

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Misc. No. HAM 68 of 2023**

**BETWEEN** : **JOSAIA DOBUI**

**APPLICANT**

**A N D** : **THE STATE**

**RESPONDENT**

**Counsel** : Applicant in person.  
: Ms. S. Naibe for the Respondent.

**Date of Hearing** : 18 October, 2023

**Date of Ruling** : 30 October, 2023

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**RULING ON APPLICATION FOR STAY OF PROCEEDINGS**

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**APPLICATION**

- [1] The applicant by notice seeks a permanent stay of proceedings in respect of criminal case no. 189 of 2019 pending at Magistrate's Court, Sigatoka.
- [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] The applicant filed his submissions in support and the state counsel filed her response on 16<sup>th</sup> October, 2023. The primary complaint raised is that there has been an unreasonable delay in having his matter determined by the court.

### **BACKGROUND INFORMATION**

- [4] The applicant was initially charged with another in the Magistrate's Court for one count of aggravated burglary contrary to section 313 (1) (a) and one count of theft contrary to section 291(1) of the Crimes Act 2009.
- [5] The matter was first called in the Magistrate's Court on 17<sup>th</sup> April, 2019. The applicant was not present so a production order was issued. On 26<sup>th</sup> July, 2019 the applicant was present and since count one was an indictable offence the file was transferred to the High Court in Suva.
- [6] In the High Court the Director of Public Prosecutions reduced the charge to one count of burglary contrary to section 312 (1) read with section 45(1) of the Crimes Act 2009. On 6<sup>th</sup> November, 2019 the High Court sent the file to the Magistrate's Court at Sigatoka for mention on 20<sup>th</sup> November, 2019.
- [7] On 20<sup>th</sup> November, 2019 the applicant was serving and he was not brought to court a production order was issued. The applicant was not produced in court on 16<sup>th</sup> December, 2019, 28<sup>th</sup> January, 2020, 17<sup>th</sup> February, 2020, on 23<sup>rd</sup> March, 2020 due to Covid-19 pandemic the matter was adjourned to 1<sup>st</sup> May, 2020. On 1<sup>st</sup> May, the matter was adjourned to 13<sup>th</sup> July, 2020, the applicant was not brought to court and the matter was adjourned to 21<sup>st</sup> September, 2020

- [8] On 21<sup>st</sup> September, 2020 the applicant was present and he pleaded not guilty to the charge the matter was adjourned to 2<sup>nd</sup> November, 2020 for mention. On 2<sup>nd</sup> November the applicant filed his voir dire grounds the prosecution was given time to file and serve the voir disclosures. The matter was adjourned to 18<sup>th</sup> January, 2021 for mention.
- [9] On 18<sup>th</sup> January, 2021 the applicant was present voir dire disclosures were not ready the matter was adjourned to 10<sup>th</sup> May, 2021.
- [10] On 10<sup>th</sup> May, 2021 due to Covid-19 restrictions the matter was adjourned to 6<sup>th</sup> July, 2021 the applicant was not brought to court. On 6<sup>th</sup> July, 2021 again the matter was adjourned due to Covid-19 restrictions and the matter was adjourned to 11<sup>th</sup> October, 2021.
- [11] On 11<sup>th</sup> October, 2021 the accused was not produced in court and the matter was adjourned to 23<sup>rd</sup> November, 2021 for mention. On this date the applicant was not produced in court so the matter was adjourned to 9<sup>th</sup> February, 2022. The applicant did raise the issue that he was waiting for the voir dire disclosures from January, 2021. The learned Magistrate issued a directive for the State Counsel to be present to show cause about the delay and why costs should not be ordered against the state counsel personally.
- [12] On 28<sup>th</sup> February, 2022 the State Counsel Mr. Singh apologized to the court and informed the court that voir dire disclosures will be served in 21 days time. On 30<sup>th</sup> March, 2022 the prosecution served voir dire disclosures to the applicant in court. On 27<sup>th</sup> June, 2022 no one from the office of the DPP was present in court. The applicant told the court the disclosures were not complete.

[13] On 11<sup>th</sup> July, 2022 the applicant was not produced in court. The court noted that voir dire disclosures were still pending. On 24<sup>th</sup> August, 2022 the applicant was present and he told the court in detail about the non-disclosure of some police statements. On 26<sup>th</sup> October, 2022 the prosecution requested for further time to provide the additional voir dire disclosures. The court granted final 28 days for the prosecution to provide the additional disclosures. On 1<sup>st</sup> February, 2023 the accused was not present so the matter was adjourned to 3<sup>rd</sup> April, 2023.

[14] On 3<sup>rd</sup> April, 2023 the applicant was not present in court and the matter was adjourned for mention on 22<sup>nd</sup> May, 2023.

### **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 allegation dates to 2017 but he was charged in 2019 he first appeared in the Magistrate’s Court on 26<sup>th</sup> July, 2019 and after 4 years the case has not been heard.

### **REASON FOR THE DELAY**

[20] The applicant states the case has been dragged by the prosecution who have failed and/or neglected to provide the complete voir dire disclosures. The prosecution has been given one year to do this but they have not obliged.

### **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 this court is whether the applicant had during the period of 4 years asserted his right to speedy trial.

[22] A perusal of the copy record shows that on most occasions the applicant was not produced in court by the Corrections Department. When he was produced in court he did not seek a speedy trial.

### **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 he cannot locate his witnesses. Furthermore the prosecution has not been able to provide him with the medical report which was by order of the court in another file.

### **DETERMINATION**

[24] There is no doubt that every person charged with a criminal offence has the right to have the matter determined within a reasonable time and to receive a fair trial according to law (including other rights) 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 on 26<sup>th</sup> July, 2019 four years have lapsed and yet the prosecution is unable to provide the complete voir dire disclosures to the applicant. It is on the basis of this delay the applicant submits his right to a fair trial is affected.

[27] It is also noted that Covid-19 had also caused a substantial delay since the courts in this country were not performing its duties due to the restrictions in place. From the copy record the delay caused by the Covid-19 restrictions is about 8 months and 23 days:

[28] Taking into consideration the evidence before this court I have no hesitation in stating that the delay of four years from the time the applicant was brought to court is not unreasonable taking into account the fact that due to Covid-19 restrictions the court was not able to function properly. It is also noted that the applicant had been produced in the Magistrate's Court at Sigatoka on 26<sup>th</sup> July, 2020 for the first time but he did not inform the court that by virtue of a court order he had been taken to the Navua

hospital for medical treatment and he wanted a copy of his medical report. On 21<sup>st</sup> September, 2020 the applicant had informed the learned Magistrate for an order to be made to the police for the release of his medical report but no such order was made.

[29] The prosecution has also not assisted the Magistrate's Court in as much as they should have, the voir dire disclosures served on the applicant is not complete. It is the responsibility of the prosecution to ensure that all the required disclosures are served to the applicant as soon as possible. The applicant has not provided any support for his contention that he has been prejudiced by the delay. Just saying generally that his witnesses are not available is not good enough.

[30] In *Johnson -vs. - State [2010] FJHC 356, HAM 177 of 2010 (23 August, 2010)* Goundar J. discussed the scope of determination on 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 charge filed against the applicant justifies a permanent stay of proceedings. I also find that there is no



prosecutorial misconduct or abuse of process by the prosecution which would convince this court to grant a stay of proceedings.

[33] There is 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. According to the state counsel the voir dire hearing is scheduled for 30<sup>th</sup> November, 2023 and the voir dire disclosures were served on the applicant in August, 2023. This is not disputed by the applicant but he says it is not complete. The applicant can always bring this to the attention of the learned Magistrate so that this aspect can be taken into account during the hearing.

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

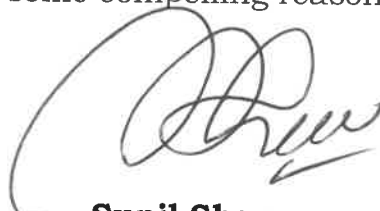
#### **ALTERNATIVE REMEDY**

[35] 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.

[36] The matter pending before the Magistrate's Court at Sigatoka 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.

## **ORDERS**

- [1] The application for permanent stay of proceedings in respect of criminal case no. 189 of 2019 pending at Magistrate's Court, Sigatoka is refused and dismissed;
- [2] The voir dire hearing is to be conducted as scheduled unless there are reasons otherwise upon the satisfaction of the court;
- [3] The substantive matter to be concluded on or before 30<sup>th</sup> June, 2024 unless there are some compelling reasons why this cannot be done.

  
**Sunil Sharma**  
**Judge**



**At Lautoka**

30 October, 2023

### **Solicitors**

**Applicant in person.**

**Office of the Director of Public Prosecutions for the Respondent.**