

IN THE HIGH COURT OF FIJI AT SUVA
CRIMINAL JURISDICTION
Miscellaneous Case Nos. HAM 7/09 and 19-23/08

Between:

GUSTON FREDERICK KEAN

Applicant

And:

THE STATE

Respondent

Hearing Date: 14 August 2009

Ruling Date: 20 August 2009

Counsel: Applicant in person
Ms. V Lidise and Ms. W. George for State

RULING

This is an application for a stay of proceedings on the basis of unreasonable delay.

[1] The Applicant is the accused named in six matters; five in Lautoka and one in Nadi. The Nadi case (105/06) charges him with robbery with violence and the Lautoka cases 600/05, 601/05, 602/05, 605/05 and 664/05 charge him with workshop burglary and larceny; burglary and larceny, shop breaking and larceny, burglary and larceny and escaping from lawful custody, respectively.

[2] The Applicant wrote to the Registrar in Lautoka on the 12 August 2008 seeking a Stay in the Nadi case on the basis of unreasonable delay and abuse of process thereby prejudicing the fairness of his trial. On the 20th November 2008 he verbally renewed his application before Sherry J in the Lautoka High Court. In response to a call for a written application, he filed a Notice of Motion and a document purporting to be an affidavit but

which was in fact an unsworn “statement” in support which I accept in lieu of an accompanying affidavit. The statement is lucid and logical and refers to a series of appearances and non appearances in his Nadi case. It is not however, compatible with the Court records.

[3] Counsel for the State has filed very detailed and helpful submissions and has referred me to recent relevant authorities for which I am most grateful. I have read the written submissions from both parties and have considered what each party has submitted in oral pleadings.

[4] On the 5th September 2008, Shameem J dismissed an application for Stay of Proceedings against this very same applicant in respect of a case of larceny in the Nasinu Magistrate’s Court. I refer to this ruling subsequently, but raise it here to make the interesting chronological point that the applicant is making a Stay application immediately on the heels of an earlier failed application which raised the same points he raises here.

[5] The “Lautoka” cases were all transferred to the High Court on the 12th June 2008 by the Resident Magistrate “for consideration of Stay application by the accused”. Proceedings in each of those 5 cases have fallen into abeyance as a result.

[6] The Court record of the “Nadi” case (145/06) reveals a sorry state of affairs indeed. Until Shameem J’s Ruling in the Nasinu case, this applicant’s case was called 18 times and the Applicant’s presence was noted only 4 times out of those 18. Most of the “mention” hearings were recording his non appearance on extending a bench warrant for his arrest. After Shameem J’s Ruling he was in custody and the case was

called 6 times but he was never brought up to appear. The Applicant informs me that whilst on bail in January and February 2006, his house had burned down and he had to look after his family as a result. His non appearances whilst in custody are inexplicable and inexcusable. Both the Applicant and Ms. Lidise tell me that as he was facing multiple appearances in different venues for the different cases the prison authorities could not cope and his absence was as the State claims a “systemic failure”. It should be noted that at all times the State was represented and ready to proceed.

[7] It can be noted from the Court records, that in the Lautoka cases the Applicant had absented himself while on bail for 2 continuous periods of 28 days and 33 days. When he did appear he made use of delays in seeking Legal Aid when hearings were forthcoming but electing to defend himself when deadlines were not looming.

[8] The State submits that they calculate that this Applicant caused delay in the progress of his “Lautoka” matters over a total period of 278 days, or 9 months. Given that the matters have only been proceeding for a total period of 2 years and 7 months, and in removing one third of that due to procrastination by the Applicant, the delay in the Lautoka cases is not inordinate.

[9] The Applicant claims that “the great and unreasonable delay has been caused by the prosecution from 2005”. The Court records show no evidence of that. In the Nadi case the prosecution was ready to proceed to trial on the 4th August 2006. The Applicant did not appear. The Lautoka files show that when the proceedings were coming close to trial the Applicant would provide false information to the Court about pending applications for legal aid.

The Law

[10] The law relating to applications to stay proceedings in this jurisdiction is recent and appears to be well settled. On three occasions since 2003 the Fiji Court of Appeal (differently constituted) has crystallised the pertinent principles. In the recent case of **Mohammed Sharif Sahim v. The State** Misc.A 17 of 2007 the Court sets a two pronged test 1] Is the delay unreasonable? 2]. If the answer is yes, can any prejudice caused be remedied? The Court went on to say (At para 30)

“it must be remembered that delay is often a strategy to avoid justice. The law on stay must not make an abuse of the processes of the Court, a successful strategy under the guise of a human rights shield”

These words of the Court with regards to a strategic ploy are highly apposite to the within case.

[11] The factors to be considered when assessing whether delay is unreasonable or not are expounded in the Privy Council decision in **Flowers v. The Queen** [2007] WLR 2396. The Board held that the Court should take into account:

1. The length of the delay
2. The reason for the delay
3. Whether or not the defendant had asserted his right to a speedy trial, and
4. The extent of any prejudice.

In the earlier application for Stay by this same Applicant, Shameem J held that although a four year delay was serious, two and a half years of that time was directly attributable

to the Applicant's non appearance. As a result she held that the delay had not been unreasonable.

[12] The Fiji Court of Appeal said in Abdul Ahmed Ali and Others v. The State [2008] FJCA 96 (at para 29)

“it is very easy for accused persons, and we know from experience that a good many of them do so, to consider that theirs are the only rights involved in a criminal trial. This is not so. The public, represented by the State has an important right in seeing that justice is done both to accused persons and to the public represented by the State”.

[13] Obviously our system of justice has two competing interests. The rights of the State cannot be ignored. The records show that each and every case referred to here was diligently and timeously prosecuted, and it must not be for a deceitful and manipulative accused to detract from that preparedness.

[14] The Applicant tells me in his oral submissions that the Nadi record is not an exact and true copy because he appeared every 2 weeks and on each occasion asked for a speedy trial. That is not so and I suspect that such an assertion is more to a view of satisfying the Flowers test (of which he had notice in Shameem J's ruling) rather than adopting a position of utmost veracity.

[15] I find that the Applicant has throughout been “playing the system”. He is certainly no stranger to our criminal courts and his long experience has taught him the ruses and wiles sufficient to beguile the Courts. Even this present Stay application is an outrageous affront to the dignity of the Court, an application

made within months of an earlier application dismissed for want of justification, and where the delay was longer.

[16] The Applicant submits that the delay has meant that he can no longer rely on 4 different defence witnesses. Two would be witnesses to alleged improprieties in a voir dire and 2 would be potential alibi witnesses on the general issue. The voir dire witnesses are deceased and the alibi witnesses are living in New Zealand. If he is to be believed I find that this situation for one case does not seriously prejudice his 6 trials. He can conduct his voir dire in a different way and if it is imperative he can bring his alibi witnesses from New Zealand.

[17] In the premises, **this application is refused** and I make the following Orders:

ORDERS

- (i) That the Nadi case (105/06) be returned to the Nadi Magistrate's Court and be called on 27th August 2009 to set a hearing date with the utmost priority.
- (ii) That the 5 Lautoka cases (600/05, 601/05, 602/05, 605/05 and 664/05) be returned to the Lautoka Magistrate's Court and be called on 28th August 2009 to set hearing dates of the utmost priority.
- (iii) Production Orders be issued to enable the Applicant to be brought up on these dates.

[17] I would add in passing and in conclusion that the practice of adjourning a case for “mention” without good reason either stated or recorded be deprecated. The records of these cases show that even when disclosures have been made and the prosecution is ready to go to trial, adjournments for mention for no reason given at all, are still freely given.

Paul K. Madigan
Judge

At Suva
20 August 2009