

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

Criminal Miscellaneous Case No. HAM 237 of 2018

BETWEEN : DESHWAR KRISHORE DUTT  
Applicant

AND : STATE  
Respondent

Counsel : Applicant in person  
Mr. Alvin Singh for the Respondent

Date of Hearing : 24 April 2019

Date of Ruling : 19 June 2019

RULING

1. The Applicant filed a notice of motion on 23 November 2018 supported by an affidavit sworn by him to seek an order for permanent stay of proceedings. He made the application in respect of Criminal Case No 41 of 2013 pending before the Magistrate's Court in Lautoka.

2. The Applicant seeks an order for stay of proceedings as remedy for contravention of Section 14(g) of the Constitution by the State. The Applicant claims that the rights guaranteed by the Constitution to have the trial begin and conclude without unreasonable delay is contravened due to the delay occurred in the Magistrate's Court case No 41 of 2013.
  
3. If a person considers that any of the rights guaranteed in the chapter on Bill of Rights in the Constitution has been or is likely to be contravened, that person can apply to the High Court for redress pursuant to Section 44 of the Constitution. Presumably, the Applicant has invoked the jurisdiction of this court pursuant to Section 44 of the Constitution to seek redress.
  
4. The Applicant was first produced before the Magistrate's Court on 25 February 2013 for one count of burglary contrary to section 312(1) of the Crimes Act and another count of theft contrary to section 291(1) of the Crimes Act. The Applicant has tabulated a summary of adjournments in the Magistrate's Court to support his application;

Total number of adjournments:	75
Number of times Applicant was present:	49
Number of times the Applicant was not produced to Court from prison:	21
Number of times the delay occasioned by the Applicant:	3
Number of times the Prosecution misconceived that the Applicant was on the run:	1
Number of times the hearings were vacated when the Applicant was present:	5
Number of times the Magistrate was not present:	30
Number of times the Applicant was ready for hearing	2

5. The Respondent too explicitly set out the chronology of events to comprehend the pattern of adjournments. The Respondent concedes that delay of 6 years is unreasonable and all stakeholders are equally liable for the delay. Therefore, I do not wish to enquire into the reasons and the extent of delay. However, it

should be noted that the contribution for the delay is predominantly by the Court and by the Prosecution. It is shocking to see that from 17 June 2013 till 06 May 2014, for nearly 11 months the case had been repeatedly adjourned due to non-availability of the Magistrate. On 06 May 2014 the case had been adjourned again for what is described as "Magistrate attending to pending chamber matters". Finally, on 28 August 2018 the case is adjourned for four months merely to produce the Applicant from custody. Undoubtedly, this is totally an unacceptable manner to handle a comparatively old matter.

6. Be that as it may, the Court must consider the extent of prejudice caused by the delay since there is no dispute regarding the unreasonable delay in the proceedings.
7. The Applicant has stated in his submissions that he is likely to be prejudiced due to the lapse of time. He claims that he cannot recall the actual events that transpired at Lautoka Police Station and he is losing memory. He also states that he has lost contact with potential witnesses and one of his witnesses has passed away.
8. In **Takiveikata v. State**, [2008] FJHC 315; HAM039.2008 (12 November 2008) Justice Bruce observed that;

"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."
9. The consequences of lapse of time is common to witnesses of both parties. However, it is for the trial Court to carefully consider the quality of evidence in such circumstances. The Applicant has not deposed in his affidavit about the

extent of prejudice caused by delay. Instead he brought up those claims only in his submissions. I am not satisfied that the Applicant proved on a balance of probability that serious prejudice is caused due to the delay. Even where the delay is unjustifiable permanent stay is the exception, and not the rule: **Nalawa v State** [2010] FJSC 2; CAV0002.2009 (13 August 2010). This Court does not see any valid reason as to why a fair trial cannot be afforded to the Applicant as no serious prejudice is shown to have caused due to the delay. In the circumstances I do not see any justification in making an order for the proceedings in the Magistrate's Court to be stayed.

10. Nevertheless, the fact remains that there has been unreasonable delay in handling the case in the Magistrate's Court. I am of the view that the delay has breached Section 14(g) of the Constitution. However, Section 44(3) of the Constitution provides for the High Court not to grant any relief in relation to an application for contravention of rights guaranteed under the Bill of Rights Chapter, if the Court considers that an adequate alternative remedy is available to the person concerned.
11. The Courts in recent times have set time frames to ensure fair trial and to remedy unreasonable delay as an alternative remedy. This seems to be the preferred approach in many instances where there is no material prejudice caused by delay and where a fair trial can be ensured. See: **Sahim v State** [2008] FJCA 124; Miscellaneous Action 17 of 2007 (25 March 2008); **Nalawa v State** [2010] FJSC 2; CAV0002.2009 (13 August 2010); **Nand v State** [2016] FJHC 272; HAM171.2015 (15 April 2016); **Vuivuda v State** [2019] FJHC 504; HAM159.2018 (17 May 2019).
12. In **Ligavai v State** [2016] FJHC 673; HAM61.2016 (22 July 2016) Justice Aluthge stayed the proceedings in the Magistrate's Court when the alternative remedy ordered by the Court to conclude the matter within a timeframe was not adhered to by the Prosecution and by the Magistrate's Court. Similarly, in **Gounder v State** [2017] FJHC 472; Miscellaneous Case 186.2016 (29 June 2017) Justice Madigan stayed the proceedings following non-adherence by the

Magistrate's Court to conclude the matter within a period specified by the High Court.

13. It is my considered opinion that it is justifiable in all circumstances to provide an alternative remedy for the unreasonable delay in this case. Therefore, I decide to set a timeframe to conclude the matter pending before the Magistrate's Court to ensure the right of the Applicant to have the trial begin and concluded without any further delay.
14. Accordingly, the application for stay of proceedings is refused. Further the following orders are made;
- i) The learned Magistrate who presides over Criminal Case No 41 of 2013 of Lautoka Magistrate's Court is directed to prioritize the matter and to conclude it within 60 days with effect from 21 June 2019.
  - ii) The Deputy registrar is ordered to serve copies of this ruling on the relevant parties for immediate attention.
  - iii) The case to be mentioned before the Magistrate's Court, Lautoka on 21 June 2019.
  - iv) The Applicant to be produced before the Magistrate's Court on 21 June 2019.



Rangajeeva Wimalasena  
**Acting Judge**

**Solicitors:**

Applicant in person

Office of the Director of Public Prosecutions for the Respondent