

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Misc. No. HAM 159 of 2018

BETWEEN : **ILAITIA VUIVUDA**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Applicant in person.
: Ms. R. Uce for the Respondent.

Date of Hearing : 16 May, 2019

Date of Ruling : 17 May, 2019

RULING ON APPLICATION FOR STAY OF PROCEEDINGS

APPLICATION

1. The applicant who is self-represented has filed an application seeking a permanent stay of proceedings in the Magistrate's Court at Nadi being criminal case No. 1227/2013.
2. In support of his application the applicant filed his affidavit sworn on 28th day of January, 2019.

3. The applicant advances the following grounds in support of his application:

- a) *The unreasonable delay will cause the miscarriage of justice and mistrial during the hearing of this matter;*
- b) *The delay in hearing the matter breaches the fundamental rights enshrined in the International Convention regarding the trial of case within reasonable time;*
- c) *The delay in a manifestation of the abuse of process and also prejudice the accused and deny me a fair and appropriate trial;*
- d) *The trial in this matter will be unsafe as most of the state witnesses either cannot clearly recall the exact events that eventuated on the date in question;*
- e) *The interest of the accused person will not be truly served should the court proceed to trial with the duplicate copy since most of the applicant's defence submissions were filed and is being kept in the original file;*
- f) *The applicant never contributed in any way to the delay in disposing this matter as most of the time the State requests for the adjournment of the hearing;*
- g) *The delay is excessive as the matter has been before the court for a period of 5 years till to date.*

4. The application is opposed by the State, however, no affidavit in reply have been filed. The State relies on the submissions of counsel.

BACKGROUND INFORMATION

5. The applicant has been charged with two others with one count of Criminal Intimidation contrary to section 375 (1) (a) (iv) of the Crimes Act, one count of Aggravated Robbery contrary to section 311 (1) (a) (b) of the Crimes Act, one count of Theft contrary to section 291 (1) of the

Crimes Act and one count of Damaging Property contrary to section 369 (1) of the Crimes Act.

6. The allegations date to 21st November, 2013. The file number of the substantive action in Magistrate's Court at Nadi is criminal case no. 1227 of 2013. For the past 5 years the substantive matter has not been heard.

AFFIDAVIT IN SUPPORT

7. Briefly the applicant deposes that he has a matter pending in the Magistrate's Court at Nadi since 2013. The court registry has lost the original file which contained all the applications and submissions in relation to the trial. The duplicate file created shows the record of proceedings from 12th March, 2018 whereas there is no record of proceedings available from 2013 to March, 2018.
8. The applicant further deposes that the Magistrate's Court has decided to fix the matter for trial without properly reconstructing the file and questioning the other pretrial issues. If the substantive matter in the Magistrate's Court proceeds to hearing the applicant says there will be substantial miscarriage of justice since he had filed his medical report in the court which is now not available hence resulting in an unfair trial.

SUBMISSIONS

9. In his written and oral submission the applicant states that he had informed the Magistrate's court that he will be challenging his confession. He had submitted his medical report with his grounds of voir dire to the court which is missing with the original file. The applicant needs a copy of his medical report to conduct his voir dire. The applicant

is unable to confirm whether he had served his grounds of voir dire and his medical report to the prosecution or not.

10. The applicant says the prosecution is aware of the missing medical report which will be to their advantage if the medical report is not located. According to the applicant he was appearing in Magistrate's Court at Nadi from 2013 until 7th April, 2015 when he was granted bail. According to the applicant he was told in court that the court file was missing and he was told by the learned Magistrate that he will be notified once the file was located.
11. After mid 2015 the applicant appeared in court on 12 March, 2018 he submits the delay has been caused by either:
 - a) The court for misplacing or losing his file; or
 - b) By the prosecution in failing to issue a production order since he was remanded in custody for all this while.

MISSING FILE

12. It is unfortunate that a file has gone missing from the Nadi Magistrate's Court registry more so there is nothing in the copy record to state the reasons how and when this happened. The prosecution has not been helpful in this regard as well since there is no affidavit filed by the State. Ideally the prosecutor in carriage of the substantive matter should have provided an affidavit with the chronology of events from 2013 to mid-2015 about what had happened in the Magistrate's Court. A chronology of events prior to 12 March, 2018 would have greatly assisted this court.
13. If there is any truth in what the applicant told this court that he was told by the Magistrate's Court to wait until the missing file was located then it is indeed a matter of concern since keeping an accused in suspense until

a missing file was located is unacceptable. A court file in relation to a pending matter which suddenly goes missing does require some investigation. The copy record is also silent on this issue as well.

14. From whatever information that is available in the copy record the chronology of events can be tabulated as follows:

<i>Date</i>	<i>Particulars</i>
12/3/18	<i>Matter called on NOAH Acc 1 and 2 appeared. Charge read and adjourned for 3rd accused to appear and accused to confirm legal representation. Original Court file not available</i>
13/3/18	<i>All accused not present. Production order served in Suva Remand Centre. Bench warrant issued on 2nd accused Fresh PO for Acc 1 and 3</i>
11/6/18	<i>All Accused not present RM in workshop</i>
9/7/18	<i>Accused 2 and 3 present only. Accused 1 appearing in Lautoka HC. Right to counsel given. Accused 2 wants private counsel and Accused 3 wants LAC. State to provide new set of disclosures. Accused 2 informed he will not get 6 months or 3 months to look for lawyer. PO issued for accused for acc 3 accused. Escorting officers to assist accused 2 to speak to family members</i>
23/7/18	<i>Accused 3 only appeared – to file his VD grounds</i>
6/8/18	<i>Accused 3 present only. State informed court that Accused 1 is in remand – PO was issued on last occasion but he hasn't been produced. Accused 2 had escaped earlier but is now arrested and in police custody. Accused 3 hasn't applied for LAC yet. Court having difficulty getting all accused persons to court together.</i>

17/8/18

*All accused persons present. Accused 1 no longer
in remand – State to file BW report
All accused wants medical report*

LAW

15. 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.”

16. 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.”

17. 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*).

18. 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

19. The applicant states that the length of delay is 5 years since the matter has been instituted in 2013.

REASON FOR THE DELAY

20. The applicant states that the matter was called from 2013 to mid-2015 when the file went missing in the court registry. After a lapse of three years the matter was again called in March, 2018 after a duplicate file was created by the court registry.

HAS APPLICANT ASSERTED HIS RIGHT TO SPEEDY TRIAL

21. The applicant's argument is that his trial has been unreasonably delayed, however, the question before the court is whether the applicant has during the period of 5 years asserted his right to speedy trial.

22. From the limited information mentioned in the copy record the applicant has not asked for a speedy trial. The affidavit of the applicant also does not state so.

PREJUDICE CAUSED TO THE APPLICANT

23. 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. The applicant has, however, not stated the specific prejudice that will be caused to him as a result of the delay. In my judgment if the prosecution witnesses are not able to recall what they had seen then it will not affect the applicant in his defence but aid his defence.

DETERMINATION

24. 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.
25. 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.”*

26. Since the applicant first appeared in Magistrate’s Court in 2013 five 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.
27. Taking into account the evidence placed before the court I have no hesitation in stating that the delay of 5 years is not unreasonable taking into account the reasons for the delay. In this situation the prosecution cannot be blamed for the delay. The Court Registry had misplaced or lost the file now that a duplicate file has been created there is no reason why the matter cannot be entered for trial as soon as possible. From the evidence adduced it appears to me that the applicant is not keen to see the matter be entered for trial.
28. There is no reason why disclosures cannot be re-served on the applicant if he so requests. Furthermore, on the issue of medical report, there is nothing stopping the applicant from seeking a copy of the medical report that was given to the Magistrate’s Court. The applicant has so far not made any such request to the court for an order to retrieve a copy of his medical report if there is indeed one. The prosecution can also provide a copy of the medical report if they were served. The current copy record begins from 12th March, 2018 till 17th August, 2018 and nowhere has the applicant made any request for an order to secure a copy of his medical report by a court order. I am sure Nadi Hospital will be able to assist as well as the prosecution if they have a copy of the accused medical report in their file.

29. 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.
30. The applicant also says that he made submissions earlier in respect of the trial, however, the applicant did not elaborate and it is not clear what the submissions were about and how those submissions would have assisted the applicant when a trial date has not been assigned. It is quite possible that the applicant is taking advantage of the missing file to avoid a hearing.
31. This court is satisfied based on the evidence that the applicant will not be prejudiced 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. It is incorrect for the applicant to suggest that the prosecution had failed to issue a production order since he was remanded in custody when the applicant knows it is the court which has the powers to remand the applicant. Furthermore, the applicant informed this court that he was granted bail on 7th April, 2015. This court finds on the evidence presented 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 difficulties in the conduct of his defence. The trial court has processes to deal with admissibility of evidence if it can be shown prejudice will be caused to the applicant as a result of delay.

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

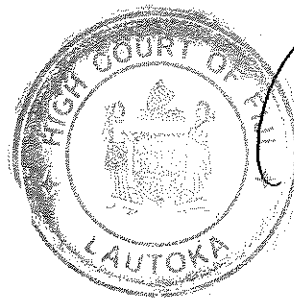
ALTERNATIVE REMEDY


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. The applicant informed the court that this matter has already been assigned a mention date for 24th May, 2019 so that the prosecution can provide voir dire disclosures. This suggests that the applicant has already filed his fresh voir dire grounds and the substantive matter has made some progress.

ORDERS

- (1) The application for permanent stay of proceedings in respect of criminal case no. 1227 of 2013 pending at Nadi Magistrate's Court is refused and dismissed;

- (2) The substantive matter pending at Magistrate's Court at Nadi is to be heard within 90 days from 24th May, 2019 or as soon as practicable thereafter.
- (3) A copy of this ruling is to be sent to the Chief Magistrate for his information and necessary action forthwith.




Sunil Sharma
Judge

At Lautoka

17th May, 2019

Solicitors

Applicant in person.

Office of the Director of Public Prosecutions for the Respondent.