REPUBLIC OF TRINIDAD AND TOBAGO

Civil Appeal No. 137 of 2006

IN THE COURT OF APPEAL

BETWEEN

HARDEO SINANAN

Appellants

AND

HER WORSHIP
SENIOR MAGISTRATE MRS. MARCIA AYERS-CAESAR

Respondent

PANEL: **I. Archie, C.J.**
M. Warner, J.A.
W. Kangaloo, J.A.

APPEARANCES:

Mr. R. Maharaj, S.C; and Ms. V. Maharaj for the Appellant

Mr. N. Byam for the Respondent

DATE DELIVERED: **8th July, 2009**

Delivered by M. Warner, J.A.

JUDGMENT

1. This is an appeal from a decision of Pemberton J. handed down on the 26th October, 2006 in which she dismissed the appellant's application for judicial review of a decision of Senior Magistrate Marcia Ayers-Caesar. The Magistrate, during the course of a preliminary inquiry, refused to stay proceedings commenced against the appellant in respect of charges laid under section 18 of the Larceny Act and section 9 of the Criminal Offences Act, and overruled a no case submission made on the appellant's behalf.

2. The perennial problem of the magistrates' courts process has been the increasingly heavy caseload. There is no doubt that backlog and delay, and their associated ills have been one of the major concerns of the administration of justice.

Issues

The issues for determination in this court are:

(i) whether there has been such delay in the prosecution of the appellant's case to amount to an abuse of process; and

(ii) whether the proceedings should be stayed.

Background

3. The appellant, a police constable was arrested on the 29th September 1994 and charged with larceny and falsifying a cashbook belonging to his employer with an intention to defraud. He was suspended from duty and one-quarter of his salary and allowances were withheld. It was not until the 8th of May 1996 that state counsel was

appointed to prosecute the matter. By the 19th July, 2000, he had appeared in the Magistrate's court to answer the charges on thirty seven occasions. On 19th July 2000, the prosecution indicated to the Magistrate that it would proceed by way of paper committal. A disturbing feature of this case was that it was only then that a decision was taken to proceed in this manner. By this time, the case had come on hearing on 84 occasions and 9 years and 8 months had elapsed. On the 13th September, 2000, after having heard submissions, the Magistrate ruled that she would proceed by way of oral evidence and depositions. The prosecution led its evidence during the period 5th June, 2002 to 10th July 2003.

4. On the 22nd July 2003 senior counsel raised the issue of inordinate delay and abuse of process, before the Magistrate and he sought a stay of the proceeding. He also submitted that the prosecution had failed to establish a prima facie case against the appellant. The Magistrate handed down her ruling on the 27th May 2004 in which she held against the appellant. The appellant was therefore called upon to answer the charges. On the application of Counsel for the appellant the matter was adjourned to 24th June 2004. On the 23rd June 2004 Best J. granted the appellant leave to apply for judicial review of the Magistrate's decision. This appeal arose in the circumstances which I have related. It is to be noted that the Magistrate's refusal to uphold a no case submission is no longer the subject of appeal.

5. The Magistrate filed an affidavit in which she gave a detailed account of the several endorsements appearing on the record. She concluded that on 20 occasions adjournments were sought either wholly or partly as a result of the lack of readiness of

the defence. The appellant disputed this finding. The affidavit of Albert Edwards one of the legal representatives of the appellant deposed to this effect. While these statistics may have been relevant, in my view they ought not weigh heavily on either side because the matter came on for hearing from time to time before different magistrates upon whom the duty fell to manage the court and to take appropriate steps if the rules were being flagrantly ignored by either side. The proper approach to the question would be to examine the total period of delay in the context of all the circumstances of the case.

6. The Magistrate also raised the vexed question of the general state of her lists. The normal pattern was that approximately 100 cases were fixed for hearing on a daily basis, and in the main, capital offences were given priority. Some delay, she deposed, was unavoidable and to be expected. The Magistrate was referring here to institutional delay — lack of resources. The underlying cause was, however, the alarming increase in criminal activity in the country.

7. She deposed, as well, about nature of the case. Fraud had been alleged. These cases were generally lengthy. In this instance, special arrangements had to be made to facilitate witnesses, some of whom had retired from the police service. In addition, Attorney for the appellant quite often reserved cross-examination. There had also been a change of legal representation on in the appellant's behalf.

8. It is however the, affidavit of Nizam Khan legal officer in the office of the Director of Public Prosecutions on whom the responsibility for the conduct of the proceedings, fell which encapsulates the respondent's case. He deposed:

> ***"Throughout the course of the relevant proceedings, there were a number of changes with regard to the prosecution's representation. In all, responsibility for the conduct of the relevant proceedings changed on five occasions. This was partly a result of the substantial overturn of staff at the Office of the D.P.P. during the years 1996 to 2001. In addition, at or around the beginning of 1996, the workload of attorneys at the Office of the D.P.P. increased significantly. The increased workload, which is a situation that continues to this day, came about as a result of staff shortages and a substantial increase in crime and criminal charges in the country. Attorneys were consequently forced to manage their caseloads in such a way that precedence was given to certain matters. Generally, matters, which involve accused persons who are in custody, receive greater precedence.***
>
> ***Attempts were however made by the prosecution to expedite the pace of the relevant proceedings. In May 2001, the prosecution sought to utilize the procedure of paper committal. This would have been a speedier mode of proceeding than proceeding by way of oral evidence.***
> ***The paper committal was however rendered abortive when, subsequent to the totality of evidence being led in this manner, then counsel for the Applicant, Mr. Israel Khan S.C., made a no case submission."***

9. Once again the scarcity of resources was underscored. One may well ask the question how long ought a court to tolerate these excuses?

10. A guide may be found in Lord Bingham's speech in **Dyer *v Watson [2002] 3 WLR 1488* at 1508**; a case which concerned Article 6 of the European Convention on Human Rights — the right to trial within a reasonable time. He said:

> *"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 organise 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 …****But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement,*** *and the authorities 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.*
>
> ***Emphasis Added***

11. Lord Bingham advocates a weighing process, that is, a subjective balancing of several factors, on a case by case basis.

Submissions in the High Court and Court of Appeal

12. Counsel emphasised that the appellant had suffered inconvenience and detriment both mentally and physically - his life was thrown into turmoil and confusion. The delay, Counsel submitted was excessive. The prosecution had taken 9 years to hear the evidence against the appellant and that, in itself, gave rise to presumed prejudice and therefore constituted an abuse of process. The appellant, it was contended, had always insisted that the matter be determined expeditiously. Counsel identified the issues for determination by the trial judge as follows:

a. Whether the decision of the Magistrate to refuse to stay the proceedings on the basis of excessive delay has rendered any further prosecution of the said proceedings an abuse of process and is unlawful; and

b. Whether the decision to overrule the no case submission was unlawful.

13. He argued that the prosecution took one and a half years to appoint counsel and six years to make a decision to proceed by way of committal. Counsel conceded, however, that issues of delay can be adequately dealt with by the trial judge in the criminal court. He stated though, that the appellant's case was exceptional since there was too long a period of uncertainty; the quality of justice was affected and public confidence in the administration of justice would be shaken.

14. State Counsel made four points on the respondent's behalf:

(i) The right to be tried within a reasonable time must be balanced against the interest of the public in having the accused tried- the court is entitled to take into account the prevailing system of legal administration and the prevailing economic, social and cultural conditions;

(ii) Only in exceptional circumstances will criminal proceedings be stayed;

(iii) There is a heavy burden of proof on a defendant who seeks a stay on account of delay;

(iv) The court should take into account the measures available to the trial judge to avoid unfairness.

The Judge's findings and submissions in the Court of Appeal

15. Mr Maharaj took issue with the trial judge's assessment of her role in judicial review proceedings. In particular, her statement that the court's role was to review the decision to ensure that it was not tainted by bias or mala fides, or was so unreasonable as not to bear scrutiny or that delay had affected the efficacy of the decision. Counsel

observed that this statement indicated that the judge had disregarded some of the provisions of section 5(3) of the Judicial Review Act, and as a result she fell into error. She had not addressed her mind to the failure of the Magistrate to exercise her discretion reasonably.

Analysis

16. Under the Republican Constitution of Trinidad and Tobago and under the common law a person who is charged with a criminal offence enjoys the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. Embodied in this right is the recognition that unreasonable delay may have the effect of denying an accused of the ability to answer a charge fully and fairly.

17. The court has a discretion to grant a stay of criminal proceedings on the ground that to continue them would amount to an abuse of process. This is, however, an exceptional remedy. As the trial judge quite properly reminded herself though, these are judicial review proceedings. The court is exercising a supervisory role. It is not an appeal. Its role is to consider whether the decision making process was flawed.

18. The principles which ought to guide a court in the exercise of it power to stay proceedings on account of delay amounting to abuse of process have been consistently spelt out in several cases in the Privy Council, in the English Courts and in this jurisdiction. (See **Bell v DPP 32 WIR 317**; **Mungroo v R [1991] WLR 135**; **DPP v Tokai 1996 AC 856**; **Charles and ors v the State (1995) 54 WIR 455**; **Sookeramy v. DPP another [1996] 48 WIR**; **Boodhoo v Attorney General 2004 UKPC17**; **Attorney**

General's Ref No.1 of (1990), (1992) 95 Cr App R 326; Attorney General's Ref No.2 of (2001) [2004] A.C. 72).

19. The weight of existing authority supports the proposition that an accused must show that a fair trial is no longer possible. Stays on the ground of unjustifiable delay should only be granted in exceptional cases (See Attorney General's Reference (No.1 of 1990) [1992]3 All E R 169. This caution is particularly relevant where the application for a stay is made in a magistrates' court. There is a line of authority to the effect that justices have power to stay committal proceedings but such power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused. The power has most comprehensively been considered and affirmed by the Divisional Court in ***Reg. v. Telford Justices, Ex parte Badhan*** **[1991] 2 Q.B. 78, 81.** This is a power to be most sparingly exercised. Magistrates have received more than sufficient judicial warning See, for example, Lord Lane C.J. in ***Reg. v. Oxford City Justices***, ***Ex parte Smith*** **(1982) 75 Cr.App.R. 200** and **Ackner L.J.** in ***Reg. v. Horsham Justices, Ex parte Reeves*** ***(Note)*** **(1980) 75 Cr. App.R. 236**.)

20. ***In R v Horseferry Road Magistrates Ex Parte Bennet 1994 AC 42 64 B-D,*** Lord Griffiths said:

> ***"it appears to me to be a beneficial development and I am unpersuaded that there are any sufficient reasons to overrule a long line of authority developed by successive Lord Chief Justices and judges in the Divisional Court who are daily in much closer touch with the work in the magistrates court than your Lordships. Nor do I see any force in an argument developed by the respondents which sought to equate abuse of process with contempt of court. I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness***

of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures."

21. In point of jurisdiction, Mr Maharaj has called attention to section 15 (1) of the Judicial Review Act which does provide that the remedy of judicial review is available to a person who is adversely affected when a person who has a duty to make a decision does not do so in a timely fashion. A magistrate conducting a preliminary enquiry falls within that category. However, I am of the view that the caution is still appropriate – the power to stay proceedings should still be sparingly exercised.

22. In ***Attorney-General's Reference (No. 1 of 1990)*** the Court of Appeal in England stressed that a stay on the grounds of delay was to be imposed only in exceptional circumstances. Lord Lane C.J. at page 643-644 said:

"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 actions of the defendant himself should never be the foundation for a stay. … 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 words, the continuance of the prosecution amounts to a misuse of the process of the court."

23. In ***George Tan Soon Gin v. Judge Cameron*** [1992] 2 A.C. 205 the Board, however, developed the point. At page 225 Lord Mustill said:

"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"

24. The case of ***Mungroo*** was one of the earlier cases on delay, in which the Privy Council recognized the constraints imposed by local conditions. The difficulties stem from increasingly heavy workloads to which both the Magistrate and Mr Khan have deposed.

25. In Bell, their Lordships cited with approval dicta in ***Barker v Wingo 407 U S 514***, in which Powell J identified the following factors when the court considered the right to a speedy trial under the Constitution of the United States of America. They were, the length of the delay; the reasons given by the prosecution to justify the delay; the responsibility of the accused for asserting his rights and prejudice to the accused.

26. One of the more important authorities handed down by this court is **Sookermany v DPP 48 WIR 346 [1996]**. This was a constitutional motion in which the applicant moved the court to stay proceedings for murder. He alleged that his constitutional right to a trial within a reasonable time had been breached — some seven years had elapsed since he had been committed to stand trial first with manslaughter and then charged with murder a stay was refused because no actual prejudice was shown. Chief Justice de la Bastide had this to say:

> ***"the question of whether or not the accused has suffered some actual prejudice in the presentation of his defence as a result of delay, looms much larger in a case based on common law than in one which is based on some explicit written provision, where damage to an accused's security interest is given a greater weighting;(b) the question whether such actual prejudice may be remedied or counteracted by the trial judge is highly relevant to whether a stay should be granted at common law, but may be disregarded in enforcing an explicit written right; and (c) again, in the delicate balancing exercise which has to be undertaken, the fact that delays of the order of that complained of by the accused are in practice unavoidable in a large number of cases, given the deficiencies of the machinery provided in that country for bringing to trial of accused persons and the way in which it operates, can only be used to a very limited extent***

to deny an explicitly given right, but may be weighted somewhat heavily in a common-law situation...

The right of an accused to be tried within a reasonable time must in every case be balanced against the interests of the public in having him tried (see Bell v director of Public Prosecutions (1985) 32 WIR at pages 327, 328).In performing his balancing exercise, the court is entitled to take into account the prevailing system of legal administration and the prevailing economic, social and cultural conditions that are found in the particular country. This point was made by Lord Templeton in Bell and reiterated by him in Mungroo v R (1991) WLR 1351. The Board also recognized that he problem of institutional delays is a complex one to which there may be no simple ready-made solution, and that the scarcity of financial resources is clearly a factor to be taken into account in countries like Jamaica."

27. The public interest was held to be an important consideration. The reasoning was consistent with the dicta in **Bell,** that the prevailing economic and social conditions must be taken into account.

28. Drawing on the case law collated, the following principles may be extracted:

(i) A stay should be imposed in exceptional circumstances;

(ii) The burden of proof of proving serious prejudice to the extent that a fair trial was impossible, rests on the accused;

(iii) While lengthy, inexplicable delay raises the question of presumptive prejudice the core issues is whether the accused could be afforded a fair trial;

(iv) Where delay in the conduct of a case is so great, even when viewed against the public interest in having the guilty convicted, it becomes an abuse and is unacceptable.

Prosecutorial delay in the instant case

29. This case begins with prosecutorial delay during the period 1994 to 2000. This led the trial judge to make the important observation that, "as conceded by counsel for

the State, there was no explanation for this lapse". This was the basis of one of the main grounds of appeal. Mr Maharaj submitted that the Magistrate had failed to appreciate the significance of this highly material factor. It seems to me, however, that this observation must be viewed against the background of Mr Khan's affidavit. He deposed to shortages of staff and increased workload during the relevant period.

30. The Magistrate began her narrative by reference to when the matters first came before her late in the year 2000. She considered the accused's attitude to the delay and the time at which the objection was taken. She was of the opinion that objection to the delay ought to have been taken earlier, with a view to expediting the pace of the proceedings.

31. To summarize, the Magistrate took into account lack of readiness of the defence; state of her lists and complexity. The nature of the case however was that it was based on documentary evidence. The appellant on the other hand complained about the unexplained delay on the prosecution's part and maintained that the delay was presumptively prejudicial.

32. The trial judge concluded that the Magistrate's decision could not be impeached on the ground of unlawfulness in that she asked the right questions and did not take into account any improper considerations. I do not think that this finding can be criticized.

33. The grant of a stay of proceedings is aimed at ensuring the proper administration of justice and ought not to be used to express disapproval or as a form of punishment.

(See **Ex parte Belsham (1992)1 All ER at page 395**, later overruled on a jurisdictional point by the House of Lords in **Re Ashton (1994) 1 A.C. 9).**

34. As I have indicated, the issue of pressure on the court, surge of business and the like are all matters to which the court ought not to turn a blind eye. Even when there is an unjustified delay, the stay should be the exception rather than the rule.

35. The judge's assessment that a fair trial will still be possible was influenced by the concession which counsel had made. In other words, the appellant will yet be able to raise these issues before the trial judge. It is to be undrescored that in all the cases cited, one returns to the core issue — is a fair trial possible? As to the nature of the evidence, the Magistrate took into consideration that the case was based on documentary evidence. The witnesses will not be relying on "immediate memory of events" or identification of witnesses.

36. There is yet another principle in play which affects the public interest. These charges have been brought against a person in a position of trust. This factor does affect the administration of justice and the public's perception of it in a broad but important way. The concept of a fair trial involves fairness to both the prosecutor and the public and the defendant. (See judgment of Justice Openshaw in ***DPP v Meakin*** **(2006) EWHC (Admin) 1067**, in an application by way of case stated).

37. In the case of Attorney General's Reference No 2 of 2001, the House of Lords in a 7-2 majority judgment delivered on the 11th December 2003 considered whether there had been a violation of Article 6(1) of the European convention of Human Rights in

circumstances where the accused could not demonstrate any prejudice arising from the delay.

38. The House agreed with the Court of Appeal that criminal proceedings may be stayed on the ground of the reasonable time requirement in Article 6(1) only if (a) a fair hearing is no longer possible or (b) it is for any compelling reason unfair to try the defendant. For reasons which have no impact on this case, there has been much debate about the dicta, to the extent that the judge highlighted the submission of state counsel that the decision had "effectively attenuated to the point of mere obliteration the concept of presumed prejudiced" I am not prepared to go that far, particularly because that decision was based on a provision which was differently worded. I emphasise however that there are so many imponderables that each case must be determined on its own facts. Significantly however, this case also decides that the court's jurisdiction to stop a prosecution on the ground of abuse of process should only be exercised in exceptional cases.

39. I turn now to the other limb of Mr Maharaj's argument which he developed in his speaking note filed on the 12th January 2009. He relied on dicta in the case of ***R v Feltham Magistrates' court ex parte Mohammed Rafiq Ebrahim v DPP*** **(2001)** EWHC Admin 130 in which the court identified the category of cases which fell outside of those which could, despite delay, be fairly tried. In such cases, a court will not be prepared to allow them to proceed because the prosecutors have been guilty of "such serious misbehaviour that they should not be allowed to benefit from it." This was not the focus of the argument in the court below. While the appellant did set out the

chronology of facts in a detailed manner, there was no suggestion that the prosecution had manipulated or misused the process. In fact, at paragraph 12, I have referred to issues which counsel for the appellant identified for the trial judge's determination. The trial judge in her judgment only devoted her attention to the aspect of delay. She began her discourse with the maxim "justice delayed is justice denied". She summarized the arguments and applied the delay principles established in the authorities cited.

40. If the allegation was that the case was not being pursued in good faith, then the inquiry would have taken on a different character. The consequences of bad faith are serious, particularly when such an allegation is proven against someone who holds public office. While the dilatoriness of the persons responsible for the delay is to be deplored, I can find no evidence of misuse or manipulation of the process. There has been no deliberate use of procedures to gain an unfair advantage.

41. I am of the opinion therefore, that the judge was correct when she refused the application for judicial review. The respondent had not identified any exceptional feature in the case — in fact, counsel conceded that a fair trial could still be held, and as I have indicated, there has been no misuse or manipulation of process.

42. I would therefore dismiss this appeal with costs to the respondent.

Margot Warner
Justice of Appeal