IN THE HIGH COURT OF FIJI
AT LABASA
[CRIMINAL JURISDICTION]

CRIMINAL MISC. CASE NO. HAM 001 OF 2020

BETWEEN	**:**	**RANJISHWAR PRASAD**
AND	**:**	**THE STATE**
Counsel	**:**	**Mr A Sen for the Accused** **Ms A Vavadakua for the State**
Date of Hearing	:	**5 February 2020**
Date of Ruling	**:**	**13 August 2020**

RULING

[1] This is an application for stay of prosecution on the ground of unreasonable post-charge delay.

[2] On 16 November 2009, the Applicant appeared in the Magistrates' Court at Savusavu and pleaded not guilty to a charge of indecent assault contrary to section 154(1) of the Penal Code. The charge alleged that the Applicant on 9 October 2009 at Rabi indecently assaulted a teenage girl by touching her buttocks. The Applicant was a teacher on the island at the time. He was later terminated from his employment by the Ministry of Education while the criminal case was pending for hearing.

[3] Section 14(2) (g) of the Constitution states:

> Every person charged with an offence has the right to have a trial begin and conclude without unreasonable delay.

[4] The constitutional right to have a trial begin and conclude without unreasonable delay reflects the principles of fairness accorded to an accused by the criminal justice system. The courts have inherent power to stop a trial that the accused has been or will be prejudiced in the preparation or conduct of his defence by unjustifiable delay (*R v Derby Crown Court, ex p Brooks* (1985) 80 Cr. App. R. 164). The purpose of the power is not to vindicate an accused by stopping the trial. The purpose of the power is to protect the process of the court from abuse. It is a power that must be exercised in the most exceptional circumstances (*Director of Public Prosecutions v. Humphrys* [1976] 2 ALL ER 497 at 511, [1977] AC 1 at 26).

[5] In *Queen v Edwards* [2009] HCA 20 (21May 2009)) the High Court of Australia has held that the decision to stop a trial on the grounds of delay or lost evidence is an extreme step that should only be taken when there are no alternative methods to deal with the prejudice suffered by the accused. In *State v Peceli Vuniwa & Others* HAC 31 of 2005, Shameem J stated that a stay should only be granted where there are no other available remedies to deal with the complaint such as, for instance the exclusion of evidence, or directions to the assessors on the effect of delay on memories.

[6] In *Sahim v The State* MISC Action No. 17 of 2007 (25 March 2008), the Court of Appeal had to determine whether there was a breach of the accused's right to be tried within reasonable time under the 1997 Constitution. The Court after reviewing the relevant authorities from various jurisdictions, summarized the approach of the courts in paragraph [29]:

> *The correct approach of the courts must therefore be two-pronged. Firstly, is there unreasonable delay and a breach of section 29(3) of the Constitution? In answering this question, prejudice is relevant but not necessary where the delay is found to be otherwise oppressive in all the circumstances. The second question is if there has been a breach what is the remedy? In determining the appropriate remedy, absence of prejudice becomes relevant. Where an accused person is able to be tried fairly without any impairment in the conduct of the defence, the prosecution should not be stayed. Where the issue is raised on appeal, and the appellant was fairly tried despite the delay, his or her remedy*

lies in the proportionate reduction of sentence or in the imposition of a non-custodial sentence.

[7] The question of whether a fair trial is possible may depend on the circumstances of each case. In *Nalawa v State* [2010] FJSC 2; CAV0002.2009 (13 August 2010), the Supreme Court said at [18]:

Whether or not a fair trial was possible in any given case depends on the facts of each case. They include the ability of the defence to run a defence because of the delay.

[8] The Applicant was charged and produced in the Magistrates' Court on 16 November 2009. He pleaded not guilty to the charge and was released on bail. The trial has not been heard since that date.

[9] The application for stay was filed on 8 January 2020. The length of the delay is eleven years. In the eleven years, the case was adjourned on more than sixty occasions and handled by seven different judicial officers. The adjournments were mostly sought by the prosecution or were systemic. The applicant is not at fault. Neither did he assert his right to a speedy trial nor did he waive his right to a speedy trial. He made appearances on all occasions to answer the charge.

[10] The charge was a summary offence. It did not involve any complex issues. The Applicant had given notice that he was going to rely on alibi as his defence. He now says two of his alibi witnesses have passed away and the others cannot be located with the passage of time. He submits that he will be prejudiced in the conduct of his defence if the trial proceeds.

[11] Even if there was no actual prejudice in the conduct of his defence, the eleven years delay to determine a summary charge in itself is oppressive and unconscionable. The applicant lost his employment in the public service and reached a retirement age while waiting for his day in court. The question of alternative remedies does not arise.

[12] The delay is unreasonable and oppressive in all the circumstances of the case. The application is allowed and the prosecution is permanently stayed.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Maqbool & Company for the Accused

Office of the Director of Public Prosecutions for the State