IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 48 of 2014

BETWEEN : ANARE TOKALAUVERE

Applicant

AND : STATE

Respondent

Counsel : Applicant in Person
Mr. S. Babitu for Respondent

Date of Hearing : 3 June 2014
Date of Ruling : 10 June 2014

RULING

1. This is an application for permanent stay of proceedings.

2. The applicant is charged before the Magistrate Court of Lautoka with others on one count of Robbery with violence.

3. The particulars of the offences are:

   ROBBERY WITH VIOLENCE : Contrary to Section 293 [1] [b] of the Penal Code, CAP 17.

   Anare Tokalauvere, Emori Laqai, William Drasuna, Joseva Saqila, Iowane Naio, Mosese Baloadrau on the 13th day of November, 2009 at Lautoka in the Western Division robbed **Suresh Naidu s/o Pollaiya** of cash $38,805.90 immediately before the time of such robbery did use personal violence on the said **Suresh Naidu s/o Pollaiya.**

4. The application were filed on 24 February 2014 on the basis of abuse of process and prosecutorial misconduct which resulted in unreasonable delay and if this matter further proceeds it would amount to that no fair trial would be held.

5. Both parties have filed written submissions.

6. The principles for stay of prosecution are settled in Fiji. In ***Mohammed Sharif Sahim v. State***[2007] FCA 17/07, the Court of Appeal when reviewing the law on criminal trial delay held that:

"...it was well settled since ***Apaitia Seru and Anthony Fredrick Stevens v. The State Crim. App. AAU 0041/42 of 1995 S*** *that where the delay was unreasonable, prejudice to the accused could be presumed. This court in that case adopted the approach of the majority of the Supreme Court of Canada in* ***R v. Morgan*** *[1992] 1SCR and New Zealand court of appeal in* ***Martin v. District Court at Tauranga*** *[1995] 2 NZLR 419 that stated:*

" The general approach to a determination as to whether the right has been denied is not 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 lead to delay or are otherwise the cause of the delay. As I noted in Smith (R v Smith (1989) 52 CCC (3D) 97), (I)t is axiomatic that some delay is inevitable. The question is, at which 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:

(i) The length of delay
(ii) Waiver of time periods
(iii) The reasons for the delay, including
(a) Inherent time requirements of the case;
(b) Actions of the accused;
(c) Actions of the Crown;
(d) Limits on institutional resources, and
(e) Other reasons for the delay, and
(iv) Prejudice to the accused."

7. In ***Johnson v State*** *[2010] FJHC 356;HAM 177.2010 (23 August 2010), Hon. Mr. Justice D. Goundar stated:*

*"...The circumstances in which abuse of process may arise are varied. In **R v Derby Crown Court, exp Brooks** [1984] Cr. App. R.164, Sir Roger Ormrod identified two circumstances in which abuse of process may arise:*

"...It may be abuse of process if either

(a) The prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or
(b) On the balance of probability the defendant had been, or will be, prejudiced in the prosecution of or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused or to genuine difficulty in effecting service."

8. His lordship further quoted Justice Pain's remarks from ***State v Rokotuiwai*** [1998] FJHC 196 identifying the factors which needs to be considered in deciding whether delay is reasonable or not:

".. The length of the delay, the reasons for the delay, the actions of the defendant, the actions of the prosecutor, availability of legal and judicial resources, the nature of the charge and prejudice to the defendant may be relevant."

9. Hon. Mr. Justice Paul Madigan in ***Tafizal Rahiman v State*** [2011] FJHC 298 at paragraph 7 stated that:

*"The facts to be considered when assessing whether delay is unreasonable or not are expounded in the Privy Council decision in **Flowers v The Queen** [2007] WLR 2396. The board held that the Court should take into account:*

(i) The length of delay;
(ii) The reason for delay;
(iii) Whether or not the defendant has asserted his rights to a speedy trial; and
(iv) The extend of prejudice."

Stay in this case was refused even though the delay was 5 years because they were not brought to court which was a system failure and not an unreasonable delay.

10. The State in their submissions has submitted that the trial dates were vacated due to the fact one or more accused being not present on the trial days. Careful perusal of the copy record confirms this position. This case was firstly fixed for trial on 17.5.2010. On that day 2nd and 4th accused were absent and bench warrants were issued against them. On subsequent days the applicant and other co-accused were absent till 11.1.2011. When this case was again fixed for trial on 9.5.2011 the prosecution witnesses were absent. Then again one or more accused were absent till this case taken up for voir-dire hearing on 28.2.2013. The ruling was delivered on 20.9.2013. Thereafter, the Resident Magistrate was not available on several days as he was sitting in Nadi Magistrates Court. Now the case is to be mentioned on 14.7.2014 to fix for hearing.

11. Therefore it is clear that although there is delay of 4 ½ years the co-accused had contributed to the delay in most of the instances.

12. In ***Nalawa v State*** CAV 0002/09 (13 August 2010) the Supreme Court of Fiji laid down the following principles may now be stated as basic to common law.

"(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 prosecution, very rarely will a stay be granted.

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

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

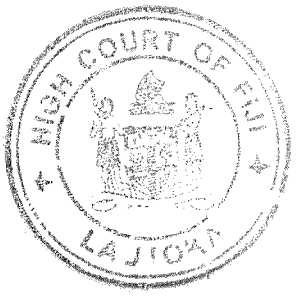
13. The applicant has failed to show on balance of probabilities that due to delay he would suffer serious prejudice to the extent that no trial could be held.

14. A stay proceeding is an exceptional remedy, and will only be used if other remedies are not available to deal with the justice of the case. Considering all above, the delay in this case is not unreasonable.

15. Applying the above principles, I do not find merit in any of the grounds on which the application for stay is founded. The case is to be mentioned on 14.7.2014 in the Magistrate Court. The application for permanent stay of the prosecution is, accordingly, disallowed and dismissed.

16. Considering the date of filing of the charge, I direct the learned Magistrate to give priority to this case and conclude this matter within 6 months from 14.7.2014. Further, I request both parties to co-operate with the learned Magistrate to conclude this matter within that time frame.

17. Copy of this ruling to be send to the learned Magistrate.



Sudharshana De Silva
JUDGE

At Lautoka
10th June 2014

Solicitors : **Applicant in person**
Office of the Director of Public Prosecutions for Respondent