IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

HAM NO. 24 OF 2016

BETWEEN : PENI TUILASELASE

Petitioner

AND : STATE

Respondent

Counsel : Ms. V. Narara for the Applicant

Mr. J. Nuidamu for Respondent

Date of Hearing : 1st of June 2016

Date of Ruling : 28th of June 2016

RULING ON STAY OF PROCEEDINGS

Introduction

1. The Applicant files this application seeking an order to the effect that the proceedings of the criminal case No 713 of 2008 in the Magistrates' court of Lautoka be permanently stayed. This application is being supported by an affidavit of the Applicant, stating the grounds of this application.

2. The Respondent filed an affidavit of Vimal Pillay, stating the objections to this application. The court then directed the Respondent to file a supplementary affidavit, which the Respondent filed accordingly. Subsequent to the filing of the respective affidavits, the matter was set down for hearing on the 1st of June 2016. The learned counsel for the Applicant and the Respondent informed the court that they wish to conduct the hearing by way of written submissions. Hence, I directed them to file their respective written submissions, which they filed as per the direction. Having carefully considered the respective affidavits and written submissions of the parties and the record of the proceedings in the Magistrates' court, I now proceed to pronounce my ruling as follows.

Background

3. The Applicant has been charged in the Magistrates' Court of Lautoka with four other accused persons for one count of Robbery with Violence, contrary to Section 293 (1) (b) of the Penal Code. They were first produced in the Magistrates' Court on the 29th of September 2008. The Applicant was granted bail on the 13th of October 2008. Subsequently the Applicant had appeared in court on few occasions. He had then absconded in appearing in court. Hence, the court had issued a bench warrant against the Applicant on the 21st of November 2008.

4. According to the record of the proceedings in the Magistrates' court, the Applicant appeared again in court on the 1st of November 2010, that was nearly after two years of his last appearance. The matter had been adjourned on many occasions due to the non-availability of the Applicant. The Applicant was again granted bail on the 6th of October 2011.

5. Having appeared in court on few more occasions, the Applicant again failed to appear in court since 4th of July 2012. The prosecution informed the court that the Applicant was in remand custody in Suva for another unrelated matter. The court had then issued a production order to produce the Applicant on the 5th of November 2012. According to the record of the proceedings in the Magistrates' court, it appears that the Applicant was produced in court only on the 10th of February 2014, that was nearly after one year and three months of the production order. However, there is no record of whether he was remanded or granted bail on that day. The matter was last called on the 12th of May 2014, where the Applicant did not appear. Thereafter, the matter had not been mentioned in the court and had lost track.

6. Meanwhile, three of the co-accused persons who were charged with the Applicant have already been pleaded guilty and sentenced by the court before the matter had lost track in 2014. The matter is now pending against the Applicant and the fourth accused person only.

7. The Applicant in his affidavit has admitted that he was on bench warrant since 2008 till 2010. He has further stated that he was again granted bail in 2011. Meanwhile, he was arrested and remanded in custody for another matter in Suva. However, no production order was issued by the Magistrates' court of Lautoka to produce him for this instant matter until in 2014. Having stated the background of the proceedings, the Applicant urges that the delay of approximately six years is an injustice caused to him.

8. The Respondent states that the delay of this matter was mainly caused by the Applicant as he had been absconding the court between 2008 to 2010. He was

then remanded in custody for another matter. Hence, the delay was not caused by the prosecution.

9. Having briefly discussed the chronological background of the proceedings in the Magistrates' court and the submissions of the parties in this application, I now draw my attention to discuss the applicable laws pertaining to an application of this nature.

The Law and Analyses

10. Article 15 (3) of the Constitution of Fiji states that;

"every person charged with an offence has the right to have the case determined within a reasonable time".

11. Lord Bingham of Cornhill in **Attorney General's Reference No 2 of 2001 (2003) UKHL 68)** expounded the approach of the courts in England on the issue of stay of proceedings on the ground of delay in more elaborative manner, where his lordship found that;

"If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite

the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of condition (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing.

12. According to the observation of Lord Bingham in **Attorney General's Reference No 2 of 2001 (supra),** it is only appropriate to stay or dismiss a criminal proceedings on the ground of delay if there are reasons to satisfy that the accused is so prejudiced in the conduct of his defence and that a fair trial is no longer possible.

13. Having comparatively reviewed the approaches of the jurisdictions of New Zealand, Canada, England and European Court of Human Rights, the Fiji Court of Appeal in **Mohammed Sharif Sahim v State (Misc Action No 17 of 2007)** held that the governing principle in an application of this nature must always founded on whether an accused person can be tried fairly without any impairment in the conduct of his defence. If the court finds an affirmative conclusion for that question, the prosecution should not be stayed on the ground of unreasonable delay only. The Fiji Court of Appeal held that;

"The correct approach of the court 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"

14. The Fiji Court of Appeal in **Mohammed Sharif Sahim (supra)** went further and held that the above stated approach would preserve the rights stipulated under Article 29 (3) of the Constitution (Presently Article 15 (3) of the Constitution of 2013) without taking an excessive and an exorbitant step of terminating the proceedings in criminal actions.

15. The Supreme Court of Fiji in **Nalawa v State (2010) FJSC 2; CAV0002.2009 (13 August 2010)** upheld the approach enunciated in **Mohammed Sharif (Supra)** and found that;

"That right has been expressed in numerous cases at Common Law and the following principles may now be stated as basic to the 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 the 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

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,

16. Justice Goundar in **Johnson v State [2010] FJHC 356; HAM177.2010 (23 August 2010)** found that the stay of proceedings on the ground of delay is granted only if there is prejudice that the accused person could no longer capable of having a fair hearing.

17. In view of the principle enunciated in **Mohammed Sharif Sahim (supra)** and **Nalawa (supra),** it appears that the applicable approach in determining of stay of proceedings on the ground of delay constitutes two main components. The first component is to determine whether the delay is unreasonable. If the court is satisfied that the delay is unreasonable, the court is then required to consider what is the appropriate and available remedy for such unreasonable delay. If the court is satisfied that the accused person is still able to be tried fairly without any impairment in the conduct of his defence, the court should not stay the proceedings.

18. Justice Bruce in **Takiveikata v State [2008] FJHC 315; HAM039.2008 (12 November 2008)** found that the burden of proof in an application of this nature is on the Applicant and the standard of proof is balance of probability.

19. In this instant case, it appears that many factors have been contributed to the delay of taking the proceedings into conclusion over the years since the matter was instituted in 2008. The conduct of the Applicant has significantly contributed to this delay as he had been absconding the court for nearly two years between 2008 to 2010. It is regrettable to note that the lack of coordination and commitment shown by the prison authority, registry of the Magistrates' court of Lautoka and the office of police prosecution has also adversely contributed to this protracted delay.

20. However, the Applicant has not stated, either in his affidavit or in his written submissions whether this delay impedes the possibility of having a fair trial without any impairment in the conduct of his defence. He has only deposed in the affidavit that the delay itself is prejudiced to him. However, as discussed above, the Applicant is required to satisfy the court on balance of probability that the delay has caused him prejudice to the extent that a fair trial could no longer be possible.

21. In the absence of such evidence to satisfy the court that a fair trial could no longer be possible due to the delay, I am of the view that with proper judicial monitoring and expedient judicial intervention, the matter can be concluded within a short period of time.

22. Accordingly, it is my opinion that, though this delay of eight years is unreasonable, I still find that the Applicant is not prejudiced in the conduct of his defence and a fair trial is still possible.

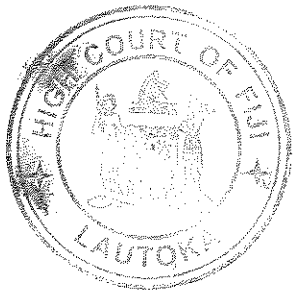
23. Having considered the interest of the public and the Applicant in the criminal proceedings, it is my opinion that an expedient hearing would be an appropriate remedy, which is capable of preserving the rights of the Applicant as stipulated under Article 15 (3) of the constitution and also the rights of public. Hence, I refuse this application to stay of proceedings and dismiss it accordingly.

24. Though I am mindful of the fact that the cause list of the Magistrates' court is full of other prioritised cases, I still find that the highest priority should be given to this instant matter as there has been a protracted delay of nearly eight years. Hence, I direct the learned Magistrate to conclude the hearing of this matter within sixty (60) days of this order.

25. Further I direct the Deputy Registrar to serve a copy of this ruling to the relevant Learned Magistrate of Lautoka and to the Chief Magistrate for their information forthwith.

R. D. R. Thushara Rajasinghe

Judge



At Lautoka

28th of June 2016

Solicitors : Office of Legal Aid Commission for the Applicant

Office of the Director of Public Prosecutions for Respondent