

IN THE HIGH COURT OF FIJI  
AT SUVA  
CRIMINAL JURISDICTION

Miscellaneous Case No: HAM 248 of 2013  
Miscellaneous Case No. HAM 249 of 2013  
Miscellaneous Case No. HAM 250 of 2013

BETWEEN : JOELI TAWATATAU

AND : STATE

Counsel : Applicant In Person  
: Mr. Qalinauci T for the State  
Date of Ruling : 17<sup>th</sup> June 2014

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**RULING**

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1. The applicant, Mr. Joeli Tawatatau had filed three separate applications, HAM 248/2013, HAM 249/2013 and HAM 250/2013, seeking this court's intervention to permanently stay the proceedings of three criminal cases pending against him in the Magistrate's Court, 1039/2011, 1046/2011 and 1047/2011 respectively.
2. All three applications are based on the following four grounds:
  - a) Double jeopardy
  - b) Abuse of process
  - c) Inordinate delay
  - d) Unfair trial.
3. It was agreed by both the applicant and the Respondent that all three applications can be dealt together as their basis is same. Thus, I will mainly

focus on HAM 248/2013 and the Ruling will apply to the two remaining applications, HAM 249/2013 and HAM 250/2013.

4. The applicant claims that he was assaulted by the police officers during his arrest and as a result he sustained injuries. His claim for 'Double Jeopardy' comes in that context; he cannot be punished twice, once police and then the court. This, on the face of it, does not carry any merit and amounts to a total misconception of the principle of 'Double Jeopardy'. The applicant has misdirected himself on the 1<sup>st</sup> ground and thus, fails.
5. The law relating to permanent stay of proceedings in criminal matters has been discussed in several case authorities. This court, in **Pratishna Narayan v. State**, HAM 207 of 2013 (22<sup>nd</sup> May 2014), after a careful analysis of both local and overseas decisions of the higher courts, said that an application to stay proceedings permanently in a criminal matter has to be done only in exceptional circumstances when it is proved by the accused on balance of probability that either he cannot have a fair trial or it would be unfair for the court to try him in a given scenario. It was stressed in **Pratishna Narayan** (supra) that the judicial discretion to stay criminal proceedings has to be exercised sparingly to reach the ultimate objective of a fair trial and that 'fairness' is not only to the accused, but to the prosecution as well.
6. The remaining three grounds of appeal, Abuse of process, Inordinate delay and unfair trial have been emerged with the delay of almost 2 years from the inception of the Magistrate's court cases.
7. In common law, it is accepted that though the 'delay' is unjustifiable, if no fault can be attributed to the prosecution, an order for stay of proceedings is rarely been considered and in fact, it is an exception, but not the rule. Further, if there is no prejudice caused to the defence depriving them of having a fair trial or a trial according to the law, a stay will not be granted. The issue of 'delay' has to be addressed with the length of delay, the reason for the delay, whether or not a defendant has asserted his or her right to a speedy trial and the extent of any prejudice to the defendant. [**Tevita Nalawa v. State** [2010] FJSC 2; CAV 0002.2009 (13<sup>th</sup> August 2010)]

8. The Court of Appeal, in the case of **Mohammed Sharif Shaim v. State**, *Misc. Action No. 17 of 2007* held that a 5 years delay after the charges been laid down in the Magistrate's Court amounts to an unreasonable delay. But, instead of ordering a stay, the matter was referred back for the trial to be commenced within 40 days. It was 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 that if that question can be answered affirmatively, the prosecution should not be stayed.
9. The chronology of events pertaining to Case No. 1039/2011 (HAM 250/13), the oldest pending case amongst the lot, had initiated in Nasinu Magistrate's Court on 29<sup>th</sup> of September 2011. The applicant been charged with Burglary and Theft, had been served 2<sup>nd</sup> phase disclosures on 23<sup>rd</sup> of January 2012. As per the records on 6<sup>th</sup> of June 2012, the applicant had been served full disclosures and his application for Legal Aid assistance was still pending. Even on 11<sup>th</sup> of July 2012, the applicant's legal representation issue had been pending. On 4<sup>th</sup> of February 2013, this matter had been fixed for trial on 30<sup>th</sup> of September 2013. But, unfortunately the prosecution was not ready on that day as the prosecuting officer was sick. Despite the applicant's claims that the prosecution is giving lame excuses to have the case adjourned and request for an acquittal, the learned Magistrate had accepted that the prosecution has a 'reasonable cause' to move for an adjournment. The hearing had been adjourned to 20<sup>th</sup> of November 2013. The applicant filed the stay application, HAM 250/2013, in the High Court before the 2<sup>nd</sup> hearing date.
10. Nasinu Magistrate's Court No. 1046/2011 (HAM 249/2013) had been initiated on 5<sup>th</sup> of October 2011. The applicant had been bailed out by the learned Magistrate twice in this case, once on 4<sup>th</sup> April 2012 and then on 19<sup>th</sup> of November 2012. But, the applicant could not meet the ordered requirements. Matter had been fixed for hearing on 4<sup>th</sup> February 2013, when mentioned in court on 19<sup>th</sup> November 2012. Before 4<sup>th</sup> February 2013, several adjournments had been taken place for applicant's bail issues, him been produced in other courts and for the DPP to bring down the charges of "Aggravated Robbery" and "Theft of a motor vehicle" to one Receiving Stolen properties. On 4<sup>th</sup> February 2013, when the prosecution was ready to proceed with the hearing, the applicant wanted to go for a *Voire Dire* hearing and the hearing of the substantive matter had been adjourned to 22<sup>nd</sup> May 2013. On that day, the

applicant's witness was not present in court. Though the prosecution was ready to proceed with the *voire dire*, the learned Magistrate had adjourned the hearing till 30<sup>th</sup> July 2013, saying that it is not fair by the accused to proceed without his witness. On 30<sup>th</sup> July 2013 the hearing did not take place due to the non-availability of the prosecution witnesses. They were issued with Bench warrants and matter was fixed for mention on 30<sup>th</sup> September 2013. The application for stay (HAM 249/2013), had been filed by the applicant in High Court before the scheduled date.

11. Suva Magistrate's Court case No. 1047/2011 (HAM 248/2013) is for 'Resisting Arrest'. Initially it was pending before Nasinu Magistrate's Court, but later transferred to Suva over a jurisdictional issue. This case had also initiated on 5<sup>th</sup> October 2011. On 3<sup>rd</sup> February 2012, after several mention days from its inception, the applicant had told court that he wants to engage a counsel. Even by 6<sup>th</sup> June 2012, the plea could not be taken as the applicant had applied for Legal Aid Commission's assistance. The issue of legal representation had not been finalized even till 18<sup>th</sup> September 2012. The applicant had not been produced before court for several dates and on 18<sup>th</sup> of September 2013 he had made a representation to the prosecution to withdraw the charge. Then on 10<sup>th</sup> October 2013 the applicant had moved for a stay of proceedings in this case as well.
12. The sequence of events pertaining to all three cases, 1039/2011, 1046/2011 and 1047/2011, show that the 'delay' to conclude the matters is been contributed by both the prosecution and the applicant, but mostly by the applicant. Issues such as applicant's legal representation by the Legal Aid Commission, his bail and sudden move for a *voire dire* inquiry along with the absence of defence witnesses had caused the delay from the applicant's side. Therefore, it is not correct, if not unfair, to say that the delay is due to the sole responsibility of the prosecution. Thus, this court is not inclined to accept the assertion of the applicant, that there is such inordinate delay which would amount to abuse of process and unfair trial.
13. This court is of the firm opinion that the applicant did not prove on balance of probability that he will be prejudiced or will not have a fair trial if he is to proceed with the trials in the Magistrate's Courts over the alleged delay. In fact, had he proceeded ahead in the ordinary course, these three cases might

have been disposed by now. All the grievances of the applicant, especially the assaults to him in the course of the arrest and interview can be dealt with in a *voire dire* inquiry, as he opted to do once in Case No. 1046/2011 (HAM 249/2013). Hence, the three (3) applications to stay the proceedings of Magistrate's Court (Nasinu) Criminal Nos. 1039/2011, 1046/2011 and 1047/2011 (Suva Magistrate's Court) do not carry any valid appeal ground to be entertained.

14. Thus, all three cases will be referred back to the respective Magistrate's Courts. The learned Magistrates who are presiding in the respective courts are hereby ordered to give priority to these cases and conclude before 31<sup>st</sup> December 2014.
15. The Ruling of this court applies to all three applications and must convey the same to the respective Magistrate's Courts without any delay. A feedback on the outcome of the cases should be submitted to the High Court Criminal Registry by the respective Magistrate's Court Criminal Registries on or before 31<sup>st</sup> January 2015.
16. The three applications, HAM 248/2013, HAM 249/2013 and HAM 250/2013 are dismissed accordingly.



Janaka Bandara  
Judge

At Suva  
Applicant in Person  
Office of the Director of Prosecution for State