

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Misc. No. HAM 191 of 2023

BETWEEN : **UMA DUTT**
APPLICANT

A N D : **THE STATE**
RESPONDENT

Counsel : Ms. N. Khan for the Applicant.
: Mr. S. Seruvatu for the Respondent.

Date of Hearing : 20 November, 2023
Date of Ruling : 27 November, 2023

RULING ON APPLICATION FOR STAY OF PROCEEDINGS

APPLICATION

- [1] The applicant by notice of motion dated 3rd August, 2023 filed the affidavit and supplementary affidavit of Uma Dutt sworn on 3rd August, 2023 and 21st August, 2023 respectively seeks a permanent stay of proceedings in respect of criminal case no. 645 of 2017 pending at Magistrate's Court, Lautoka.
- [2] This application is made pursuant to section 15 (1) and (3) and section 44 of the Constitution of Fiji and the inherent jurisdiction of the High Court.

- [3] The application is opposed by the State, however, no affidavit in reply have been filed. The State relies on the submission of counsel.
- [4] The applicant's counsel filed her written submissions and both counsel made oral submissions during the hearing for which this court is grateful. The primary complaint raised by the applicant is that there has been an unreasonable delay in having his matter determined by the court.

BACKGROUND INFORMATION

- [5] The applicant was initially charged in the Magistrate's Court at Lautoka for two counts of indecent assault contrary to section 212 (1) and four counts of indecently insulting or annoying any person contrary to section 213 (1) of the Crimes Act 2009.
- [6] The matter was first called in the Magistrate's Court on 20th May, 2017. The applicant pleaded not guilty and after several adjournments the matter was fixed for trial on 27th March, 2018. The matter proceeded to hearing as assigned. The prosecution called four witnesses and since there were other witnesses left the matter was adjourned to 25th April, 2018 for continuation.
- [7] On this date two witnesses were called and the prosecution sought time to file amended charges. The defence objected to the application, the court gave both parties time to file further submissions on this issue. The hearing was adjourned to 15th May, 2018 for mention. On this date defence sought further time to file submissions the matter was adjourned for ruling on 9th July, 2018 the court also ordered that hearing proceed on this date.

- [8] On this date the prosecution was granted leave to file amended charges by oral pronouncement with a written ruling delivered by the Magistrate's Court dated 9th November, 2018. The applicant was at liberty to recall any prosecution witness for further cross examination. The defence counsel informed the court that she does not require any prosecution witness to be recalled for cross examination (page 21 of copy record part 1). On 21st August, 2018 the prosecution closed its case.
- [9] The matter was adjourned to 23rd November for the defence to open its case. In the meantime, the Resident Magistrate who heard the matter was promoted to the High Court as an Acting Puisne Judge. On 3rd June, 2019 a trial *de novo* was granted by the court, in the meantime the prosecution had amended the charges as follows:
- a) two counts of indecent assault; and
 - b) four counts of indecently insulting or annoying any person.
- [10] The applicant pleaded not guilty to all the counts as per amended charges. A new trial date was assigned for 4th November, 2019 which did not proceed and was re fixed for 13th January, 2020. The trial did not proceed and was adjourned to 6th April, 2020, however, due to Covid-19 pandemic there was no court sitting. The matter proceeded to trial on 15th December, 2020 with continuation of the prosecution case on 20th April, 2021, 4th May, 2021 and again on 13th July, 2021. The prosecution closed its case on 17th November, 2022.
- [11] On 21st August, 2023 the Magistrate's Court held that the accused had a case to answer as charged. The matter is now scheduled for defence case on 28th November, 2023.

- [12] The applicant seeks the intervention of this court on two grounds:
- a) Unreasonable delay in having the matter determined;
 - b) Prejudice caused to the applicant.

LAW

- [13] 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.”

- [14] 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.”

- [15] 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*).

[16] 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

[17] The applicant states that he was charged on 20th May, 2017 and the same day he appeared in court and after 6 years the case has not been finalized.

REASON FOR THE DELAY

[18] The applicant has given four reasons for the delay by the prosecution:

- a) The prosecution after the close of its case on the initial charges applied for an amendment of charges which was granted by the court. The matter had proceeded in a timely manner but it was the prosecution which had asked for the amendment of the charges. The defence had vigorously opposed this application but the court nevertheless granted the orders;

- b) The second reason is after the plea was taken on the amended charges there was a further delay since a no case to answer ruling was to be delivered by the court after the defence did not wish to cross examine any of the prosecution witnesses;
- c) The third reason is that the prosecution opposed the defence application to have a trial *de novo* for which submissions were made by both parties and a ruling in favour of the applicant for a trial *de novo* was delivered on 3rd June, 2019;
- d) The final reason is that trial *de novo* started on 15th December, 2020 and after several adjournments and piece meal hearing on 17th November, 2022 the prosecution closed its case. The no case to answer ruling was delivered on 21st August, 2023.

HAS APPLICANT ASSERTED HIS RIGHT TO SPEEDY TRIAL

- [19] 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 6 years asserted his right to speedy trial.
- [20] A perusal of the copy record shows that the applicant was on bail and he had appeared in court on all occasions but he did not seek a speedy trial.

PREJUDICE CAUSED TO THE APPLICANT

- [21] The applicant's counsel in her written and oral submission states that although the applicant has the advantage of being innocent until proven guilty it is taking the court too long to determine his innocence. The delay of 6 years is unreasonable. The applicant has been personally affected he

is a family man with two children, his wife's wage is not good enough to supplement the family's needs and wants.

[22] The counsel further stated that living with a charge for six years is not an easy task with people's negative comments and perception about him. The applicant has not been able to secure an employment due to the charges hanging over him.

[23] Finally counsel stated that the applicant has been prejudiced due to the delay and he may not get a fair trial since he cannot locate his witnesses. At paragraph 4.3 (iii) counsel states:

" ... His trial has been fixed for 28/11/23 but his two main witnesses, Jeenal Chand and Mereani Leba, have both gone abroad and he cannot locate them to subpoena them for his defence case. This put the applicant into a very difficult and prejudicial position. How will the applicant then prove his innocence if he does not have any witness? We submit that the court should consider this."

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 which the courts at all levels respect and apply. What is a reasonable time is a matter of fact and is construed on a case by case basis bearing in mind the history of what has transpired leading to the delay.

[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 six years have lapsed. The applicant is not happy with this delay and he is asking this court to intervene by granting a permanent stay of proceedings. Furthermore his two witnesses Jeenal Chand and Mereani Leba have gone abroad and he does not know their whereabouts. Jeenal was the team leader of one the complainant's and Mereani a member of the team. These witnesses are crucial to his defence. It is on the basis of the delay by the prosecution and the court that the applicant submits his right to a fair trial is affected since the above mentioned two defence witnesses are not available.

[27] At the outset it is also noted that Covid-19 pandemic had also been an intervening factor beyond the control of everyone which caused a substantial delay to not only this matter but to all the matters in court. The courts in this country were not performing its functions due to the restrictions in place. From the copy record the delay caused by the Covid-

19 restrictions from 6th April, 2020 to 14th September, 2020 is about 6 months.

- [28] Looking at the current status of the case it cannot be said that the matter has not made any substantial progress since inception. The chronology of the events show the parties have been actively engaged in doing what they were supposed to be doing. The prosecution to protect the interest of the complainants, the defence counsel the interest of the accused and the court in hearing the substantive matter under the initial charges, then after trial *de novo* was ordered, interlocutory applications made, giving its rulings and hearing evidence during trial proper on two occasions.
- [29] Despite the delay of six years in completing the case one should look at the current status of the matter which has now progressed past the no case to answer ruling and is now for the defence to open its case which is scheduled for 28th November, 2023.
- [30] Taking into consideration the progress made I have no hesitation in stating that the delay of six years from the time the applicant was brought to court is not unreasonable. The matter has gone into its final phase the delay was also compounded by the Covid-19 restrictions which had affected the court's normal function.
- [31] When one looks at the progress made in this matter after the trial *de novo* ruling on 3rd June, 2019 and the untimely lockdowns and pandemic the matter is now for the defence to open its case.
- [32] In respect of the prejudice caused by the delay that the accused is not able to get his two defence witnesses namely Jeenal Chand and Mereani Leba

the applicant in his affidavit deposes the following at paragraphs 5 and 6 of his supplementary affidavit:

Paragraph 5

I have three witnesses for my defence case including me, now my two main witnesses cannot be located due to the delay in my matter being determined within a reasonable time.

Paragraph 6

One of the witness is Jeenal Chand who was my Manager at the time I was still employed by Fiji Revenue & Customs Authority. He gave his statement, however, he obtained a green card and migrated to the United States of America. Whilst the other witness is Mereani Leba who was also working with me at FRCS. I was her team leader and she was my team member. She is in Australia working under the seasonal worker scheme. She did not give her statement to the police when they took her for questioning. I now cannot contact them as they have both moved on and are out of the country.

[33] The applicant has not provided any details of what the witnesses were to say by way of a signed proof of evidence and how the absence of these witnesses had affected his case strategy. Merely saying that the absence of these witnesses will have a prejudicial effect is not good enough.

[34] During the cross examination of the complainants and the other prosecution witnesses the defence had not put any material suggestion about the presence of these two witnesses.

[35] I have also noted that at no time the applicant had requested the prosecution to make Jeenal Chand (whose police statement was disclosed to the defence) available to the defence. The police statement of this witness has not been annexed to the affidavit of the applicant as well.

[36] 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."

[37] 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

[38] 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 by the prosecution which would convince this court to grant a stay of proceedings.

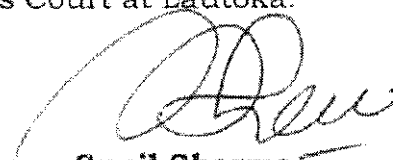
[39] There is no evidence of any prejudice caused to the defence which will affect fair trial. The application for stay of proceedings is refused and dismissed.

ALTERNATIVE REMEDY

- [40] 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.
- [41] The matter pending before the Magistrate's Court at Lautoka falls within its criminal division hence it is important to consider the interest of the complainants 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. 645 of 2017 pending at Magistrate's Court, Lautoka is refused and dismissed;
- [2] The defence to open its case as scheduled on 28th November, 2023 in the Magistrate's Court at Lautoka.


Sunil Sharma
Judge



At Lautoka

27 November, 2023

Solicitors

**Messrs Natasha Khan & Associates, Lautoka for the Applicant.
Office of the Director of Public Prosecutions for the Respondent.**