

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

**CRIMINAL REVISION CASE NO: HAR 001/2009**

**BETWEEN:**

**TUPOU VUETAKI**

***Applicant***

**AND:**

**THE STATE**

***Respondent***

Hearing: 21<sup>st</sup> July 2009  
Ruling: 21<sup>st</sup> August 2009

Counsel: Applicant in person  
Ms S. Puamau for State

## **RULING**

### **Introduction**

[1] Tupou Vuetaki (the applicant) is charged with two counts of robbery with violence and one count of act with intent to cause grievous harm. His trial is pending in the Magistrates' Court. He now seeks a stay of the prosecution.

### **Procedural History**

- [2] The offences were allegedly committed on 19 November 2005. The applicant and his co-accused were charged on 1 December 2005. They appeared in the Magistrates' Court and pleaded not guilty to the charges. Both the applicant and his co-accused were remanded in custody.
- [3] The applicant applied for bail in the High Court. On 20 March 2006, the High Court granted bail to the applicant.
- [4] On 29 March 2006, the applicant appeared in the Magistrates' Court and elected High Court trial. However, no transfer order was made because the court did not have the file.
- [5] The case was called for mention on 26 April 2006 and a trial date of 25 July 2006 was fixed.
- [6] On 25 July 2006, the trial could not commence because the co-accused failed to appear.
- [7] On 28 August 2006, the case was called for mention and a trial date of 28 November 2006 was fixed.
- [8] On 28 November 2006, the trial did not commence because the prosecution was not ready.

- [9] On 26 March 2007, the trial commenced. The case was part heard when it got adjourned to 6 June 2007 for continuation of trial.
- [10] On 6 June 2007, the prosecutor failed to appear and the applicant and his co-accused were discharged by the court.
- [11] On the same day the prosecution re-filed the charges against the applicant and his co-accused. However, the applicant did not appear in court until 18 January 2008. Apparently, on 22 October 2007, the prosecution learnt that the applicant was in remand in an unrelated matter but for reasons not clear in the record, a production order was not served on the prison until January 2008.
- [12] From 28 January 2008 to 20 April 2008 the case was adjourned five times to allow the police to execute the bench warrant against the co-accused.
- [13] On 18 April 2008, the applicant was released on bail.
- [14] From 28 April 2008 to 6 January 2009, the case was adjourned nine times to allow the prosecution to execute the pending bench warrant against the co-accused.
- [15] On 9 January 2009, the application for stay was filed in the High Court.

### **Grounds for Stay**

[16] The application for stay is made on the grounds that the delay in prosecution is unreasonable and the re-filing of the charges after a discharge is an abuse of process.

### **Relevant Principles**

[17] The principles for stay on the ground of delay are well settled. The governing principles were summarized in ***Sahim –v- State*** MISC. Action No. 17 of 2007 by the Court of Appeal:

“Firstly, is there unreasonable delay ...? 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.”

### **Consideration of Grounds**

[18] The delay is post charge. The length of delay from the date of charge to the date of the application for stay is almost four years. The applicant is not responsible for any of this delay. To a large extent the delay was caused by the prosecution and the non appearance of the co-accused. The delay is also systematic. The Magistrates' Court granted unnecessary adjournments and failed to control the procedures to avoid delay.

- [19] In all the circumstances, I find the delay unreasonable. The question is what is the appropriate remedy for the breach of the applicant's right? In determining the appropriate remedy, proof of actual prejudice is relevant.
- [20] The applicant submits he cannot locate his alibi witnesses because they have changed their residential addresses. The applicant says his alibi witnesses were his relatives and friends.
- [21] An absence of witnesses may justify a stay of the prosecution (***Tuiloa v. State*** *Crim. Misc. Case No. HAM 60 of 2007*). The court is to make an assessment of the relevance and impact of the absent witnesses proposed testimony.
- [22] The test is whether by reason of the absent of any particular witnesses the accused will not receive a fair trial (***R v. Cavanagh*** [1972] 2 All ER 704; ***R v. Shaw*** [1972] 1 WLR 679 and ***R v. Leung Chi-Gsing*** *Cr. App. 37/92*).
- [23] I bear in mind that the unavailability of alibi witnesses only arose after this application for stay was filed. Before the filing of the stay application, the applicant gave no notice of any alibi witnesses.
- [24] Ms Puamau submits that the prosecution case against the applicant is circumstantial. He was seen getting out of the getaway car after it crashed when the police gave a chase few hours after the alleged offences. No witness places the applicant at the alleged crime scene. In any event, the applicant has not given any details of his alibi evidence or the witnesses.

- [25] The applicant submits that he was not aware that he had to give notice to the court about his alibi witnesses. He submits without his alibi witnesses, the trial would be unfair or it would be unfair to try him at all.
- [26] Ms Puamau submits that the State is willing to assist the applicant to locate his alibi witnesses provided he provides more details about their identity.
- [27] Upon the evidence before me I do not accept that the applicant's alibi witnesses are unavailable. I am not satisfied that the applicant has diligently tried to locate the whereabouts of his alibi witnesses who he says are his relatives and friends. With due diligent search, the applicant should be able to locate his relatives and friends. If he is unsuccessful, then the State has offered to assist him.
- [28] In all circumstances, I am not satisfied that the trial would be unfair or it would be unfair to try the applicant if his alibi witnesses are unavailable. The trial procedures provide adequate protection to the applicant in the case of unavailable witnesses.
- [29] The burden of proof is on the prosecution to prove guilt. The applicant carries no burden to prove anything. If he gives evidence of alibi but cannot support his evidence with witnesses because of their unavailability due to delay, the trial court can make necessary inferences in favour of the applicant and against the prosecution.

[30] The second complaint of the applicant is that the re-filing of the charge after his discharge is an abuse of process.

[31] The applicant was discharged by the Magistrates' Court when the prosecutor failed to appear in court. There is nothing in the record to suggest that the learned Magistrate made any enquiries about the whereabouts of the prosecutor before discharging the applicant. The trial was part heard. The decision to discharge the applicant was hastily made without any regard whatsoever why the prosecutor was not in court. Ms Puamau advised this Court from the bar table that she was late because she was making enquiries about a surety of the applicant upon the request of the Magistrates' Court.

[32] Given that the Magistrate did not exercise his discretion judicially in discharging the applicant in the absence of the prosecutor and that a discharge is not a bar to subsequent proceeding, I am not satisfied that the re-filing of the charge was a misuse of any procedure or was done for improper purpose. There was no abuse of process.

[33] For all these reasons, the application for stay must fail.

### **Result**

[34] I make the following declaration and orders:

1. The applicant's right to be tried within a reasonable time has been breached.

2. The trial of the applicant is to take place without any further delay.
3. Case remitted to the Magistrates' Court.

Daniel Goundar  
**JUDGE**

At Suva  
21<sup>st</sup> August 2009

**Solicitors:**

Applicant in person  
Office of the DPP for State