

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

Miscellaneous Case No: HAM 37 of 2009

BETWEEN:

RIYAZ ALI NUR
SAHAMAT ANSAR ALI
NAUSHAD ALI
PRAGDEESHWARAN GOUNDAR

Applicants

AND:

THE STATE

Respondent

Date of Hearing & Ruling: 11th September 2009

Reasons: 21st September 2009

Counsel: Mr. H.A. Shah for 1st, 2nd & 3rd Applicants
Mr. D.S. Naidu for the 4th Applicant
Ms V. Lidise for State

RULING

- [1] The applicants seek a permanent stay of the criminal proceedings against them in the Magistrates' Court. On 11 September 2009, I refused the application. I now give my reasons.
- [2] On 15 December 2005, the applicants appeared on a number of fraud related charges in the Magistrates' Court. The charges against one co-accused were later withdrawn and he was made a prosecution witness. The prosecution case is that the applicants were employees of Courts Homecentres Limited and that they acted in concert to steal furniture and electronic items from their employer by raising false invoices and delivery dockets. The relevant documents are available.
- [3] The trial commenced on 3 September 2009 before the application for stay could be heard.
- [4] The application for stay was filed on 1 September 2009 but could not be heard until 10 September 2009 because of unavailability of a full time judge in the Criminal Division, High Court, Lautoka.
- [5] The alleged delay is post charge. The length of delay is approximately four years. In these four years the applicants were on bail and they made approximately thirty appearances in court.
- [6] The stay is being sought on the following grounds:
- (i) Defence witnesses are now not locatable and some of them have died.

- (ii) Recollection of events by the witnesses would have been faded with passage of time.
- (iii) In all the circumstances the applicants would not receive a fair trial.

[7] Counsel for the applicants submit the test for stay on the ground of delay is whether there is potential prejudice to the accused persons from receiving a fair trial, citing **Amber Grace MacKenzie v. R** DC WHA T 013181 6 June 2003, **State v. Armugam & Ors.** HAC 0013 of 1998L, **Mosheem Khan v. DPP & A-G** HAA 113 of 2004L, **Ambika Prasad & anr. v. State** HBM 037 of 2004L, and **Tawake v. State** [2009] FJHC 35; HAM126D.2008 (6 February 2009) as authorities.

[8] The State submits the delay was not caused by the prosecution but was systematic. Most of the time was taken sorting out legal representation and dealing with a counsel, who represented a co-accused, but was disqualified by conflict of interest because of his previous involvement in the case as a prosecutor. The Magistrate invited formal application from the State for counsel's disqualification, which should have been a straight forward matter and dealt without delay. Some delay was caused by erroneous transfer of the case to the High Court by the Magistrates' Court. On the first fixed trial date of 1 August 2007, the trial did not proceed because counsel for the co-accused against who the charges were later withdrawn, sought an adjournment. The prosecution was ready to proceed with the trial on this date.

[9] As regards the witnesses, the State submits the relevant witnesses are available and the applicants can cross examine the witnesses on the impact of delay on their memories. The impact of delay on the memories of witnesses can also be

taken into account by the trial Magistrate in the assessment of the evidence when considering the guilt or innocence of the applicants.

- [10] A stay on ground of delay in constitutional law did not require proof of actual prejudice. It was held by the Court of Appeal in **Seru & Stevens v State** *Criminal Appeal AAU0041/42 of 1995S* that if the delay unreasonable, prejudice can be presumed and a stay will be granted. The cases cited by the applicants followed the dicta in **Seru**. In a more recent case of **Sahim v State** *Misc. Action No.17 of 2007*, the Court of Appeal observed that the court in **Seru** did not address the availability of alternative remedies in the absence of proof of actual prejudice. In **Sahim**, the court said:

“The correct approach of the courts 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.

In adopting this approach, the purpose of the section 29(3) right is preserved, without the necessity of taking the disproportionate and draconian step of terminating proceedings in each case. 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 courts, a successful strategy under the guise of a human rights shield.”

[11] The dicta in *Sahim* are consistent with the principles for stay in common law. The common law test for stay on the ground of delay is summarised by Lord Lane CJ in *Attorney-General's Reference (No. 1 of 1990)* [1992] 3 All ER 169 at 176:

“Stays 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.

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.”

[12] The observations of Lord Lane CJ were approved in *Tan v Cameron* [1992] AC 205 (Privy Council) by Lord Mustill at page 225:

“Naturally, the longer the delay the more likely it will be that the prosecution is at fault, and that the delay has caused prejudice to the defendant; and the less that the prosecution has to offer by explanation, the more easily can fault be inferred. But the establishment of these facts is only one step on the way to a consideration of whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any longer to hold the defendant to account. This is a question to be considered in the round, and nothing is gained by the introduction of shifting burdens of proof, which serves only to break down into formal steps what is in reality a single appreciation of what is or is not unfair.”

[13] The principles for stay of prosecution strike a balance between two public interests. The first public interest is that a person who is alleged to have

committed a crime should be brought to trial. The second public interest is that a person who is charged with a crime should not be prejudiced in his or her defence by prosecutorial delay. Striking the balance in an individual case will depend on a consideration of all the facts of the matter, and in particular the following factors:

- (a) The length of the delay;
- (b) The reasons for the delay (including on the part of the accused, the judiciary, the prosecution or legal aid);
- (c) The inherent time requirements of the case;
- (d) The limitations on institutional resources (including the judiciary, the prosecution and legal aid);
- (e) Any waiver by an accused of his rights;
- (f) Acquiescence to delay by an accused;
- (g) The effect of delay on the fairness of a trial;
- (h) Any prejudice to the accused caused by the delay [see, ***Tevita Nalawa v. State*** AAU0031 of 2007S].

[14] More recently in ***Jonacani Nacagi v. State*** *Crim. Misc. Case No: HAM 23 of 2009* this Court reviewed the principles for stay on ground of delay and said:

"..... the governing principles for a stay application on the ground of delay either in the common law or the constitutional law are:

1. Is there a breach of right to be tried within a reasonable time; the reasonableness inquiry to be made using ***Dyer v. Watson*** approach?
2. If the case is not heard within a reasonable time, regardless of the accused being prejudiced or not due to the delay, there is a breach of right.
3. Whether the breach could be remedied by an appropriate remedy without recourse to stay of the proceedings, unless

the hearing would be unfair or it would be unfair to try the accused at all.”

[15] The approach in ***Dyer v. Watson*** [2002] UKPC D1 was set out by Lord Bingham:

“52. In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.

53. The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognized, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.

54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he

is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organize their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit under section 22(3)(b) of the Prosecution of Offences Act 1985, to show that he has acted 'with all due diligence and expedition.' But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities will make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter."

[16] On the facts of this case, I find the delay to be unreasonable. Although this is a complex fraud case, there is no justification for the delay of four years. I do not attribute the delay to the applicants. Nor do I attribute the delay to the

prosecution. The delay was systematic, that is, the failure by the Magistrates' Court to control its own proceedings and to prevent unnecessary delay. I find the applicants' rights to be tried within a reasonable time have been breached.

[17] The question is whether the breach could be remedied by an appropriate remedy without recourse to stay of the prosecution. I bear in mind the principle that a stay should not be granted unless the hearing would be unfair or it would be unfair to try the applicants at all.

[18] The applicants rely on the unavailability of witnesses and possible loss of memories of available witnesses to show unfairness.

[19] When the issue of a fair trial arises from absence of witnesses, the onus is on the applicants to prove on balance of probability that by reason of the absence of any particular witness they will be unable to receive a fair trial (***Malakai Tuiloa v. State Criminal Misc. Case No. HAM 10 of 2007***).

[20] In the present case, except for assertions, the applicants did not offer details of their unavailable witnesses and the relevance of their testimonies to their defence. Thus, this Court was unable to make an assessment of the relevance and impact of the absent witnesses proposed testimony on the right to a fair trial. The onus was on the applicants and they failed to discharge the onus.

[21] The issue of fade memories of the available prosecution witnesses is a matter that the trial Magistrate can consider in the assessment of the evidence. The applicants can cross examine the witnesses on their memories as well.

[22] If the applicants are convicted, delay is a matter that can also be considered in deciding appropriate sentences.

[23] In all circumstances, I am not satisfied that the trial would be unfair or it would be unfair to try the applicants at all. The trial procedures provide adequate protection against any concerns the applicants have on the memories of available prosecution witnesses.

[24] The applications are refused. The trial must continue in the Magistrates' Court without any further delay.

SO ORDERED:

Daniel Goundar
JUDGE

At Lautoka
21st September 2009

Solicitors:

Mr. H.A. Shah for 1st, 2nd & 3rd Applicants
Mr. D.S. Naidu for the 4th Applicant
Office of the DPP for State

