

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO.: HAM NO. 144 OF 2016

BETWEEN: SHIRI NARAYAN

Applicant

AND: FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION
(FICAC)

Respondent

Counsel : Mr. V. Sharma for Applicant

Ms. L. Bokini-Ratu for Respondent

Date of Hearing : 11th May, 2017

Date of Ruling : 09th June, 2017

RULING

Introduction

- 1 This is an application seeking a permanent stay of proceedings in Nadi Magistrates Court criminal case No. 14 of 2015.

2. The Applicant was charged with one count of Extortion by Public Officer contrary to Section 107 of the Penal Code Cap17. The charge against the Applicant is as follows:

SHIRI NARAYAN, on the 22nd day of September 2006, at Nadi in the Western Division, whilst being employed in the public service as Divisional Surveyor Western of the Lands Department, accepted a payment of \$10,000 from one Ashwin Kumar, beyond his proper pay and emoluments for the performance of his duties as a Divisional Surveyor Western for approving transfer and change of lease.

3. On the 11th August 2016, the Applicant filed a Motion and Affidavit in support of his application, and on 30th November, 2016 he filed a further Affidavit in Reply. On 25th October 2016, the Respondent filed an affidavits of Edwin Chandra and on 9th November, 2016 Serupepeli Neiko in Reply.

4. As per the Affidavit dated 11th August, 2016 filed by the Applicant, the application for stay is made on following grounds:

- I. Unreasonable delay in laying the charge
- II. Prejudice caused to the Applicant by delay
- III. A fair trial is not possible

The Law

5. In Attorney General's reference (No 1 of 1990) (1992) Q.B 630 at 643-644) CJ Lord Lane discussed the principles applicable in stay of proceedings on the ground of delay, where His Lordship observed;

“Stay imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust. We respectfully adopt the reasoning of

Bernnan J in Jago v District Court of New South Wales (1989) 168 C.L.R.23. In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the action of the defendant himself, should never be the foundation for a stay,

In answering to the second question posed by the Attorney- General, no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held; in other word, that the continuance of the prosecution amounts to a misuse of the process of the court. In assessing whether there is likely to be prejudice and if so where it can properly be described as serious, the following matters should be borne in mind; first, the power of the judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence, secondly, the trial process itself, which should ensure that all relevant issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the power of the judge to give appropriate direction to the jury before they consider their verdict”.

6. In *Nalawa v State* [2010] FJSC 2; CAV002.2009 (13 August 2010) the Supreme Court of Fiji adopted the common law approach and held;

The following principles may now be stated as basic to the 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 the 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*

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.*

7. In the case of *Ratu Inoke Takiveikata & Others v. State* [2008] FJHC 315; HAM039.2008 (12 November 2008) Justice Bruce at paragraph 12 stated 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 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”

Analysis

8. The first two grounds raised by the Applicant, namely, that substantial delay in the laying of charge and that the Applicant has been greatly prejudiced by the delay are interrelated grounds and can be dealt with together.
9. In view of aforementioned authorities, the Applicant is required to show, on the balance of probabilities, that the delay is unreasonable and that, owing to the delay, he will suffer serious prejudice to the extent that no fair trial can be held. In other words, that the continuance of the prosecution amounts to a misuse or abuse of the process of the court.
10. The Applicant in his affidavit dated 11th August, 2016, states that, on or about 17th May, 2007, he was charged by FICAC at the Magistrates Court at Lautoka for the offence Extortion by Public Officer and, on 8th November, 2007, he was discharged. He submits that laying of a charge again on same facts in Criminal

Case No. 14 of 2015 at the Nadi Magistrates Court on 5th March 2015 by FICAC, after a lapse of 9 years, has been greatly prejudicial to him.

11. The Respondent concedes that there is a considerable delay in bringing the charge. However, they submit that the seriousness of the offence alleged, the Applicant's post as a senior public official and the amount of money (\$10,000) involved in the alleged extortion justify the initiation and continuation of the prosecution against the Applicant.
12. Explaining the delay, the Affidavit of Serupepeli Neiko states, (from paragraph 6 – 11), that the Applicant's file (CID/HQPEP 28/08) had been in the custody of the Fiji Police Force (FPF) while they investigated the Applicant from 2008 – 2013. The Affidavit of Neiko further states that the FPF transferred the matter to the office of the Director of Public Prosecutions (DPP) on 25 March 2013, and that the matter was never in FICAC's custody between 2008 – 2013.
13. The Affidavit of Edwin Chandra states (at paragraph 12 (ii)) that Applicant's file was not transferred to FICAC from the office of the DPP until 21 August 2014. In addition, the Affidavit of Edwin Chandra also refers to a letter from the DPP, attached as "EC 3", explaining the rationale behind the transfer of the case back to FICAC. The letter states that the Applicant's file had been forwarded to the DPP's office for continuation of Prosecution when the original charge was withdrawn after the legality of FICAC was challenged in Court. The letter from the DPP further states that the file was transferred back to FICAC on the basis that the issues concerning FICAC's standing had been resolved and there was sufficient evidence for the Commission to proceed with the matter.
14. There is no indication that any inherent complexity of the case was responsible for the gross delay. It appears that the delay has been due to a factor beyond the control of FICAC. The transfer to and subsequent languishing of the file with the FPF and office of the DPP was due to a legal challenge on FICAC's standing and was thus, out of the Prosecution's hands. FICAC cannot be blamed for the delay as the brief had been in the custody of FPF and the DPP. There are no serious

allegations of impropriety by the authorities, alleging for instance that the transcript of his trial has been destroyed and records 'weeded' or that case against him was fabricated from the beginning for political reasons. In light of the above, I find no evidence of malice to persecute on the part of the Prosecution.

15. According to the Affidavit dated 11th August, 2016, Applicant had been discharged by the Lautoka Magistrates Court in 2007 under Section 201 (2) (b) (ii) of the Criminal Procedure Code. FICAC states (in Affidavit of Edwin Chandra) that the original charge was withdrawn after the legality of FICAC was challenged in Court.

Section 201 reads:

201.-(1) The prosecutor may with the consent of the court at any time before a final order is passed in any case under this Part withdraw the complaint.

(2) On any withdrawal as aforesaid-

(a) where the withdrawal is made after the accused person is called upon to make his defence, the court shall acquit the accused;

(b) where the withdrawal is made before the accused person is called upon to make his defence, the court shall subject to the provisions of section 210, in its discretion make one or other of the following orders:-

(i) an order acquitting the accused;

(ii) an order discharging the accused.

(3) An order discharging the accused under paragraph (b)(ii) of subsection (2) shall not operate as a bar to subsequent proceedings against the accused person on account of the same facts. (Section substituted by 24 of 1950, s. 11.)

16. It is clear, since the Applicant has been discharged under Section 201 (2) (b) (ii) of the Criminal Procedure Code, he can be lawfully prosecuted again on account of the same facts. The Applicant does not say that the late prosecution is illegal. His main contention is that he has been greatly prejudiced by the delay.

17. The discharge Order in Lautoka matter was made in 2007, and until the Applicant was recharged in 2015, he was a free man. He can't complain that the charge had been kept hanging over his head and had had seriously damaging consequences for him. The period to be taken into consideration in calculating the duration of the proceedings in the circumstances of the present case started, in my opinion, on 5th March 2015 when the Applicant was recharged in the Magistrates Court at Nadi.
18. A decision to stay a prosecution on the ground of delay is a serious matter. A stay clashes with the interests of the State, representing the general body of citizens, in bringing the case to justice. The more serious the charge the greater the interests of the community in ensuring the case goes to trial. This is particularly relevant to the charge brought against Applicant which is intrinsically linked to public interest. In these circumstances, no court would stay proceedings lightly.
19. In Abdul Ahmed Ali, Uma Dutt & Roshni Devi v. The State (Appeal No. AAU0075 of 2007, 14 April 2008) the Court of Appeal emphasized that it is not the rights of accused persons alone which are at issue in a criminal trial. The public, represented by the State, has an important right in seeing that justice is done both to accused persons and to the public represented by the State (at para [29]).
20. I find that the delay in laying the charge against the accused is not unreasonable in the circumstances of this case.
21. It is up to the Applicant to prove on the balance of probabilities that he has been prejudiced due to the supposed delay in the laying of charges.
22. In the case of FICAC v Qarase HAM 110 of 2012, one of the grounds advanced by the accused in support of his application for a stay of proceedings was that he had been charged late as the offences alleged were twenty (20) years old. The

Court in that matter noted that, in advancing the ground, the Accused had stated that there were both pre and post charge delays which were to be attributed to the Prosecution as there had been no “genuine reason” provided by the Prosecution with regards to the delay. Fernando J, in discussing the law on stay in his ruling, referred to the case of Director of Public Prosecutions v Jackaran Tokai and others (Trinidad and Tobago) [[1996] (12th June 1996) Privy Council Appeal No. 53 of 1995 where the Privy Council stated that:

“Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would only be a short time before the public, understandably, viewed the process with suspicion and mistrust....”

In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a Permanent Stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay.

In answer to the second question posed by the Attorney-General, no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court...”

23. In refusing the application by the Applicant in the case stated above, Fernando J noted that there had been considerable pre charge delay before stating, at paragraph 15, that:

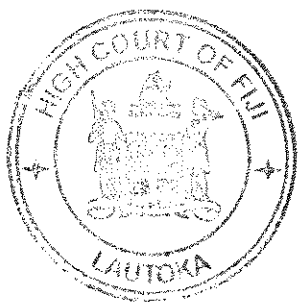
“There is considerable pre charge delay. However, there is no evidence of malice or intent to persecute on the part of the prosecution in bringing the charges late but on the contrary the accused has to show the element of prejudice...”


24. The presence of prejudice should be actual rather than speculative. There was no evidence in this case of actual prejudice, in the sense, for example, of witnesses being dead or unavailable. Applicant has made a generic statement. It is impossible to say to what extent the delay may have materially affected the Applicant in his impending trial.
25. The Applicant contends that he has been greatly prejudiced specifically with regard to employment opportunities. According to the Affidavit dated 11th August, 2016 filed by the Applicant, he was first charged by FICAC on 17th May, 2007 (SN1). He was suspended by the Ministry of Land and Mineral Resources on or about 16th February, 2007 way before the charge was brought in the Magistracy. The Public Commission Disciplinary Board had found him guilty of 14 charges laid by the Ministry and, after a hearing, he has been demoted. In 2009, he has been transferred to the Ministry of Agriculture (MOA) where he had served as the Senior Surveyor Western till 2013. There is no evidence that his suspension from service and the demotion are associated with the charge brought in the Magistracy.
26. The Applicant further states that during the six months of his extended contract starting from 23rd January, 2015, the current charge against him was filed in the Nadi Magistrates Court and he was not given a further extension and was not considered for the post of Senior Surveyor Western even though there were shortages of Registered Surveyors in MOA.
27. It appears that Applicant's prejudice claim is based on mere speculation. He has failed to prove on the balance of probability that the extension was not granted because of the case pending before the Nadi Magistrates Court.
28. Even if his claim as to the detriment to his job opportunities is accepted, Applicant, for the purpose of this application, must show on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. In other words, that the continuance of the prosecution amounts to a misuse of the process of the court. Applicant has

miserably failed to do so. Applicant has not produced any evidence to support his assertion that he will not receive a fair trial or that the continuation of the prosecution against him would amount to the misuse of the process of the Court by the Prosecution.

29. It is evident from the case laws, as set out in *Takiveikata v State* (supra) and *FICAC v Qarase* (supra), that a stay of proceedings, whether it is due to delay or any other reasons, is a remedy that should only be resorted to when all other possible remedies available to an accused have failed. An application for a stay of proceedings, whether it is made on the grounds of delay or any other reasons, cannot be allowed if other remedies are available to the Applicant.
30. In the matter at hand, there is a remedy that is available to the Applicant in the matter and it is that of an order for an expedited trial. It is possible to expedite the trial of the Applicant in this matter before the Nadi Magistrates Court as the matter is already at pre-trial conference state.
31. I find that the delay in laying the charge will not cause serious prejudice to the Applicant to the extent that no fair trial can be held. I am not satisfied that the continuation of the prosecution will amount to an abuse of the process of the court.
32. As such, in exercising inherent jurisdiction of this Court, I make following orders:
 - I. The application for a stay is refused.
 - II. The learned Magistrate at Nadi hearing the case is directed that the trial of the Applicant for Criminal Case No. 14 of 2015 be expedited and be concluded within six months from the date he/she has received this Order.

III. I direct the Deputy Registrar to send a copy of this Ruling to the Resident Magistrate at Nadi forthwith with a copy to the Chief Magistrate.




Aruna Aluthge
Judge

At Lautoka

09th June, 2017

Counsel: Vijay Naidu & Associates for Applicant

Office of the Fiji Independent Commission Against Corruption for
Respondent