

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Miscellaneous Case No: HAM 148 of 2023**

**BETWEEN:**                      **ELIKI MOTOTABUA**                      **APPLICANT**

**A N D:**                              **THE STATE**                              **RESPONDENT**

**Counsel:**                              Applicant In Person  
    Ms. B. Kantharia for Respondent

**Date of Ruling:**                      15<sup>th</sup> September 2023

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**JUDGMENT**

**[On Stay Proceeding]**

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1. The Applicant files this Notice of Motion, seeking an order to permanently stay the proceeding in Criminal Case No 01 of 2015 in the Magistrate's Court at Nausori. This Notice of Motion is supported by an affidavit of the Applicant explaining the grounds for this application.
2. The State objected to this application. Both parties filed their respective written submissions, which I have dully considered. Having done that, I now proceed to pronounce the Judgment on this matter.

## Background

3. The Applicant was produced in the Magistrate's Court on the 2nd of January 2015 with one Count of Found in Possession of Illicit Drugs, contrary to Section 5 (a) of the Illicit Drugs Act. The matter had proceeded through the pre-trial stages at a snail space for various reasons. The Applicant had substantively contributed to this delay by making clusters of applications and taking an unreasonably long time to organize his counsel, which he eventually did not obtain. Moreover, it appears from the Magistrate's Court proceedings that the Applicant was uncooperative, where he refused to accept the new set of disclosures provided by the Prosecution after he either misplaced or left his original set of disclosures somewhere. He had abusively told the learned Magistrate to use the new set of disclosures as toilet papers when the Prosecution generously offered him a new set of disclosures in order to take the matter forward. (*vide page 15 of the Copy Record*).
4. Irrespective of this delay, the hearing of this matter eventually commenced on the 30th of June 2020. The hearing was adjourned several times due to the non-availability of certain witnesses. However, the Prosecution managed to finish most of their main witnesses. In the meantime, the learned Resident Magistrate left the Jurisdiction after completing his contract, and the matter was listed before another Magistrate. The second learned Magistrate had, quite accurately, acted under Section 139 of the Criminal Procedure Act and explained to the Applicant his right under Section 139. The Applicant, with the consent of the Prosecution, opted for a trial *de novo* on the 24th of May 2022.
5. Subsequently, the matter was taken up for the hearing on three occasions. On all these occasions, the Prosecution was ready to proceed with the hearing, but some of their witnesses were unavailable. The Applicant had objected to part-hearing; hence, the hearing was vacated. The Applicant then filed this application in the High Court.

## The law

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

*“In an earlier decision of this court, of Seru and Stephens, prejudice was presumed because of the length of delay and the history of the case. What the court did not address was the availability of alternative remedies in the absence of proof of actual prejudice.*

*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.”*

7. 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 Section 29 (3) of the Constitution (Presently Section 15 (3) of the Constitution of 2013) without taking an excessive and an exorbitant step of terminating the proceedings in criminal actions.

8. 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,*
9. Given the above-discussed judicial precedents relating to the law on “stay proceedings,” the Applicant has not provided any material facts or evidence to establish that this alleged delay has affected his right to a fair trial. In fact, the Applicant had contributed substantially to the delay by making clusters of applications, as I explained above. The Applicant opted for a trial *de novo* before another Magistrate and then objected on three occasions when the Prosecution was ready to commence the hearing with the available witnesses.
10. The Applicant is charged with a serious offence; hence, there is a significant public interest in this proceedings. It is in the wider public interest that this Prosecution should come to an end through a fairly conducted hearing. This delay would not cause any adverse prejudice to the Applicant in conducting his defense.
11. Considering the reasons discussed above, 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 Section 15 (3) of the Constitution and also the rights of the public. Hence, I refuse this application to stay of proceedings and dismiss it accordingly.

12. Though I am mindful of the fact that the cause list of the Magistrate's Court is full of other prioritized cases, I still find that the highest priority should be given to this matter as there has been a reasonable delay. Hence, I direct the Learned Magistrate to conclude the hearing of this matter within a reasonable time without undue delay.
13. Further, I direct the Registry of the High Court (Criminal) to serve a copy of this ruling to the relevant Learned Magistrate in Nausori forthwith.



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**Hon. Mr. Justice R.D.R.T. Rajasinghe**

**At Suva**

15<sup>th</sup> September 2023

**Solicitors**

Applicant In Person

Office of the Director of Public Prosecutions for the Respondent.