IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO.: HAM 80 OF 2016

BETWEEN: **UMLESH CHAND**

APPLICANT

AND: **STATE**

RESPONDENT

Counsel : **Applicant in person**

Mr. S. Babitu for Respondent

Date of Hearing : **22nd June, 2016**

Date of Ruling : **15th July, 2016**

RULING

1. The Applicant files this notice of motion seeking a permanent stay of proceedings in criminal case No.403 of 2012 in the Magistrates Court at Lautoka. He is charged with one count of Possession of Counterfeit Currency Notes with Intent to Utter or Put Off contrary to Section 166(3) of the Crimes Decree 44 of 2009.

Background

2. The above mentioned case was first called in the Magistrates Court on the 13th of August 2012. On the same day, it was transferred to the Lautoka High Court to be called on the 17th of August 2012.

3. From the 17th of August 2012 to the 11th of July 2013, the matter was in the Lautoka High Court. The matter was then remitted back to the Lautoka Magistrates Court in extended jurisdiction to be called again on the 2nd of August 2013.

4. On the 13th of August 2013, a trial date was fixed from the 7th of April 2014 to the 11th of April 2014. He was on bail but did not appear on the 15th of August 2013. Accordingly a bench warrant was issued against the Applicant.

5. Applicant did not appear on the following dates, 16.9.2013, 25.11.2013, 10.3.2014, 7.4.2014 and 6.5.2014. Reasons for his non-appearance are not clear.

6. Finally, on the 28th of July 2014, Applicant appeared and case was to be called on the 18th of August 2014 to re-fixe a trial date. On that day, Resident Magistrate was not sitting and the matter was adjourned by the Court Officer to the 22nd of September 2014. On the 22nd of September 2014, another mention date was given to fix a trial date. Court record does not state the reason for the adjournment. On the 10th November, 2014, Court Officer adjourned the matter for 2nd February, 2015 as the Resident Magistrate was not sitting.

7. On the 2nd of February 2015 Applicant failed to appear and a bench warrant was issued. He appeared on the 16th of February 2015 voluntarily and matter was than adjourned to the 17th of August 2015 for Hearing. On the 17th of August 2015, Applicant was not present on the hearing date and a bench warrant was issued on the Applicant.

8. On the 16th of November 2015, Applicant appeared with LAC Counsel and informed the Court that he was remanded in another matter and that is the reason he did not appear. Another Hearing date was given on the 4th of April 2016.

9. On the 4th of April 2016, again the Applicant did not appear as he was in remand for another matter, thus trial vacated.

The Law on Stay

10. In the case of ***Ratu Inoke Takiveikata & Others v. State*** *[2008] FJHC 315; HAM039.2008 (12 November 2008),* Justice Bruce at paragraph 20 stated that it is that the source of power of a court such as the High Court of Fiji to make an order of stay of proceedings is found within the inherent power of that court to regulate its own process.

11. In the case of ***Asesela Tawake v. State*** *[2009] FJHC 35; HAM 126D.2008 (6 February 2009),* Justice Shameem (as she was then), explained the law on stay.

12. She stated in paragraph 9 that the law has shifted from a position that a stay must be granted once delay is held to be unreasonable, to a position that a stay should be granted where the delay is held to be unreasonable and the accused person is unlikely to get a fair trial. This is a case of chronic post-charge systemic delay.

13. At common law, a stay was only ordered when there were no other available remedies to the accused and when a fair trial was no longer possible. This was the law as set out in ***Attorney-General's Reference (No. 1 of 1990) (1991) QB 630.*** At common law the relevant questions were:

    1. *Was the delay unreasonable?*
    2. *Has the delay deprived the accused of a fair trial?*
    3. *Are there other available remedies to alleviate the prejudice?*

However, it is not to say that this list of considerations set as necessarily exhaustive but under one heading or another it encompasses all the factors that may be regarded as relevant in the present case.

14. In ***Seru*** *(2003) FJCA 26 (30 may, 2003)* the Court of Appeal considered all the matters set out in ***Martin v. Tauanga District Court*** [1995] 2 NZLR 419, where it was said that 'delays approaching a certain threshold may be regarded as "presumptively prejudicial"'.

Burden and Standard of Proof on Application for Stay of Proceedings

15. In the case of ***Ratu Inoke Takiveikata & Others v. State***, *(Supra)* Learned Justice Bruce at paragraph 12 stated 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 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"*

Analysis

16. Having analysed the law relating to Stay of Proceedings, I now turn to apply the law to the factual scenario of this case.

Delay

17. The chronology at the magistracy identifies the length of the delay, almost 04 years from the charge to the beginning of the trial. It appears that both the Court and the Applicant are responsible for the delay. It cannot be said that the delay is systematic or calculated to undermine the interests of the Applicant. One can argue that the length of the delay of 4 years in a criminal case (from institution to the beginning of trial) is presumptively prejudicial to the Applicant. However, when viewed objectively,

and considered in the context of considerable contribution to the delay by the Applicant, it cannot be said that the delay is unreasonable.

18. Delay is not serious in that it 'was not such that the court should necessarily hold that there had been an abuse of the process'. Given the backlogs in the magistracy, disposal process necessarily takes time. To have serious high profile charges hanging over one's head for more than 4 years, with the ultimate spectre of a possible prison sentence in itself would be prejudicial. However, the charge against the Applicant is not that serious and the delay in itself cannot be considered as prejudicial.

19. Indeed the delay is mainly due to Applicant not being brought to court due to other pending cases against him or he being on bench warrant. On the last hearing day (04.04.2016) Applicant had not been brought to Court because the High Court had remanded him in another matter. Where the principle reason for the delay is the fault of the accused, even a lengthy delay might be accepted as reasonable.

20. There is no evidence that the Applicant positively asserted his right to a speedy trial at the magistracy although Applicant was represented by a Counsel. It could be said that the delays caused by the Defence were just as great as or even more so than those caused by the Court or Prosecution. In addition, there was no objection by the Defence to delays caused by the Court or Prosecution. There is no evidence in the record to show that the bench warrant had been issued whilst the Applicant was in remand. On 17th August 2015, his Counsel had not indicated to Court that he was in remand for another matter. If that was the case he could have enlightened the Magistrate when he was brought to court on the next day. Conversely, he had surrendered to court and furnished fresh bail at least on two occasions.

21. There is no evidence in the record to show that the Residence Magistrates who handled the matter from time to time had granted adjournments without justifiable reasons.

22. Counsel appeared for Applicants from time to time had become sleeping partners of

the delayed progression of the case. As was said in **Shameem**, [2007] FJCA 19; AAU 0096.2005 (23 march 2007) *It must be remembered that delay is often a strategy to avoid justice. The law on stay must not make an abuse of the process of the courts a successful strategy under the guise of a human rights shield.*

23. I do not find the delay in this case to be oppressive in all the circumstances so as to hold that there had been an abuse of process. Looking at the sum of the relevant factors discussed in this ruling, I am driven to the conclusion that in the circumstances of this case, the delay which occurred between charge and trial was not unreasonable.

24. Applicant has cited ***Seru*** in his submission. Circumstances under which appeal was granted in ***Seru*** (*supra)* are distinguishable in that, in ***Seru***, Court considered prejudice caused by systemic delay to the **appellant** who had occupied a prominent public position. Prominent figures, from the Prime Minister down, were involved. There was no alternative remedy available at that stage to (Mr.) Seru as the matter had come up in appeal.

25. Conversely, this case involves possession of counterfeit notes. The public, represented by the state, has an important right in seeing that justice is done both to accused persons and to the public represented by the State. In my opinion, given the circumstances of this case, public interest outweighs the interests of the Applicant. On a balancing of the rights of the Applicant against the public interest, I decide that the application for Stay should be dismissed.

Prejudice

26. Applicant has failed to show as to how he was to be prejudiced by the delay. He seems to be running his argument on the premise that delays in itself is presumptively prejudicial to him. He has merely stated that defence witnesses cannot be easily located. However, he has not revealed his defence and as to how that defence will be prejudiced by non- availability of witnesses. No stay should be granted in the absence of any serious prejudice to the defence so that no fair trial can

be held.

Alternative Remedy

27. High Court is not inclined to satay proceedings at the magistracy when alternative remedies are available to the Applicant. Where the breach could be remedied by an appropriate remedy without recourse to stay of proceedings, unless the hearing would be unfair or it would be unfair to try the accused at all.

28. This court can set a time frame within which the trial shall be concluded by the Magistrate. Apart from that, right of Appeal is available to the Applicant in the event he is being found guilty in a proceeding which had dragged on for a long time. As was held in ***Seru*** *(supra)* the ground of delay alone, if presented to the satisfaction of the Appellate Court, is sufficient to quash the conviction and sentence.

29. Even where delay is unjustifiable, a permanent satay is the exception and not the rule. Where there is no fault on the part of the Prosecution, very rarely will a stay be granted.

30. It is important to note the provision of Section 44(4) of the Constitution where it is provided:

> *"The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this Section if it considers that an adequate alternative remedy is available to the person concerned.*

Conclusion

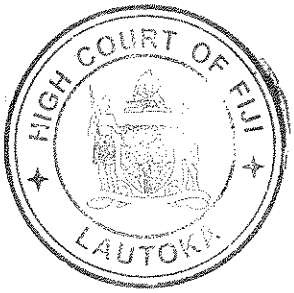
31. I am not persuaded that a fair trial is not possible. Nor am I persuaded that it would otherwise be unfair to try the Applicant. Applicant is entitled to a fair trial, and to raise all those matters he has raised in this application in the course of it. In that circumstance, it is not appropriate to stay the proceedings. The public interest in final determination of criminal charges requires that a charge should not be stayed, because the alternative of trial expedition is just and appropriate in all the circumstances.

ORDERS

32. 1. The application for a stay is refused.

2. The Learned Magistrate at Lautoka handling the case is directed to conclude the trial within three months from the date he has received this Order.

Registry is directed to send a Copy of this Order to the Chief Magistrate.



Aruna Aluthge

Judge

At Lautoka

15th July, 2016

Solicitors: **Applicant in Person**

Office of the Director of Public Prosecution for Respondent