

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Misc. No. HAM 170 of 2016

BETWEEN : **ISAIA BOBO**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. P. Chand [LAC] for the Applicant.
: Mr. A. Singh for the Respondent.

Date of Ruling : 12 May, 2017

RULING ON APPLICATION FOR STAY OF PROCEEDINGS

APPLICATION

- [1] The Applicant by Notice of Motion supported by his own affidavit sworn on 18 August, 2016 and supplementary affidavit sworn on 6 December 2016 respectively seeks a permanent stay of proceedings in respect of criminal case no. 843 of 2009 pending at Magistrate's Court, Nadi.

[2] The application is opposed by the State, however, no affidavit in reply have been filed. The State relies on the submission of counsel.

[3] During the hearing it became obvious that the whereabouts of the Applicant from 23 July 2014 to 12 November 2015 was not known. The court on its own motion ordered the Commissioner of Corrections Service to inform the court as to where the Applicant was between the dates mentioned. The Fiji Corrections Service by letter dated 18 April, 2017 informed the court as follows:-

“The Applicant ISAIA BOBO was initially brought into the custody of the Fiji Corrections Service at the Lautoka Corrections Centre on 2 December, 2013 to be remanded in custody under the orders of the Magistrate Court at Rakiraki.

The Applicant had numerous criminal cases pending against him and was regularly escorted to court by the police to attend his pending cases.

Unfortunately on one such occasion, the Applicant escaped from the custody of the police. Upon being recaptured he was subsequently convicted and sentenced to a term of imprisonment by the Magistrate Court.

On 8 January, 2015 the Applicant was again sentenced to a term of imprisonment to a total of 12 years and 6 months for a series of criminal offences that were pending against him.

After the applicant’s admission into prison as a convict on 8 January 2015, he was transferred to the Maximum Corrections Centre where he currently serves his sentence and remains today.

On 23 July 2014 to 12 November 2015 the Applicant Isaia Bobo was in the custody of the Fiji Corrections Service initially as a remand prisoner and then a convicted prisoner.”

BACKGROUND INFORMATION

- [4] The Applicant has been charged with another in the Magistrate's Court with one count of Burglary contrary to section 299 (a) of the Penal Code Cap. 17 and one count of Larceny from Dwelling House contrary to section 270 of the Penal Code Cap. 17.
- [5] The Applicant was first produced in the Magistrate's Court on 13 October, 2009 to date the case has not been heard. It is on this basis the Applicant says that there has been an abuse of process, delay contrary to section 14 (2) of the Constitution of the Republic of Fiji and Prosecutorial Misconduct. The Applicant contends that the delay has been for a period of 7 years.
- [6] For clarity and completeness the chronology of events can be tabulated as follows:

APPEARANCE IN COURT

| Date | Prosecution | Accused 1 (Autiko Qaliso) | Accused 2 (Isaia Bobo) | Adjournments |
|--|-------------------------|--|-----------------------------------|---|
| 13/10/2009 (Bail) | Present (IP N Singh) | Present | Present | Both Accused remanded in custody till 16/10/09 |
| 16/10/09 | Present (IP Nawal) | Present | Present | Remand in custody till 30/10/09 |
| 30/10/09 | Present (Sgt Akesb) | Present | Present | Remand in custody until 13/11/09 |
| 13/11/09 | Present (IP N Singh) | Present | Present | 27/11/09 Ruling for Bail |
| 11/12/09 Both accused Seeking bail | Present (CPL Naidu) | Present | Present | Bail refused Remand in custody till |

| | | | | |
|--------------------|---------------------|--|-------------|---|
| | | | | 23/12/09 |
| 23/12/09 | Present (CPL Naidu) | Present | Present | 15/01/10 for mention only |
| 06/01/2010 | Present (Sgt Akesh) | Present | Present | Both accused Bailed No surety for 2 nd Accused. 2 nd accused remanded 15/01/10 for mention |
| 07/01/10 | Present (CPL Naidu) | Not Present | Present | Surety for 2 nd accused present 15/01/10 for mention only |
| 15/01/10 (mention) | Not present | Present | Not present | 15/02/10 for mention only |
| 19/01/10 | Present (SGT Akesh) | Not Present | Present | 02/02/10 for mention only |
| 02/02/10 (mention) | Present (SGT Naidu) | It just says the Accused is Not Present but it is not clear as to which Accused is Not Present | | 21/05/10 for mention only |
| 18/02/10 | Present (SGT Naidu) | Not Present | Present | 22/02/10 for mention |
| 22/02/10 (mention) | Present (SGT Naidu) | It just says the Accused is present but it is not clear as to which Accused is present | | 12/03/10 for mention |
| 12/03/10 (mention) | Present (Naidu) | Not present | Not present | 24/06/10 Mention |
| 24/06/10 (mention) | Present (Akesh) | Not Present | Not Present | 30/08/10 for mention |
| 28/06/10 | Not present | Not present | Not Present | 09/08/10 for mention |
| 09/08/10 | Present | Present | Present | |
| 30/08/10 | Not Present | Not Present | Not Present | 13/10/10 for mention |
| 13/10/10 | Present (Naidu) | Not Present | Present | 14/12/10 for mention |
| 14/12/10 (mention) | Present | Present | Not Present | 24/02/11 for mention |
| 24/02/11 | Not Present | Not Present | Not Present | |

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|--------------------------------------|----------------------|--|--------------------------|--|
| (Mention) | | | | |
| 11/07/11 | Present (WPC Ana) | Present | No Appearance | 25/07/11 for mention |
| 25/07/11 | Present(A. Kumar) | Present | Not Present | 08/08/11 for mention |
| 08/08/11 | Present (CPL Ajay) | Present | No Appearance | 22/08/11 for mention |
| 22/08/11 | Not Present | Bench Warrant | Present | 05/09/11 for mention |
| 05/09/11 | Present (CPL Ajay) | Present | Bench Warrant | 19/09/11 for mention |
| 19/09/11 | Not Present | Not Present | Not Present | |
| 26/09/11 | Present (CPL Naidu) | Present | Bench Warrant | Remand in Custody extended till 29/09/11 |
| 29/09/11 | Present (CPL Naidu) | Present | Bench Warrant | 06/10/11 for Mention |
| 06/10/11 | Present (CPL Naidu) | It just says the Accused is present but it is not clear as to which Accused is present | | 20/10/11 for Mention |
| 20/10/11 | Present (Mr. Naidu) | Present | Present | 28/11/11 for mention |
| 28/10/11 | Not Present | Present | Present | 31/10/11 for Mention |
| 31/10/11 (Surety bail for Accused 1) | Present (CPL Naidu) | Present | Present | |
| 16/12/11 | Present (SGT Naidu) | Present | Not Present (remand) | 22/12/11 for Mention |
| 22/12/11 | Present (SGT Naidu) | Present | Present | 27/03/12 for Hearing |
| 27/03/12 (Hearing) | Present (IP Gosai) | No Appearance (bail) | No Appearance (remanded) | 01/05/12 for Mention |
| 26/06/12 | No Appearance | No Appearance | No Appearance | 21/09/12 for Mention |
| 21/09/12 | No Appearance | No Appearance | No Appearance | 23/09/13 for mention |
| 30/07/13 | Present (CPL Etuate) | Not present | Not present | 23/09/13 for mention |

| | | | | |
|--|-----------------------|--|---------------|--------------------------------------|
| Later @ 2.30pm | Present (CPL Francis) | Not Present | Not Present | |
| 23/09/13 | Present (WPC Ana) | Not Present | Not Present | 24/10/13 for Mention |
| 24/10/13 | Not Present | Not Present | Not Present | Adjourned for 25/11/13 |
| 03/04/14 | Present (PC Dinesh) | Bench Warrant not extended | Bench Warrant | Adjourned for 30/05/14 |
| 30/05/14 | Present (WPC Ana) | It just says the Accused is Not Present but it is not clear as to which Accused is Not Present | | Adjourned for 22/08/14 |
| 22/08/14 | Present (WPC Ana) | Not Present | Not Present | 21/11/14 for Mention |
| 21/11/14 | Present (WPC Kini) | It just says the Accused is Not Present but it is not clear as to which Accused is Not Present | | 26/03/15 for Mention |
| 26/03/15 | Present (WPC Ana) | Not Present | Not Present | Hearing 12/11/15 |
| 12/11/15 | Present (WPC Ana) | It just says the Accused is present but it is not clear as to which Accused is present | | 05/02/16 Mention to fix Hearing date |
| 05/02/16 | Present (Siteri) | It just says the Accused is present but it is not clear as to which Accused is present | | Adjourned to 18/04/16 |
| 18/04/16 | Present (WPC Mere) | Not Present | Present | |
| 16/05/16 | Present (PC Dinesh) | No Appearance | Present | 03/06/16 |
| 03/06/16 | Present (SGT Chand) | No Appearance | Present | 05/07/16 |
| 05/07/16 | Present (SGT Chand) | No Appearance | Present | 23/08/16 for Mention |
| 28/08/16 | Present (SGT Bole) | No Appearance | Present | Mention on 07/11/16 |
| Later @ 9.45am (Stood Down accused 2 Counsel Not Present | Present (SGT Bole) | No Appearance | Present | |

| | | | | |
|---|---------|------------------|---------|--|
| Later @ 11.40am (Stood Down for the affidavit of investigating officer) | Present | No Appearance | Present | |
|---|---------|------------------|---------|--|

LAW

[7] 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.”

[8] 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.”

[9] 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*).

- [10] 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

- [11] The Applicant states that he first appeared in the Magistrate's Court on 13 October, 2009 and after 7 years the case has not been heard. The next date in the Magistrates Court is 28 August, 2017 for hearing.

REASON FOR THE DELAY

- [12] The Applicant states the case has been dragged by the State, his co-accused as well as by him, however, he attributes the long delay caused to the State in serving him disclosures after 7 adjournments (should be 6 adjournments) on 6 January 2010 that is after about 3 months of his first appearance in court.
- [13] Although the Applicant agrees he was on bench warrant which contributed to the delay, however, he submits that he was not produced in court when he was in remand for other matters. It was only after he started serving from 8 January, 2015 that he was produced in court on 12 November, 2015 some 11 months after he became a convicted

prisoner. The Applicant submits it was the responsibility of the State to locate him and produce him in court which the State had failed to do.

- [14] In view of the above it is important to scrutinize the copy record from 13 October 2009 to 28 August 2016. Altogether there have been about 53 adjournments granted.

BENCH WARRANTS ISSUED AGAINST THE APPLICANT

(See paragraphs 13 to 46 of the Applicant's Supplementary Affidavit sworn on 6 December 2016)

| | Issue Date | Cancelled | Period of absence |
|-----|--------------------------------|------------------|--------------------------|
| (a) | First Bench Warrant 15/01/10 | 19/01/10 | 4 days |
| (b) | Second Bench Warrant 02/02/10 | 18/02/10 | 16 days |
| (c) | Third Bench Warrant 12/03/10 | 28/06/10 | 3 months |
| (d) | Fourth Bench Warrant 30/08/10 | 13/10/10 | 2 months |
| (e) | Fifth Bench Warrant 14/12/10 | 22/08/11 | 8 months |
| (f) | Sixth Bench Warrant 05/09/11 | 20/10/11 | 1½ months |
| (g) | Seventh Bench Warrant 23/09/13 | 13/11/13 | 2 months |

Total period of absence by the Applicant -1 year, 5 months, 5 days.

Note:

Annexure to Supplementary Affidavit of Applicant indicates Applicant on remand from 14/11/13 to 23/07/14 (about 8 months).

- [15] The Applicant has been on bench warrant for about 1 year, 5 months and 5 days in total. A perusal of the copy record also shows that on most occasions both the accused were not present or either one of the two was present or a production order was issued since the Applicant was remanded for other matters.

HAS APPLICANT ASSERTED HIS RIGHT TO SPEEDY TRIAL

- [16] 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.
- [17] A perusal of the copy record shows that it was only once in 7 years on 22/12/2011 that counsel on behalf of the Applicant took a hearing date. Other than this there is no suggestion that the Applicant made it known to the court that he wanted a speedy trial.

PREJUDICE CAUSED TO THE APPLICANT

- [18] The Applicant states that he has been prejudiced due to the delay and he may not get a fair trial since the State witnesses may not be able to recall their evidence and will heavily rely on their Police Statements.
- [19] Furthermore, the Applicant is unable to locate his witnesses due to the delay caused and he will not be able to properly defend himself.

DETERMINATION

- [20] There is no doubt that the right of an accused person to receive a fair trial according to law including other rights is an important right which the Courts at all levels respect.
- [21] The Supreme Court of Fiji in *Tevita Nalawa* (supra) formulated the principles of protecting an accused's right as basic to the common law 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.”*

[22] Since the Applicant first appeared in Magistrate’s Court on 13 October, 2009 seven years has lapsed and yet the matter is pending trial. It is on the basis of this delay the Applicant submits his right to fair trial is affected.

[23] There is also no doubt that the Applicant has substantially contributed to the delay by not appearing in court which compelled the court to issue bench warrants against him. This led to the matter been dragged for months.

[24] If the Applicant was concerned about this case and wanted a speedy trial he firstly would not have breached his bail conditions by not appearing in court. He was lucky to be given bail despite his disrespect to court order and breach of bail conditions. Secondly he did not inform the court or make attempts to inform the court via the Corrections Service during the past seven years that he had other matters pending or of his whereabouts after conviction.

[25] It will be unfair to place a burden on the State to locate all the accused persons who chose not to co-operate by evading bench warrants issued or not informing the court of their other pending matters.

- [26] Taking into consideration the evidence before this court I have no hesitation in stating that the delay of seven years is unreasonable, however, the conduct of the Applicant cannot be ignored at the same time. The Applicant has systematically taken advantage of the court system and has conveniently albeit incorrectly tried to lay the blame on the State for his wrong doings.
- [27] Had the Applicant adhered to court orders and been cooperative I am certain his case would have been decided by now. The State after serving disclosures on the Applicant on 6 January 2010 did inform the court that a hearing date could be assigned. Thereafter the State could not take a hearing date since it was restrained by the absence of the Applicant or the other accused from court. There is no evidence before the court of any Prosecutorial Misconduct which would have impeded the right of the Applicant towards a fair trial or that there has been an abuse of process by the State.
- [28] The Applicant's contention that he will not be able to receive a fair trial since State witnesses may not be able to recall evidence and will heavily rely on their police statement is misconceived and speculative. At trial the Applicant will have the chance to cross examine the State witnesses and challenge their veracity. The issue of memory of the Prosecution witnesses could be more appropriately dealt with by the learned Magistrate at trial whilst evaluating evidence.
- [29] As to the non-availability of defence witnesses the Applicant has not specifically stated the nature of the evidence the defence witnesses were supposed to adduce and its material relevance to defence.
- [30] In *Johnson -vs- State [2010] FJHC 356, HAM 177 of 2010 (23 August, 2010)* Goundar J. discussed the scope of determination of 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.”

[31] 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.

CONCLUSION

[32] 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 process which would convince this court to grant a stay of proceedings. There is also no evidence of any serious prejudice to the defence which will affect fair trial. The Applicant can be tried fairly without any impairment in the conduct of his defence. The trial court has processes to deal with admissibility of evidence if it can be shown there is prejudice to the Applicant as a result of delay.

[33] The application for stay of proceedings is refused and dismissed.

ALTERNATIVE REMEDY

[34] 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.

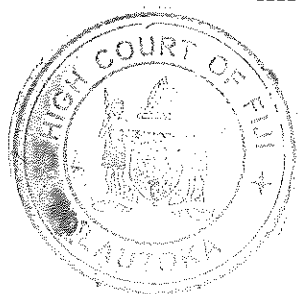
[35] The matter pending before the Nadi Magistrate's Court falls within its criminal division hence it is important to consider the interest of the victim and the interest of the Applicant. In my view appropriate orders towards an expedited hearing in the Magistrate's Court would be an adequate alternative remedy which will preserve the rights of the Applicant and prevent any Constitutional breaches. I am aware that this matter has already been assigned a hearing for 28 August, 2017.

[36] Before I leave I think it is important to put on record that any breach of bail conditions is a serious matter which should not be taken lightly. This court is concerned to note the number of times the Applicant was granted bail despite his continued breaches of the bail conditions. The Bail Act is very clear on such breaches which must be followed to give it the efficacy it deserves.

ORDERS

- (1) The application for permanent stay of proceedings in respect of criminal case no. 843 of 2009 pending at Nadi Magistrate's Court is refused and dismissed;
- (2) Criminal case no. 843 of 2009 is to be called for mention at Nadi Magistrate's Court on 19 May, 2017;
- (3) The purpose of order 2 above is to ascertain whether there is going to be a trial within trial or not;
- (4) If there is going to be a trial within trial then the Applicant is to file and serve his grounds within 7 days and the State is to be given 21 days to attend to the needful;

- (5) If there is no trial within trial then the substantive hearing to be conducted within 40 days from 19 May, 2017.
- [6] If there is going to be a trial within trial then the hearing of this matter is to be conducted within 40 days after Order 4 above has been complied with.
- (7) A copy of this ruling is to be sent to the Chief Magistrate for his information and necessary action forthwith.



At Lautoka

12 May, 2017

A handwritten signature in black ink, appearing to read "Sunil Sharma".

Sunil Sharma

Judge

Solicitors

Office of the Legal Aid Commission, Nadi for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.