

[3] The appellant now seeks to stay the order directing trial so the appeal to this Court may be heard before any further hearing takes place in the Magistrates' Court.

[4] The applicant was charged with serious offences arising out of allegedly bogus claims to be able to arrange visas to the United States of America by which he obtained a total of more than \$60,000.00. He first appeared in the Magistrates' Court to answer the charges on 27 July 2001 and pleaded not guilty. There followed no less than 31 further appearances which brought it to July 2006. It was on that date that application for constitutional redress was made to the High Court but, having awaited written submissions, it was not heard until 26 March 2007.

[5] Following a carefully researched and detailed judgment, the learned judge pointed out that, whilst the applicant was alleging prejudice arising from the delay, he did not advance any evidence to support the allegation. He explained that the court cannot be left in a position of having to guess at possible prejudice and stated that "the fact remains that there is no direct evidence of prejudice to the accused's fair trial rights".

[6] He concluded:

"I do not accept that [the accused's] fair trial rights are prejudiced by the overall delay.

I accept that there is a strong public interest in the prosecution and punishment of crime and in this case I am satisfied that the appropriate course is to declare the delay unreasonable, provide some guidance and encouragements to avoid such delays in the future and then direct that the trial proceed at the earliest opportunity.

The application to stay the proceedings is refused.

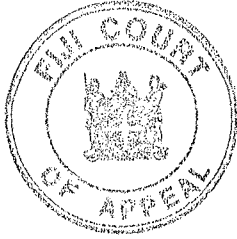
- (i) I declare that there has been in this case unreasonable delay in bringing these charges to trial
- (ii) I declare the cause of this delay was primarily a failure of the court system to manage the case to a hearing
- (iii) I also declare that the accused and the prosecution significantly contributed to the delay

(iv) I direct the Chief Magistrate to ensure this trial is heard by a Resident Magistrate within the next 40 days.”

- [7] The present application was made to this Court after the Resident Magistrate had listed the case for 1 June 2007 to fix a trial date. I have had to direct that the magistrate be advised that the matter shall be adjourned until the result of this application is known when I shall give any necessary consequential directions.
- [8] The Court heard submissions from counsel on the effect of the delay. In essence Mr Raza, for the applicant, submits that the length of the delay can reach, and has in this case reached, a stage where it can only be seen as prejudicial. If this is such a case, it is wrong to send it for trial.
- [9] Mr Bulamainaivalu points out that the public interest is in having the case tried and so the best solution for the present situation is to ensure that is done as quickly as possible – a solution the judge has endeavoured to achieve by his order for expeditious trial. He suggests that the fact the trial takes place will not remove the applicant’s right to appeal the delay unless, of course, he is acquitted. A stay now will only exacerbate the existing delay.
- [10] Mr Raza reminds the Court that he only seeks a stay pending appeal. If the Court of Appeal so directs, the case will still have to be tried. On the other hand, if the appeal succeeds, the trial will have been unnecessary.
- [11] It is not, of course, for me at this stage to determine the effect of a delay of the length that has occurred here. That is for the substantive appeal. The judge’s finding that the delay was unreasonable, understandably, is not challenged by either side. Neither is his conclusion that it was primarily a failure of the court system. Mr Raza indicates, from the bar table, that he will challenge the suggestion that the defence contributed significantly to the delay. I do not have the court record and so I cannot take that into account and must proceed on the basis that the judge’s conclusion on that was based on the evidence placed before him.

- [12] The main thrust of the applicant's case here is that, on the basis of this Court's decision in Mohammed Riaz Shameem v The State; Crim App AAU 96/05, 23 March 2007, the delay is so great that there must be a serious doubt that a fair trial can now be held. In those circumstances, that should be determined by the Court of Appeal before the trial is held. What, Mr Raza asks, is the point in completing a trial if the final result is likely to be a successful appeal?
- [13] I consider the circumstances in Shameem's case differ in some very important and significant aspects from the present case. At the same time, the learned judge has found the delay in the present case to be unreasonable. That having been accepted, the test for the Court will be to decide whether that delay has prejudiced the applicant's chances of a fair trial. Whether or not the applicant has produced evidence of prejudice in the form, for example, of disappearance of witnesses or difficulty in proof of vital facts, it still leads to the ultimate test of whether or not it will prevent a fair trial. That is the basis of the appeal to this Court. It seems a pointless exercise if the case is heard in the Magistrates' Court at which trial, no doubt, the same challenge will be mounted and, if a conviction results, be subject to a fresh pursuit on appeal to this Court.
- [14] I appreciate that this may add to the overall delay if the appeal is not successful but I trust that will not be more than a few more months. After an overall period of six years in the wilderness of the magistrates' courts, I consider that a small price to pay in order to avoid a possibly unjust result and all the delays of a subsequent appeal. If the present appeal fails, I do not consider the extra months will have more than a minor effect on the trial that will have still to be held.
- [15] I order the direction of Winter J that the case be tried expeditiously by a Resident Magistrate be stayed pending this appeal. The case in that court is to be adjourned pending the result of the Court of Appeal decision.

[16] The applicant is to attend the Magistrates' Court in Suva on Tuesday 12 June 2007 in order to have his bail extended to a date six months from that day. If the Court of Appeal decision is delivered before that, he should then be summonsed to the court and any necessary further orders made. If it has not been decided by that date, his bail will need to be further extended.



A handwritten signature in cursive script, appearing to read "Gordon Ward".

Gordon Ward
PRESIDENT