

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

**Criminal Misc. No. HAM 218 of 2023**

**BETWEEN** : **LEMEKI SEVUTIA**  
**APPLICANT**

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

**Counsel** : Applicant in person.  
: Ms. S. Swastika for the Respondent.

**Date of Hearing** : 27 May, 2024  
**Date of Ruling** : 30 May, 2024

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**RULING ON APPLICATION FOR STAY OF PROCEEDINGS**

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**APPLICATION**

1. The applicant by hand written notice dated 29<sup>th</sup> August, 2023 seeks a permanent stay of proceedings in respect of EJR criminal case no. 07 of 2019 pending at Magistrate's Court, Rakiraki. The applicant has not filed his affidavit in support, however, no objection has been taken by the state counsel hence this court has accepted the application on the basis of what has been filed in court.

2. The applicant has raised the following grounds in support of his application for a permanent stay of proceedings:
  - a) Circumstances are such that a fair trial cannot be held in the Magistrate's Court;
  - b) The conduct of the executive has been so wrong that it should be an affront to the conscience of the High Court to allow the proceedings to go ahead.
3. This application is made pursuant to section 15 (1) of the Constitution of Fiji.
4. The application is opposed by the State, however, no affidavit in reply have been filed. The State relies on the submissions of counsel.

#### **BACKGROUND INFORMATION**

5. The applicant faces one count of aggravated robbery contrary to section 311 (1) (a) of the Crimes Act 2009 and one count of injuring animals contrary to section 368 of the Crimes Act 2009.
6. It is alleged that on 23<sup>rd</sup> April, 2019 the applicant with another dishonestly appropriated (stole) the following items: \$500.00 cash (FJD), assorted jewelleries valued at \$1,930.00 and a Nokia brand mobile phone valued at \$60.00, all to the total value of \$2,490.00 being the property of SUSAN DOUGLAS, and prior to stealing the said items the applicant and another used force on SUSAN DOUGLAS.

7. It is also alleged that on the same day the applicant willfully and unlawfully wounded a dog belonging to SUSAN DOUGLAS.
8. On 4<sup>th</sup> September, 2019 the High Court remitted this file to the Magistrate's Court at Rakiraki to be tried under the extended jurisdiction of the High Court. The matter was called in the Magistrate's Court on 18<sup>th</sup> October, 2019. After several adjournments the applicant informed the court that he will be challenging his confession. On 8<sup>th</sup> September, 2022 the matter was stood down by the learned Magistrate to allow the applicant to write his grounds of voir dire. Thereafter on 9<sup>th</sup> November, 2022 the applicant filed his amended voir dire grounds. On 11<sup>th</sup> April, 2023 the prosecution served the voir disclosures to the applicant in court.
9. On 22<sup>nd</sup> January, 2024 the Magistrate's Court proceeded to voir dire hearing. The voir dire ruling was delivered on 21<sup>st</sup> February, 2024 in the ruling the learned Magistrate ordered that the caution interview of the applicant was inadmissible. The trial proper is scheduled for 6<sup>th</sup> June, 2024 in the Magistrate's Court at Rakiraki.

### **LAW**

10. Section 15 (1) of the Constitution of Fiji states:-

*“Every person charged with an offence has the right to a fair trial before a court of law.”*

11. The applicant bears the burden of proof of establishing the factual basis on balance of probabilities which would justify the intervention of this court by way of granting a stay of proceedings. The above was stated by Bruce J. in *Ratu Inoke Takiveikata and others -vs- State, Criminal Miscellaneous Case No. HAM 039 of 2008* at paragraph 12 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 of 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.”*

12. In *Mohammed Sharif Shaim vs State, Miscellaneous Action No. 17 of 2007* the High Court held that a 5 year delay after charges had been laid in the Suva Magistrate’s Court was unreasonable. However, instead of ordering a stay, the High Court ordered that the trial commence within 40 days. On appeal the Court of Appeal held that the governing factor must always be whether an accused can be tried fairly without any impairment in the conduct of his defence and if that question can be answered affirmatively, the prosecution should not be stayed (see paragraph 24 *Tevita Nalawa – vs.- State, Criminal Appeal No. CAV 0002 of 2009*).
13. The Supreme Court of Fiji in *Tevita Nalawa* (supra) stated the following factors as relevant to any case in which the question of delay affecting a fair trial is an issue:
  - (i) the length of the delay;
  - (ii) the reason for the delay;
  - (iii) whether or not the Applicant has asserted his or her right to a speedy trial; and
  - (iv) the extent of any prejudice.

### **LENGTH OF THE DELAY**

14. After the matter was sent to the Magistrate's Court to be tried under the extended jurisdiction of the High Court it is noted that on many occasions the applicant was not brought to court, when the applicant was in court the other accused was absent. The matter got further delayed due to COVID 19 restrictions, however, despite the above within 5 years of the applicant's appearance the voir dire hearing has been completed with a ruling delivered and a trial proper date given for 6<sup>th</sup> June, 2024 which is in the next few weeks. The applicant has not raised delay as a ground to support his stay application in any event the delay in the applicant's case is not inordinate or excessive considering the progress made by the Magistrate's Court.

### **REASON FOR THE DELAY**

15. The applicant has not raised delay as a ground hence this aspect of delay component is not applicable.

### **HAS APPLICANT ASSERTED HIS RIGHT TO SPEEDY TRIAL**

16. This aspect of delay component is also not applicable.

### **PREJUDICE CAUSED TO THE APPLICANT**

17. The applicant argued that he will not receive a fair trial if this matter is not stayed his caution interview has been ruled inadmissible and there is no other evidence implicating him. The complainant has not identified him, however, the prosecution is now calling his co-accused to give evidence against him by giving him immunity.

18. The applicant further argued that by calling the co-accused the prosecution is making sure that he gets convicted by the court which means the co-accused escapes punishment and he gets convicted because the co-accused will do anything and everything to save himself.
19. Finally, the applicant submits that he will be prejudiced as a result of the above and the prosecution is using its powers in an unjust, unfair and oppressive manner against him.

### **DETERMINATION**

20. There is no doubt that every person charged with a criminal offence has the right to have the matter determined within a reasonable time and to receive a fair trial according to law which the courts at all levels respect and apply. What is a reasonable time is a matter of fact and is construed on a case by case basis bearing in mind the history of what has transpired leading to the delay.
21. The Supreme Court of Fiji in *Tevita Nalawa* (supra) formulated the principles of protecting an accused's right as basic to the common law at paragraph 21 as follows :-
  - (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 would 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.”*

22. Looking at the current status of this matter it cannot be said that the matter has not made any substantial progress. The chronology of the events show that the matter is now ready for trial which is scheduled for 6<sup>th</sup> June, 2024 at the Magistrate’s Court, Rakiraki.
23. The applicant’s contention that he will not receive a fair trial since the co-accused will be giving evidence against him is misconceived since he has the opportunity to cross examine the co-accused. This court cannot intervene to stay a matter which is properly before the Magistrate’s Court the prosecution has the opportunity to put forward its case and the defence to create a reasonable doubt. There is no unfairness in the prosecution strategy if they wish to call the co-accused as a prosecution witness. It is the court which is the final arbiter that will decide on the evidence the guilt or otherwise of the applicant.
24. I am satisfied based on the evidence before me that the applicant will not be prejudiced in his defence his right of cross examination is available and a fair trial is possible.

### **CONCLUSION**

25. Having considered the evidence before this court I am not satisfied that the prosecution is acting unfairly against the applicant by calling the co-accused as a prosecution witness with full disclosures made to the applicant. The arguments raised by the applicant do not justify a permanent stay of proceedings in the Magistrate’s Court. There is also no

prosecutorial misconduct or abuse of process by the prosecution which would convince this court to grant a stay of proceedings.

26. There is no evidence of any prejudice caused to the defence which will affect fair trial. The application for stay of proceedings is refused and dismissed.

### **ALTERNATIVE REMEDY**

27. Since the applicant has raised an issue of Constitutional breach this court is mandated under section 44 (4) of the Constitution of the Republic of Fiji to consider adequate alternative remedy that is available to the applicant.
28. The matter pending before the Magistrate's Court at Rakiraki falls within its criminal division hence it is important to consider the interest of the complainant and the interest of the applicant. In my view the scheduled trial proper in the Magistrate's Court for 6<sup>th</sup> June is the most appropriate remedy which will preserve the rights of the applicant and prevent any Constitutional breaches.

### **ORDERS**

- [1] The application for permanent stay of proceedings in respect of EJR Criminal Case No. 07 of 2019 pending at Magistrate's Court, Rakiraki is refused and dismissed;



[2] The matter to take its normal course at the Magistrate's Court, Rakiraki as scheduled.



**Sunil Sharma**  
**Judge**

**At Lautoka**

30 May, 2024

**Solicitors**

**Applicant in person.**

**Office of the Director of Public Prosecutions for the Respondent.**

