the Bill of Rights on Trial Without Undue Delay" ((1995) 1 *HRLP* 56 at 62–3) where Prof Rishworth said that the logic of the Canadian approach, that a stay seems to be a minimum remedy, is compelling none the less:

> … the very seriousness of this remedy will inevitably lead to greater tolerance of delay in order to avoid the granting of stays in all but the most deserving of cases.

**[57]** I am satisfied that in Fiji we can comfortably follow the reasoning of the Privy Council in *Boolell*. The court does not further contravene the right in continuing the proceedings after a breach of it has been found since the breach consists in the delay which has accrued and not in the prospective hearing.

**[58]** In this way shockingly long delays that are clearly unreasonable and violate the right might be properly recognised rather than ignored simply because of the undesirability of turning criminals loose. In *Du* Winkelman J quoted the American Professor Amsterdam from his article: "Speedy Criminal Trial: Rights and Remedies" (1975) 27 *Stan L Rev* 525 at 535–6:

> The primary form of judicial relief against denial of a speedy trial should be to expedite the trial not to abort it … If the sole wrong done by the delay is "undue and oppressive incarceration prior to trial" the remedy ought to be release from pre-trial confinement; if prolongation of the anxiety and other vicissitudes "accompanying public accusation" is sufficiently extensive, the remedy ought to be dismissal without prejudice; and it is only when delay gives rise to possibilities [of impairment off the ability of an accused to defend himself or when a powerful sanction is needed to compel prosecutorial obedience to norms of speedy trial which judges cannot otherwise enforce, that dismissal of a prosecution is warranted.

**[59]** A slavish adherence to the stay remedy is not necessary or desirable in Fiji when there are alternatives that offer a proportionate and just remedy for unreasonable delay. This is in keeping with the proper use of the courts powers to stay or strike out proceedings. The prima facie duty of a court is to try a person

who is charged before it with an offence which the court has the power to try. Therefore the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Compare Lord Lowry in *Ex parte Bennett* at AC 74; All ER 161.

**[60]** In the final analysis it comes back to judicial technique in finding both a balance between the competing societal and personal interests involved and a remedy involving a proportional response to the breach of that right. A flexible approach to remedy rather than a rigid adherence to an automatic stay offer the best result for the state and the accused. A flexible approach will better promote an adherence to the right as judges will more readily find and denounce as unreasonable any real delay in the trial of an accused.

**[61]** Some of the remedies that may be available are:

(i) A declaration. Rishworth et al, in The New Zealand Bill of Rights (Oxford 2003) note that a declaration has the salutary effect of condemning the Crown's deviation from the required standards of conduct. Not only is there greater symbolic effect, but a declaration may be more likely to bring a matter to the attention of parliament as well as the public, thereby promoting political accountability for the breach as a result.

(ii) Timetabling orders to expedite the process of trial and to bring a fixture on at a reasonable time.

(iii) Release from pre-trial confinement on strict bail terms until trial.

(iv) Dismissal without prejudice; if the anxiety accompanying public accusation is sufficiently extensive.

(v) Comfort orders, such as name, identity and details of allegation suppression until trial. This to allow the innocent but anxious Accused and his or her family to get on with life while the prosecution continues its efforts to bring the matter to trial. Where the investigation or prosecution has been extensively delayed or mismanaged, thereby delaying the trial through no fault of the accused then costs orders to accompany a declaration.

(vi) Trial direction to the assessors that delay is a factor for consideration.

(vii) Sentence mitigation and reduction of penalty as delay has caused an accused to be on strict bail terms at the pleasure of the state awaiting trial.

(viii) The payment of compensation to an acquitted defendant.

(ix) If unfairness is established after trial then the quashing of any conviction.

**This case**

**[62]** In this case there has been systemic delay. There has been delay caused by the prosecution. There has been delay caused by the Accused. The rights under s 29 of the Constitution are however personal to the person charged. Accordingly, I am prepared to find that the delay is unreasonable and I will in my conclusion declare that to be so. In my view to obtain a stay remedy in circumstances where the accused has contributed to the delay the applicant must demonstrate on the balance of probabilities some prejudice that flows from the delay.

**[63]** In this case counsel for the Accused was unable to provide any evidential basis for his contention. He could not advance in evidence any reason why witnesses were unavailable. Apart from presumptive prejudice counsel could not demonstrate actual prejudice to his client from faded recall or lost evidence.

**[64]** The Applicant has the burden of proving his case in these applications. The court cannot be left in a position where it has to guess at possible prejudice.

**[65]** I accept the comment of their Lordships in *Shameem* that in such a case the defence would be wise to provide particulars to support its contention. I do remind myself that the defence is not obliged to reveal its evidence before calling it in a criminal trial. However, the fact remains that there is no direct evidence of prejudice to the Accused's fair trial rights.

**[66]** I took the precaution of making enquiries of counsel about why that information was not provided. I received no satisfactory response.

**[67]** In this case the allegation is that the Applicant dealt with the complainants personally or through third parties when encouraging them to part with their money to pay for his visa transaction services. These allegations were reduced into statements back in early 2001. The statements were then put to the Accused shortly thereafter in a caution interview and he gave his exculpatory response. All of that material is preserved and remains available for trial.

**[68]** The State's case will rely on what was said between the Accused and the complainants or the complainants and third parties said to have been sent by the Accused to collect money from them. The Accused has access to these statements. I do not accept that his fair trial rights are prejudiced by the overall delay.

**[69]** I accept that there is a strong public interest in the prosecution and punishment of crime and in this case I am satisfied that the appropriate course is to declare the delay unreasonable, provide some guidance and encouragement to avoid such delays in the future and then direct that the trial proceed at the earliest opportunity.

**[70]** The application to stay the proceedings is refused.

**Declarations and orders**

**[71]**

(i) I declare that there has been in this case unreasonable delay in bringing these charges to trial.

(ii) I declare the cause of this delay was primarily a failure of the court system to manage the case to a hearing.

(iii) I also declare that the Accused and the prosecution significantly contributed to that delay.

(iv) I direct the Chief Magistrate to ensure this trial is heard by a resident magistrate within the next 40 days.

*Application dismissed.*