

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO.: HAM 171 OF 2015

BETWEEN:

1. **RONALD RAKESH NAND**
2. **SALVIN SANDEEP PRASAD**
3. **DALIP CHAND**

APPLICANTS

AND:

STATE

RESPONDENT

Counsel : Mr. Iqbal Khan for Applicants
Ms. Sherlyn Kiran for Respondent

Date of Hearing : 22nd March, 2016

Date of Ruling : 15th April, 2016

RULING

1. The Applicants file this notice of motion supported by the affidavit of Applicant, Mr. Salvin Sandeep Prasad, seeking a permanent stay of proceedings in criminal case No.422 of 2006 in the Magistrate's Court at Lautoka.

Background

2. The Applicants first appeared at the Magistrates Court on 11th May, 2006, charged with Office Breaking, Entering and Larceny contrary to Section 300 of the Penal Code, Cap 17, an offence allegedly having been committed in the same year. Applicants pleaded not guilty to the charge. Since that date, a number of delays have occurred. Charge has not been heard since then. Applicants have continued on bail throughout this time. On 21st September, 2015 Counsel for the Applicants advised the Court that the present stay application had been filed in Lautoka High Court.
3. This is not their first stay application. A previous Stay application filed by the Applicants in 2010 on the ground of unreasonable delay was dismissed by this Court. Appeal filed in the Court of Appeal against the said dismissal was later withdrawn by

the Applicants. Again on 25th of November, 2013 Applicants informed Court about the second Stay application and the matter was adjourned to get the outcome. That application too was withdrawn.

4. According to the affidavit, complaint of the Applicants is twofold;
 - a. That the delay of nearly ten years to begin the trial is unreasonable and the delay in itself violated their rights guaranteed under Section 15 of the Constitution of the Republic of Fiji;
 - b. That the delay occasioned materially prejudiced their defence and fair trial guarantees. According to the affidavit, prejudice to their defence is occasioned in following manner:
 - i. That they are uncertain if the medical reports with regard to police assaults are still available or not.
 - ii. That five defence witnesses are not available; one of them had died and the others had either migrated or cannot be located.
 - iii. That several prosecution witnesses are also not available.

Law on Permanent Stay

5. State does not deny this Court has jurisdiction to consider the application based on Section 15 of the Constitution of the Republic of Fiji. In the absence of argument I do not express an opinion on the foundation of the jurisdiction, but the possibilities include regarding it as founded on the inherent jurisdiction of the High Court.
6. In the recent decision of *Karunaratne v State [2015] FJHC 849; HAM 150.2015* (4 November 2015) Justice Madigan stated:

“Stay of Proceedings in criminal matters is granted in the rarest of circumstances where there has been undue delay in bringing proceedings against a party, or alternatively where there is undue delay in the conduct of proceedings already brought. Additionally and more importantly it is an inherent power of the High Court in cases of clear and obvious miscarriages of justice and/or abuse of process cases.

7. Justice Madigan identifies the Stay jurisdiction of the High Court as coming within the Constitutional Redress jurisdiction under Section 44 of the Constitution where he stated:

“The Constitution (2013) by Section 44 provides for the right to apply for redress to a party who considers the Bill of Rights to have been contravened to his prejudice. The right is to be exercised by the High Court which has the original jurisdiction to hear and determine

applications and to make such orders and give such directions as it considers appropriate [Section 44(3)]. A direction to stay proceedings in the Magistrates Court could in proper circumstances be such an appropriate order.(para 14)..

An application for Constitutional redress is an application to the court in its civil jurisdiction, however, any application touching on matters of criminal procedure can and normally will be heard by a judge sitting in the criminal division”.

8. In deliberating on the principle of a speedy trial as set out in Section 11(b) of the Canadian Charter of Rights and Freedoms, in **R. v Askov** [1990] 2 SCR 1199 the Supreme Court of Canada set out succinctly the rights incorporated in that provision. The same rights exist in Fiji in respect of Section 15 of the Constitution of the Republic of Fiji, which provides:

“every person charged with an offence has the right to a fair trial before a court of law”. [S.15 (1)]. “Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time” [S15(3)].

9. It should be noted here that these rights existed even under Sections 29(1) and (3) of the previous Constitution under which larger part of the jurisprudence relating to Stay matters discussed in this ruling was developed by Courts in Fiji.
10. Section 11(b) of the Canadian Charter is in the same terms as Sections 15 (1) and 15(3) of the Constitution, and Section 29 of the previous Constitution. The principles enunciated by Canadian courts ought to be applied equally in Fiji. **Seru v. State** [2003] FJCA26;AAU0041.99S& AAU0042.99S (30 May 2003)
11. In **R. v. Askov** the Supreme Court of Canada said:

*Under s. 11(b) of the Charter, any person charged with an offence has the right to be tried within a **reasonable time** and this right, like other specific s. 11 guarantees, is primarily concerned with an aspect of fundamental justice guaranteed by s. 7. The primary aim of s. 11(b) is to protect the individual's rights and to protect fundamental justice for the accused. A **community or societal interest**, however, is implicit in the section in that it ensures, first, that law breakers are brought to trial and dealt with according to the law and, second, that those on trial are treated fairly and justly. A quick resolution of the charges also has important practical benefits, since memories fade with time, and witnesses may move, become ill or die. Victims, too, have a special interests in having criminal trials take place within a reasonable time, and all members of the community are entitled to see that the justice system works fairly, efficiently and with reasonable*

dispatch. The failure of the justice system to do so inevitably leads to community frustration with the judicial system and eventually to a feeling of contempt for court procedures: at 2002 (emphasis mine).

12. The Court went on to identify a number of factors whereby the delay in bringing an accused to trial should be measured to determine whether it had been unreasonable:

- length of the delay;
- explanation for the delay;
- waiver; and
- prejudice to the accused.

13. In Askov the Canadian Court went on to say that the longer the delay, ‘the more difficult it should be for a court to excuse it, and very lengthy delays may be such that they cannot be justified for any reason’. Delays attributable to the Crown/State weigh in favour of an accused. This is consistent with what was said by the Court of Appeal in Seru v. State [2003] FJCA26;AAU0041.99S& AAU0042.99S (30 May 2003).

14. Two years later the Supreme Court of Canada again addressed delay in R. v. Morin [1992] 1 SCR 771; (1992) 71 CCC (3d) 1, saying:

“The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in [R. v.] Smith (1989) 52 CCC (3d) 97: ‘It is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?’ (p. 105) While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

- 1 *the length of the delay;*
- 2 *waiver of time periods;*
- 3 *the reasons for the delay, including:*
 - (a) inherent time requirements of the case;*
 - (b) actions of the accused;*
 - (c) actions of the Crown;*
 - (d) limits on institutional resources, and other reasons for delay, and*
4. *prejudice to the accused: at 13.*

15. In Seru (*supra*) the Court of Appeal considered all the matters set out in Martin v. Tauanga District Court [1995] 2 NZLR 419, where it was said that ‘delays approaching a certain threshold may be regarded as “presumptively prejudicial”’.

16. About balancing the ‘competing interests’ involved, the Court in Seru said:

“Against the background of our consideration of the relevant factors we

come to the critical balancing exercise. A decision to stay a prosecution on the ground of delay is a serious matter. A stay clashes with the interests of the State, representing the general body of citizens, in bringing the case to justice. The more serious the charge the greater the interests of the community in ensuring the case goes to trial. This is particularly relevant to the unusual charge brought against [Mr] Seru. It follows that dismissing a case on this ground after an actual conviction is an even graver step. Assessors have made a finding, confirmed by a Judge, that the accused are guilty of significant offences. In those circumstances no court would set convictions aside lightly. But the fact remains that this country has adopted s29 (3) thus confirming that one of the fundamental rights of all citizens is to have a charge disposed of within a reasonable time. If the court fails to acknowledge unreasonable delay when it occurs, the constitutional right will become a dead letter”.

.....Looking at the sum of the relevant factors discussed above, we are driven to the conclusion that in the circumstances of this case, the delay which occurred between charge and trial was unreasonable. The appeals must succeed on this ground alone. A particular feature of the delay is the time taken over the committal process, but we rely also on the total period involved between the date of charging and the conclusion of the trial: at 7”

17. Subsequent to *Seru*, the Court of Appeal again addressed delay in *Mohammed Sharif Sahim v. The State* (Misc. Action No. 17 of 2007, 25 March 2008). The appeal against the High Court’s refusal to stay permanently the criminal trial was based in a contention that systemic delay between charge and trial was so great as to breach Accused’s common law and constitutional rights to a fair trial under s. 29(1)(3) of the then Constitution.
18. Counsel for the Attorney-General and Director of Public Prosecutions agreed the delay was serious, but said it ‘was not such that the court should necessarily hold that there had been an abuse of the process’. The application was opposed by Counsel for the Attorney-General on the basis that alternative remedies were available within the criminal trial process and the Court should refuse to grant a remedy: *at para [3]*.
19. As the Court of Appeal said, the crux of the appeal was whether, ‘once systemic delay is found to be unreasonable, a stay of proceedings is inevitable even in the absence of specific prejudice to the accused’. That question, the Court concluded, required a re-cannvassing of the authorities, which the Court proceeded to do. Reference was made not only to Canadian, United States, New Zealand and United Kingdom authorities, but to those of the European Court of Justice: *at paras [11]-[30]*.
20. Referring then to *Seru*, the Court observed that prejudice having been presumed because of the length of the delay and history of the case: What the Court did not

address was the availability of alternative remedies in the absence of proof of actual prejudice: *at para [28]*.

21. The correct approach, said the Court, ‘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. (emphasis mine)

22. The Court went on to say that this approach ‘preserves the purpose of the Section 29(3) right’ whilst obviating ‘the necessity of taking the disproportionate and draconian step of terminating proceedings in each case’:
23. The Court of Appeal in Abdul Ahmed Ali, Uma Dutt & Roshni Devi v. The State (Appeal No. AAU0075 of 2007, 14 April 2008) had cause to revisit delay and section 29(3) again in a High Court refusal to grant a permanent stay. The Court said that the history of charges, set out in the first seven pages of the High Court’s ruling, revealed ‘a sorry story of delays both by the State and in prosecuting the case’. One of the accused, Mr Dutt, raised various issues saying amongst them that four of his *alibi* witnesses had died since the charge was filed: they had, he said, seen him ‘fishing on the high seas’ on the date of the murder of which he stood jointly accused. The first accused, Mr Ali said amongst other matters that his two *alibi* witnesses had ‘moved on with their lives’ and the delay was caused by the Prosecution. The third accused, Ms Devi, raised a series of issues including that Mr Dutt had elected an oral preliminary inquiry, the Prosecution was the cause of the delay, and that the trial ‘would be prejudicial to her because her co-accused ... made confessions which incriminate[d] her’: at paras [2], [3], [4].
24. The Court of Appeal referred to Her Ladyship Judge Shameem’s decision refusing the stay, observing that she had asked herself these questions – ‘How long is too long [a delay]? And ‘What are the relevant criteria for assessing reasonableness?’ She then referred to the Court of Appeal’s judgment in Shameem v. The State [2007] FJCA 19; AAU0096/05, 23 March 2007) and in Ali, Dutt and Devi the Court of Appeal recited with approval that part which Shameem, J. cited:

*“The right to have a criminal case determined in a reasonable time must be determined by reference to the right of the individual to a fair trial process leading to a just result. In considering any such application the court will consider whether the delay is such as it is likely to prevent a fair trial. That will depend on various factors such as the length of delay, the reasons for the delay, the nature of the charge and the evidence to be called by either to a fair trial process leading to a just result. Whether considerable delay occurs in the trial itself, the effect of the court’s ability properly to access the evidence at the conclusion will also be a relevant factor. In some cases, the delay will be such that the court may consider it has reached the threshold at which it will be ‘presumptively prejudicial’: ***Apaitia Seru’s case and Martin v. Tuaranga District Court*** [1995] 2 NZLR 419”.*

25. Shameem, J. went on to say that the case before her was one of ‘great seriousness’. None of the delays there, apart from one in the Magistrates Court, had been caused by the Prosecution. A number were caused by the accused, with an election for an oral Preliminary Inquiry, then a change of mind on that point, and change of Counsel. However, many were systemic – including no Judge being located permanently in Labasa for criminal trials ‘for almost four years’, (perhaps) Legal Aid Commission Counsel ‘shifting their position in relation to representing’ the accused, the trial’s being unlikely to proceed until October 2007. The Court Record contradicted a submission by Defence Counsel that the Prosecution was not ready for the Preliminary Inquiry. In all the circumstances, Her Ladyship said she did ‘not consider that a Stay of proceedings will be justified’. The Court of Appeal agreed: *at para* [28].
26. The Court emphasised that it is not the rights of accused persons alone which are at issue in a criminal trial: 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: *at para* [29].
27. After reiterating the statement of the Court of Appeal in ***Shameem v. The State*** [2007] FJCA 19; AAU0096/05, 23 March 2007) that delay ‘is often a strategy to avoid justice’ and the need for the courts to be alert to the law on stay as being an abuse of process through being employed as a ‘successful strategy under the guise of a human rights shield’, the Court of Appeal dismissed the appeal: *at paras* [29], [30].
28. In ***Porter v. Magill*** [2002] 2 AC 357, the right [to a speedy trial] was recognised as one separate from the general right to a fair trial. It has not always been necessary for the defendant to show resulting prejudice. However, each case depends on its own facts and the jurisprudence suggests that there is a judicial tolerance of longer delay in cases of serious fraud or in cases of multiple charges and voluminous evidence. A four and a half year delay was held not to be unreasonable in ***UJL, GMR and AKP v. United Kingdom*** [2001] 33 EHRR 225 a case involving complex fraud charges: *at para* [16].

Burden and Standard of Proof on Application for Stay of Proceedings

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

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

Delay

31. The chronology at the magistracy identifies the length of the delay, almost 10 years from the charge to the beginning of the trial. It appears that both the State (Prosecution and Court) and the Applicants are responsible for the delay.
32. Counsel for the Respondent agrees the delay was serious, but argues it ‘was not such that the court should necessarily hold that there had been an abuse of the process’. According to him, from the date of the charge, this is the fifth Stay application Applicants have filed. It is understood that when there is an application before the High Court, the Magistrates Court halts proceedings to know the outcome of the application.
33. Before delving further into the issue of delay, it is pertinent to have a look at the sequence of events that led to the delay at the Magistracy. State Counsel Mr. Babitu tabulated the chronology at the Magistrates Court in his written submission. At the oral hearing, junior Counsel who appeared for Applicants had no major issues with the chronology. Since I discovered some discrepancies between the chronology tabulated in Mr. Babitu’s submission and the original case record, I postponed my ruling to get first hand information from the original case record which, at that time, was not available to me. In light of the submission made by Mr. I. Khan that present Stay application is mainly based not on delay in itself but rather on prejudice caused to them in the conduct of their defence, I proceed to rely basically on the chronology submitted by State which I reproduce below.

DATE	REASON	WHOSE APPLICATION
11/5/06	Accused remanded and matter adjourned for disclosures.	Prosecution
22/5/13	Disclosures served. Adjourned for prosecution to file amalgamated charge.	Prosecution
29/6/06	Amalgamated charge filed – matter adjourned for prosecution to sort out the letter written to court by Orange Coast investment in regards to the exhibit.	Court
30/6/06	New file – All accused plead not guilty.	
7/7/06	All defence counsel not present, adjourned.	Defence/Court
24/7/06	Accused 3 has applied for LAC and awaiting result. Mr. Gordon to write to prosecution for some documents.	Defence
1/9/06	All defence counsel not present – accused 3 told court that LAC asked for an adjournment.	Defence
29/9/06	LAC not representing 3 rd accused. Matter adjourned to fix a date for trial.	Court
13/10/06	Defence asking for documents which was not legible on the disclosures. Prosecution asked defence to write.	Prosecution
17/11/06	Adjourned for disclosures.	Prosecution
1/12/06	Defence asking for further disclosures.	Prosecution
19/1/07	Adjourned.	Court
2/2/07	Full disclosures served on counsel's clerk. Adjourned to fix a trial date.	Court
22/2/07	Mr Gordon requested for more time to go through disclosures.	Defence
19/3/07	Mr Khan wants to file <i>voir dire</i> grounds.	Defence
26/3/07	Counsels for accused not present – matter adjourned.	Defence

19/4/07	Mr Patel and Mr Sahu Khan appeared on instructions. Adjourned to fix a hearing date.	Consent
30/4/07	Counsels not present. Adjourned to fix hearing date.	Defence
15/5/07	Grounds of <i>voir dire</i> to be given to prosecution.	Defence
28-29/8/07	HEARING – Prosecutor is sick. Accused appeared with Mr Tunidau – adjourned to next day.	Prosecution
30/8/07	Accused appeared with Mr Tunidau. Prosecution objected to the counsel appearing as he had called for this docket when he was A/DDP/West and had appeared in the matter HBM 12/06 associated to this case. Matter was adjourned for prosecution to file motion and affidavit.	Court
7/9/07	Adjourned – RM is sick.	Court
24/9/07	Court ordered for motion and affidavit to be served to Fiji Law Society. Prosecution can file supplementary affidavit.	Court/Prosecution
22/10/07	Adjourned – RM in hospital.	Consent
19/11/07	Supplementary affidavits filed and served.	
7/12/07	Adjourned for NOAH to be served on Fiji Law Society.	Court
31/1/08	All submissions filed. Fiji Law Society to file affidavits. Adjourned for hearing.	Consent
21/2/08	State submissions filed. Mr Tunidau and Law Society to respond.	Defence
13/3/08	Mr Tunidau's submissions not ready.	Defence
20/3/08	Mr Tunidau's submissions filed before 4 pm. Law Society doesn't wish to be part of this. Adjourned for ruling.	Court
24/4/08	Adjourned for ruling.	Court
29/5/08	Adjourned for ruling.	Court
6/6/08	Adjourned for mention.	Court
1/7/08	Adjourned for ruling.	Court
20/8/08	Magistrate transferred the matter for case stated to HC	Court

31/10/08	<i>First call in the High Court.</i>	
13/10/08	<i>Adjourned for submissions.</i>	<i>Consent</i>
31/10/08	<i>Adjourned for hearing.</i>	<i>Consent</i>
13/11/08	<i>Hearing and ruling by J Sherry.</i>	
1/5/09	Mention in Magistrates Court after High Court determination.	Prosecution
22/6/09	Mention – Mr Shah as counsel. Adjourned to fix hearing date.	Consent
24/8/09	Accused to organize disclosures with previous counsel.	Defence
27/8/09	Mention only.	Court
16/11/09	Fixed for hearing.	
21/12/09	HEARING – issue of exhibit. Complainant wrote to court. Vacated.	Prosecution
19/4/10	Prosecution not ready to take hearing date. Adjourned for mention to fix hearing.	Prosecution
24/5/10	Adjourned for mention to fix hearing.	Court
24/5/10	<i>Adjourned for mention in High Court – stay application</i>	
12/6/10	<i>Mention in High Court</i>	
12/7/10	<i>Mention in High Court</i>	
23/7/10	<i>Mention in High Court</i>	
12/7/10	Mention to fix hearing	Court
4/10/10	Mention in Magistrates Court – bench warrant issued against Accused 2 and 3	Defence
5/10/10	Bench warrant cancelled and matter adjourned.	
19/10/10	<i>Mention in High Court to check on court record</i>	
9/11/10	<i>Check court record</i>	
19/1/11	<i>Adjourned for submissions</i>	<i>Court</i>

18/2/11	<i>Hearing of stay application</i>	
	<i>Stay refused</i>	
6/6/11	State moved to time to clarify administrative issues.	Prosecution
29/8/11	No dates available. Adjourned to fix a date for trial.	Court
14/11/11	Hearing date fixed.	Consent
26-29/3/12	Hearing vacated as Mr Shah will be overseas.	Defence
16/4/12	To fix hearing date but accused not present, bench warrant issued.	Defence
15/5/12	Bench warrant cancelled, bail extended.	
18/6/12	Defence yet to file voir dire grounds. Voir dire hearing fixed for 12/10/12.	Defence
12/10/12	HEARING – vacated on Mr Nand’s request who has just been given instruction.	Defence
3/12/12	Adjourned for disclosures and VD grounds	Prosecution/ Defence
5/2/13	Adjourned for VD grounds	Defence
26/2/13	Adjourned to fix a date for VD	Court
28/3/13	Application for bail variation for accused 1 to travel overseas.	
8/4/13	Check on Accused 1 itinerary.	Defence
3/5/13	Adjourned to fix VD date	Consent
1/7/13	Court available dates are only in December which was not suitable to defence. Adjourned to fix a VD date.	Consent
2/9/13	Adjourned to fix VD date.	Consent
28/10/13	Court informed of stay application by accused. Matter adjourned to get the outcome of the stay application.	Court
25/11/13	Mr Nand informed Court of an Interim Order being made by the High Court.	Defence
2/12/13	Hearing fixed for 21/5/14 and 22/5/14.	
21/5/14 and	Voir Dire Hearing vacated by Magistrate.	Court

22/5/14	Magistrate recused himself.	
26.5.14	Adjourned by Court.	
19/8/14	Adjourned by Court.	
3/3/15	Hearing set from 21 – 25/9/15	
21/9/15	Prosecution was ready for trial. Matter adjourned by Court on application of Defence.	
26/4/16	To check on status of case.	
11/5/16	VD Hearing	

34. As to the inherent time requirements of the case, it cannot be claimed the case was an unduly complex one. There is no indication that any inherent complexity of the case was responsible for the gross delay. There is no evidence that limits on institutional resources led to the delay either. However, in coming to the finding of this case, this court is mindful of the observation made in Seru (*supra*) in following terms:

“However, regard must be had to the background against which the particular case is set, that is the society in which the prosecution is proceeding. A highly sophisticated, wealthy country may reasonably demand higher standards of its public facilities, such as courts. This is not to disparage the public facilities available in Fiji, but plainly it would be impossible to think in terms of some absolute international standard for the case-flow of prosecutions. On the other hand it would be equally wrong for this court to take the attitude that the standard attained in the present prosecution, or any other, must be accepted because based on a court’s experience (we are now speaking hypothetically rather than with reference to the case before us) what has been achieved is not greatly out of line with the average. Obviously, possible consequences of successful applications based on breach of section 29(c) include the allocation of greater resources to the courts, or energetic administrative steps to improve case-flow, overcome delays, and focus on the disposal of trials outstanding for unduly long periods. A whole change of culture may result, in that a standard of performance which previously was accepted or at least tolerated may come to be seen as unacceptable in the light of what the Constitution has laid down”.

35. Indeed the delay can be summarised as due to two principal factors; firstly, conflict of interest situation arose out of the objection raised by the State over Mr. Tunidau’s appearance for the Defence. Secondly, number of stay applications made by the Applicants.

36. On 30th August 2007, when the matter was called for the *voir dire* inquiry, Applicants changed the Counsel and Mr. Tunidau was retained. Prosecution objected to Mr. Tunidau, who had earlier appeared for Prosecution, appearing for the Defence alleging conflict of interest situation. Mr. Tunidau saw the objection as a ‘delaying tactic’. Courts (Magistrates Court and High Court) took nearly one and half years to resolve the controversy.
37. When an issue of conflict of interests is raised, courts just can’t ignore it and rush to achieve case management targets. Such objections, if overlooked, can ultimately lead to unnecessary appeals and even quashing of convictions.
38. In **R v Sussex Justices, Ex parte McCarthy** ([1924] 1 KB 256, [1923] All ER Rep 233) Lord Hewart CJ, faced with a similar factual scenario, said:

“Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices’ affidavit, but they show very clearly that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction.

In those circumstances I am satisfied that this conviction must be quashed, unless it can be shown that the applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts, and then, on a conviction being recorded, decided to take the point. On the facts I am satisfied that there has been no waiver of the irregularity, and, that being so, the rule must be made absolute and the conviction quashed”.
39. Justice hurried is sometimes justice denied. Justice should not only be done, but should manifestly and undoubtedly be seen to be done. **[R v Sussex Justices, Ex parte McCarthy](supra)**. Delays occasioned to meet ends of justice are inevitable.
40. When the matter came up for hearing on 21st December, 2009, an issue with regard to exhibits propped up. The matter was to be re-fixed for hearing on 9th November, 2010 when the Applicants filed their first Stay application in the High Court. Stay proceedings consumed nearly one year with the result that it being refused. Indeed the delay, leading up to the determination of the previous Stay application, can be summarised as due to two principal factors; first the lapse of almost one and a half years to resolve ‘Tunidau controversy’, and secondly a delay of one year pending

determination of the Stay application by the High Court.

41. In the previous Stay matter, having considered factual scenario and legal arguments both in support and against, this Court had opined that, prior to June, 2011, there basically was no prejudice to the Applicants and the matter was sent back to the Magistrates Court at Lautoka for speedy disposal. Applicants too were apparently satisfied with the High Court determination and withdrew the appeal filed in the Court of Appeal against the High Court determination.
42. Chronology indicates that, after receiving the High Court determination in June 2011, the Magistrates Court had taken necessary steps at its disposal to proceed to trial as soon as possible, but delay was inevitable due to events for which the defence itself, to a greater extent, was responsible.
43. On 14th November, 2011, hearing dates were fixed from 26th to 29th of March, 2012 with the consent of both parties. Unfortunately, hearing had to be vacated as the Defence Counsel Mr. Shah was abroad. When the matter was called again to re-fix a hearing date, Applicants absconded and bench warrant issued. Again on 12th October, 2012, hearing had to be vacated as Mr. Nand, the new counsel retained by the Applicants, wanted time to prepare for the case. It is surprising to note that counsel retained by the Applicants from time to time had failed to file *voir dire* grounds until the matter was fixed in February 2013 for trial within trial. Defence Counsel had difficulty to take the earliest possible date in December 2013 and, when the matter was called again on 2nd September, 2013, Court was informed of another Stay application being lodged by the Appellants. Having obtained an interim order from the High Court, Applicants abandoned the Stay application and the matter was re-fixed for *voir dire* hearing from 21st to 25th September, 2015. On 21st September, 2015, when the matter was called for hearing, Prosecution was ready but counsel for Applicants, Mr I. Khan, advised the Court that the present Stay application had been filed in the High Court at Lautoka.
44. There is no evidence that the Applicants positively asserted their right to a speedy trial at the magistracy. It could be said that the delays caused by the Defence were just as great or even more so than those caused by the Prosecution. In addition, there was no objection by the Defence to delays caused by the Prosecution and at least twice there was an explicit 'no objection' or 'with consent' stated by Counsel for the Defence in relation to matters that gave rise to delay.
45. When the State objected to Applicants being represented by Mr. Tunidau, counsel himself alleged that the State's objection was a 'delaying tactic'. Given the reasons aforementioned, that cannot be considered as a delaying tactic and therefore, a positive assertion by the Applicants of their right to a speedy trial.
46. Except for that occasion, counsel appeared for Applicants from time to time had

become sleeping partners of the delayed progression of the case. Filing Stay applications in the High Court should be the last resort, after having exhausted all the remedies available at the magistracy. Otherwise, High Court would be opening the floodgates to those who are tempted to abuse the court processes. As was said in Shameem, *It must be remembered that delay is often a strategy to avoid justice. The law on stay must not make an abuse of the process of the courts a successful strategy under the guise of a human rights shield.*

47. It cannot be said that the delay is systematic or calculated to undermine the interests of the Applicants. One can argue that the length of the delay of ten years in a criminal case (from institution to the beginning of trial) is presumptively prejudicial to the Applicants. However, when viewed objectively, and considered in the context of considerable contribution to the delay by the Applicants, it cannot be said that the delay is unreasonable.
48. 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.
49. Circumstances under which appeal was granted in Seru (*supra*) are distinguishable in that, in Seru, Court considered prejudice caused by systemic delay to the appellant who had occupied a prominent public position. Prominent figures, from the Prime Minister down, were involved. There was no alternative remedy available to (Mr.) Seru at that stage to repair the damage caused by delay as the matter had come up in appeal.
50. Conversely, this case involves an office breaking and a larceny to the tune of nearly \$ 50,000 from a hotel in the Lautoka City. The case had never been tried for such a long time. 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. In my opinion, given the circumstances of this case, public interest outweighs the interests of the Applicants. On a balancing of the rights of the Applicants against the public interest, I decide that the application for Stay should be dismissed.

Prejudice

Availability of Medical Reports at Trial/ *Voir dire* proceedings with regard to alleged police assaults

51. Paragraph 6 of the affidavit. Applicants say: *‘That all of us were assaulted by police and we are not sure if the medical reports are still available or not’.*
52. Deposition in the affidavit is highly speculative and not based on facts. This assertion on the other hand is contrary to the position taken up by their Counsel (Mr. Nand) in

2013). If the Applicants were fully supplied the disclosures and exhibits I am unable to comprehend any logic in the assertion of the Applicants.

Non Availability of Defence witnesses

53. As in the present case, non-availability of witnesses and the lapse of memory over time are factors frequently raised in Stay applications as constituting prejudice. The matters raised by the Applicants in support of this Stay application is prejudice in respect of availability of witnesses. In paragraph 10 of his affidavit Applicant Salvin Prasad says:

‘That my wife who was a very crucial witness in my case has passed away and likewise the 1st Applicant’s partner has migrated to Australia’. And in para 12 he says: ‘That I am advised and verily believe that 2 civilian workers Manasa Radrivula and Josua Saketa are now very hard to be located as their evidence would assist in preparing our defence’.

54. In para 16 he says:

‘That we have provided names of five witnesses and their relevance of their testimonies to our defence and as such this Honourable Court should make an assessment of the relevance and impact of absent witnesses that would demonstrate that we will not be able to have a fair trial due to the delay of more than 9 years.

55. Neither in their written submission nor the oral submission was it stated how those witnesses are relevant or crucial to their defence. No evidence is given to prove, on a balance of probability, the significance of these witnesses or why their evidence is material to the defence.

56. This issue of non- availability of defence witnesses was addressed in Shameem (Supra) There, in refusing the application, the High Court had said:

“In his affidavit in support of the application, the applicant says that an alleged key witness is deceased and that another key witness has migrated. No evidence is given as to the significance of these witnesses or why their evidence is material. I note from the court record that the offences [sic] are allegedly committed in private, when only the complainant and the applicant were present without more evidence being placed before the court, it is impossible to accept that the alleged key witnesses are in fact material to the proceedings”: at para [7].

57. Of this, the Court of Appeal said:

“A further consideration is the effect of delay on the appellant’s witnesses. We accept that it was reasonable for the judge to comment on the lack of explanation of the relevance of the defence witnesses who were stated no longer to be available but it was not open to him to conclude that it was

impossible to accept that they were material to the case. In such a case, the defence would be wise to provide particulars to support its contention that they were material but it must be remembered that the defence is not obliged to reveal its evidence before calling it in a criminal trial. This meant that the judge should at the least have enquired why such information was not being provided: at para [25].

58. In Abdul Ahmed Ali, Uma Dutt & Roshni Devi discussed above, one of the accused, raised various issues saying amongst them that four of his *alibi* witnesses had died since the charge was filed. In that case, type of the defence and the purpose of calling the particular witnesses were clearly revealed to court by the Defence. Court there had the opportunity to assess the importance and relevancy of potential defence witnesses who were not available due to delay and to assess the prejudice caused to the defence.
59. In Malakai Tuiloa v. The State, (Cr. Misc. Case No. HAM 10/07; Criminal Case No. HAC3/07, 2/3 June 2008) the Court recounted His Lordship's determination on the question of witnesses, saying:

Absence of witnesses: Thirdly, Winter, J. addressed the absence of witnesses. Here, he acknowledged that there may be an abuse of process in continuing a trial in the absence of witnesses and that this might lead to a stay. The court, he said, 'has to make an assessment of the relevance and impact of the absent witnesses proposed testimony'. The question is 'whether by reason of the absence of any particular witness the accused will be unable to receive a fair trial': R. v. Cavanagh [1972] 2 All ER 704; R. v. Shaw [1972] 1 WLR 679; R. v. Leung Chi-Sing CrApp 37/92

60. On 03rd March, 2015, before the matter was fixed for hearing, Mr. Sharma who appeared for Applicants informed court that he intended to call all three accused and a doctor for the defence. Applicants or his counsel never raised any issue with regard to non availability of defence witnesses and the prejudice thereby caused to them. There was no evidence of actual prejudice, in the sense, for example, of witnesses being dead or unavailable.

Non availability of Prosecution Witnesses

61. Applicants have failed to adduce any evidence as to the significance of prosecution witnesses to their case or why their evidence is material. They only say that, in the event prosecution was not calling them, they intended to call them as defence witnesses. It is understood that it is the burden of the Persecution to prove the case beyond reasonable doubt. The evidential burden is the same whether it is the *voir dire* inquiry or trial proper. In absence of any explanation as to why their evidence is important to the defence, Court is unable to accept the assertion that non-availability of prosecution witnesses would be prejudicial to their defence.

Loss of memory

62. Since five of the witnesses who were intended to be called by the Defence are now either dead or gone missing, fading of their memory can no longer be a concern for the Applicants. Memory loss or fading of memory of Prosecution witnesses will definitely bolster the defence case. Defence counsel will find it comfortable to impeach the credibility of witnesses called by the Prosecution whose memory had faded over a passage of time.
63. In deliberating the judgment, magistrate can address his mind to the witnesses attempting to recall things that had happened “a significantly long time past”. In light of information made available to this court, it is impossible to say to what extent the delay may have materially affected the ability of particular witnesses to recall relevant events.
64. Reference may be made to State v. Malakai Tuiloa (*supra*). In that two applications for stay were made, the second because of the lapse of time between refusal of grant of a stay in the first instance. The relevance here is that there, upon refusing the stay, it was apparent from the Court Record that Magistrate was endeavouring to progress the case with some rapidity.

Alternative Remedy

65. High Court is not inclined to stay proceedings at the magistracy when alternative remedies are available to the Applicants. This court can set a time frame within which the trial shall be concluded by the Magistrate. Apart from that right of Appeal is available to the Applicants in the event they are being found guilty in a trial which had dragged on for over a decade. As was held in Seru the ground of delay alone, if presented to the satisfaction of the Appellate Court, is sufficient to quash the conviction and sentence.
66. 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

67. I am not persuaded that a fair trial is not possible. Nor am I persuaded that it would otherwise be unfair to try the Applicants. Applicants are entitled to a fair trial, and to raise all those matters they have raised in this application in the course of it. 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.

Consistent with the Court of Appeal's direction in Mohammed Sharif Sahim v. The State (Misc. Action No. 17 of 2007, 25 March 2008), therefore, the Orders herein are made to ensure expedition.

ORDERS

1. The application for a stay is refused.
2. The Learned Magistrate at Lautoka handling the case is directed to conclude the *voir dire* proceedings, if any, and trial proper within three months from the date he has received this Order.
3. The parties are to take such steps as are necessary to expedite the hearing of the case in the Lautoka Magistrates Court.
4. At the next mention date in Lautoka Magistrates Court: the parties are to ensure that they have ready all the witnesses and documentation and other material necessary for the *voir dire* proceedings and trial proper to proceed with expedition;



At Lautoka
15th April, 2016


Aruna Aluthge
Judge

Solicitors: Iqbal Khan & Associates for Applicants
Office of the Director of Public Prosecution for Respondent