

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO: HAM 198 OF 2014

BETWEEN : SALENDRA SEN SINHA

Applicant

AND : STATE

Respondent

Counsel : Applicant in Person
Mr. Josaia B. Niudamu for Respondent

Date of Hearing : 22 October 2014

Date of Ruling : 05 November 2014

RULING

1. This is an application for permanent stay of proceedings.
2. The applicant was charged before the Magistrate Court of Lautoka with another on one count of Keeping in Confinement Abducted Person contrary to Section 253 of the Penal Code.
3. The particulars of the offence are that the applicant with another on 10th July 2008 abducted Police Constable Vishwa Baran, wrongfully confined the said Police Constable Vishwa Baran in vehicle registration number LT 969.
4. This application was filed on 15th August 2014. The grounds for application are:
 - (i) That the learned Trial Magistrate failed to conclude the trial within a month as ordered by the High Court.
 - (ii) That the learned Trial Magistrate failed to comply with the directive given by the High Court.

- (iii) That the matter may continue to delay after 28 October 2014 and as a result, the applicant will be deprived of being released on any of the provisions of the Corrections Department.
 - (iv) The matter has been drifting in Courts since 10th July 2008. Thus a delay of six years and one month to date and still to continue, undoubtedly questions the provisions of the Section 14 (2) (g) of the Constitution.
 - (v) The matter has been set for the hearing of no case to answer submissions and thereafter the most likelihood court sitting over this matter will be as follows before the matter is concluded;
 - 1. Ruling on no case to answer submission
 - 2. (If case to answer) the defence case
 - 3. Written closing submissions
 - 4. Judgment
 - 5. (If convicted) mitigation and sentencing submissions
 - 6. Sentencing
 - (vi) That there may be a substantial period of delay that may even extend up to early next year before the matter is concluded
5. The State filed an appeal in this case earlier. (HAA 1 of 2014) in the judgment dated 30th June 2014 this Court directed the learned Magistrate to conclude the trial within a month from the next mention date 7th July 2014.
6. On 7th July 2014, further trial was fixed for 11th and 12th of August 2014. On 11.8.2014 prosecution had closed the case. Then the counsel for the other accused had moved for 21 days to file a no case to answer application. The learned Magistrate had given a mention date 15.9.2014. On that day another 14 days were given to file no case to answer submission and the case to be mentioned on 29.9.2014. On the next day both accused were absent and no submissions filed. The learned Magistrate had issued a bench warrant on the 2nd accused and a production order for the applicant. The next mention date is 1.12.2014.
7. The principles for stay of prosecution are settled in Fiji. In **Mohammed Sharif Sahim v. State**[2007] FCA 17/07, the Court of Appeal when reviewing the law on criminal trial delay held that:

*“...it was well settled since **Apaitia Seru and Anthony Fredrick Stevens v. The State Crim. App. AAU 0041/42 of 1995 S** that where the delay was unreasonable, prejudice to the accused could be presumed. This court in that case adopted the approach of the majority of the Supreme Court of Canada in **R v. Morgan** [1992] 1SCR and New Zealand court of appeal in **Martin v. District Court at Tauranga** [1995] 2 NZLR 419 that stated:*

“ The general approach to a determination as to whether the right has been denied is not the application of a mathematical or administrative formula bur rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of the delay. As I noted in Smith (R v Smith (1989) 52 CCC (3D) 97), (I)t is axiomatic that some delay is inevitable. The question is, at which point does the delay become unreasonable? ...While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

- (i) The length of delay*
- (ii) Waiver of time periods*
- (iii) The reasons for the delay, including*
 - (a) Inherent time requirements of the case;*
 - (b) Actions of the accused;*
 - (c) Actions of the Crown;*
 - (d) Limits on institutional resources, and*
 - (e) Other reasons for the delay, and*
- (iv) Prejudice to the accused.”*

8. In Johnson v State [2010] FJHC 356;HAM 177.2010 (23 August 2010), Hon. Mr. Justice D. Goundar stated:

“...The circumstances in which abuse of process may arise are varied. In R v Derby Crown Court, exp Brooks [1984] Cr. App. R.164, Sir Roger Ormrod identified two circumstances in which abuse of process may arise:

“...It may be abuse of process if either

- (a) The prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or*
- (b) On the balance of probability the defendant had been, or will be, prejudiced in the prosecution of or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused or to genuine difficulty in effecting service.”*

9. His lordship further quoted Justice Pain’s remarks from State v Rokotuiwai [1998] FJHC 196 identifying the factors which needs to be considered in deciding whether delay is reasonable or not:

“.. The length of the delay, the reasons for the delay, the actions of the defendant, the actions of the prosecutor, availability of legal and judicial resources, the nature of the charge and prejudice to the defendant may be relevant.”

10. Hon. Mr. Justice Paul Madigan in Tafizal Rahiman v State [2011] FJHC 298 at paragraph 7 stated that:

"The facts to be considered when assessing whether delay is unreasonable or not are expounded in the Privy Council decision in Flowers v The Queen [2007] WLR 2396.

The board held that the Court should take into account:

- (i) The length of delay;*
- (ii) The reason for delay;*
- (iii) Whether or not the defendant has asserted his rights to a speedy trial; and*
- (iv) The extent of prejudice."*

Stay in this case was refused even though the delay was 5 years because they were not brought to court which was a system failure and not an unreasonable delay.

11. In Nalawa v State CAV 0002/09 (13 August 2010) the Supreme Court of Fiji laid down the following principles may now be stated as basic to common law.

"(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 prosecution, very rarely will a stay be granted.

(iii) No stay should be granted in the absence of any serious prejudice to the defence so that no fair trial can be held and ;

(v) On the issue of prejudice, the trial court has process which can deal with the admissibility of evidence if it can be shown there is prejudice to an accused as a result of delay.

12. A stay proceeding is an exceptional remedy, and will only be used if other remedies are not available to deal with the justice of the case.

13. The learned Magistrate had failed to follow the directions given by this Court. The other accused was given 35 days to make a no case to answer application. When he was not present a bench warrant was issued with next day given is more than two months away. The learned Magistrate's present contract is due to end in November. He had given a date after that on 1.12.2014. The learned Magistrate had acted in complete disregard to the directions given by this Court. Further Hon. Mr. Justice Paul Madigan had directed the learned Magistrate to hear this case as a matter of strict priority on 13.7.2011. (HAM 070 of 2011)

14. The main issue raised by the applicant is delay and resulting consequences of that delay. In this background, following orders are made.

- (i) The given mention date on 1.12.2014 vacated.
 - (ii) The state to execute the bench warrant against the other accused on or before 14.11.2014.
 - (iii) The case to be mentioned in the Magistrate Court before Magistrate Peni W Dalituicama on 14.11.2014.
 - (iv) If there is an application for no case to answer by any accused, ruling on that application should be given by the learned Magistrate on or before 21.11.2014.
 - (v) If defence is called the case to be taken up on day to day basis from 21.11.2014 till conclusion.
15. Copies of this ruling to be sent to His Lordship the Chief Justice, the Chief Magistrate and the Chief Registrar for their attention.
16. This case to be mentioned on 24.11.2014 in this Court for the respondent to file a report on the progress of the above orders.


Sudharshana De Silva
JUDGE



At Lautoka
05th November 2014

Solicitors : Applicant in person
Office of the Director of Public Prosecutions for Respondent