

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO.: HAM NO. 173 OF 2016

BETWEEN: ISAIA BOBO

Applicant

AND:

STATE

Respondent

Counsel : Mr. A. Singh for Applicant

Ms. S. Dunn for Respondent

Date of Hearing : 28th June, 2017

Date of Ruling : 19th July, 2017

RULING

Introduction

- 1 This is an application seeking a permanent stay of proceedings in Nadi Magistrates Court criminal case No. 1065/08.

2. The Applicant was charged with one count of Burglary contrary to Section 299 of the Penal Code Cap17 and one count of Larceny from Dwelling House contrary to Section 270 of the Penal Code Cap 17.
3. On the 18th August 2016, the Applicant filed a Motion and Affidavit in support of his application.
4. As per the Affidavit dated 18th August, 2016 filed by the Applicant, the application for stay is made on following grounds:
 - I. Unreasonable delay
 - II. Prejudice caused by delay
 - III. Prosecutorial Misconduct/ Abuse of process

The Law

5. In *Attorney General's reference* (No 1 of 1990) (1992) Q.B 630 at 643-644) CJ Lord Lane discussed the principles applicable in stay of proceedings on the ground of delay, where His Lordship observed;

"Stay imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust. We respectfully adopt the reasoning of Bernnan J in Jago v District Court of New South Wales (1989) 168 C.L.R.23. In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the action of the defendant himself, should never be the foundation for a stay,

In answering to the second question posed by the Attorney- General, no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held; in other word, that the continuance of the prosecution amounts to a

misuse of the process of the court. In assessing whether there is likely to be prejudice and if so where it can properly be described as serious, the following matters should be borne in mind; first, the power of the judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence, secondly, the trial process itself, which should ensure that all relevant issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the power of the judge to give appropriate direction to the jury before they consider their verdict”.

6. In *Nalawa v State* [2010] FJSC 2; CAV002.2009 (13 August 2010) the Supreme Court of Fiji adopted the common law approach and held;

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.*

7. In the case of *Ratu Inoke Takiveikata & Others v. State*, [2008] FJHC 315; HAM039.2008 (12 November 2008) 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

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

Delay

09. The Applicant had first appeared in the Magistrates Court on 25th August, 2008. Chronology at the magistracy identifies the length of the delay, almost 09 years. It appears that the Court, Prosecution and the Applicant are responsible for the delay. It cannot be said that the delay is calculated to undermine the interests of the Applicant.
10. The Applicant had failed to appear in Court on several occasions forcing the court to issue bench warrants. According to the letter dated 18th April 2017, Applicant had escaped from the custody of police. Upon his arrest, he was convicted and sentenced by the Magistrates Court. On the, 8th January, 2015, he was again sentenced to a term of imprisonment of 12 years and 6 months.
11. One can argue that the length of the delay of 9 years in a criminal case 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.
12. 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 charges hanging over one's head for more than 9 years, with the ultimate specter of a possible prison sentence in itself would be prejudicial. However, the charges against the Applicant are not that serious in this case and the Applicant contributed substantially to the delay. Furthermore, the Applicant is serving a long prison term. Therefore, delay in itself cannot be considered as prejudicial.

13. 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. The case was fixed for hearing on 12th November, 2015, and on that day, Applicant had retained a Counsel from the Legal Aid Commission. She had required the State to provide a new set of disclosures to defend the case. Where the principle reason for the delay is the fault of the accused, even a lengthy delay might be accepted as reasonable.
14. There is no evidence that the Applicant positively asserted his right to a speedy trial at the magistracy. 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.
15. 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.
16. 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.
17. Applicant's case involves burglary and larceny. The public, represented by the state, has an important right in seeing that justice is done both to accused person 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

18. Applicant has failed to show as to how he was to be prejudiced by the delay. Although he has stated his memories would be bleak, he has not disclosed his

defence and how it is going to be affected by his fading memory. He seems to be running his argument on the premise that delays in itself is presumptively prejudicial to him. 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

19. High Court is not inclined to stay 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, court will not stay proceedings unless the hearing would be unfair or it would be unfair to try the accused at all.
20. This court can set a time frame within which the trial shall be concluded by the Magistrate. 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.

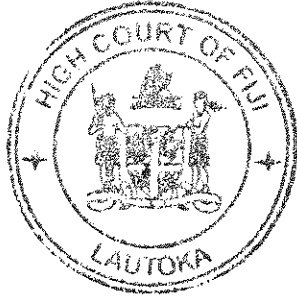
Conclusion

21. 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. 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

22.
 1. The application for a stay is refused.
 2. The Learned Magistrate at Nadi 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

19th July, 2017

Solicitors: Legal Aid Commission for Applicant

Office of the Director of Public Prosecution for Respondent