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TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. NO. CR.69/02

BETWEEN

BALRAM SUPERSAD

V

THE STATE

Before the Honourable Justice Prakash Moosai

APPEARANCES:
Mrs. Nalini Singh for State
Mr. Wayne Sturge for Defence

RULING

By his Motion filed on 3 Feb 2004, the Accused sought to have the proceedings stayed on the following grounds:

(1) The delay of about 11 years elapsing from the date of the alleged offence to the date of trial is unreasonable and constitutes an abuse and/or misuse of the process of the Court.

(2) The continuation of the prosecution herein is manifestly unfair and unjust and tends to bring the administration of justice into disrepute.

(3) The continuation of the prosecution herein at this time is

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prejudicial to the accused.

(4) The continuation of the prosecution is contrary to the principles of fundamental justice and/or fairness.

(5) The accused's right to a fair trial within a reasonable time under section 4 (a) of the Constitution has been infringed, and the accused's right to equality before the law and the protection of the law by virtue of section 4 (b) of the Constitution has been infringed.

The facts which are not in dispute establish that the accused was arrested on 18 Jun 1993 and charged with the offence of uttering a forged document. The preliminary enquiry began on 19 Aug 1994. The accused was committed to stand trial on 6 Apr 1995. The accused was unrepresented at the preliminary enquiry. At the preliminary enquiry the accused, at the end of the prosecution's case, reserved his defence. An Indictment was filed by the DPP on 13 Mar 2002, charging the accused with three offences, namely: (i) forgery; (ii) uttering a forged document; and (iii) obtaining property by virtue of a forged instrument. The matter first came on the Criminal Cause List in the High Court on 28th Nov 2002. The prosecution sought to explain the lengthy delay of **almost seven years** between committal and the filing of the Indictment on the ground that the matter was "misfiled." The prosecution indicated that in June 2001, this "file was found partly typed in a cabinet not normally used for those type of matters."

I do not think that complaint can be made of the delay between the time of arrest and committal (approximately 22 months), nor for that matter between the time of the filing of the Indictment and the date for trial (approximately 24 months). Nevertheless I must consider the issue of delay in the circumstances of this case where an accused is being tried approximately 10 years and eight months after the date of the commission of the offence.

Mr Sturge on behalf of the accused relied on the authority of **The State v Robert Mohammed and Johnny Richardson** [No. 131 of 1995] where Baird J., in construing the fundamental rights provisions of our Constitution, was of the view that the Constitution must be construed in a manner that is consistent with the State's international

treaty obligations and concluded that the right to a fair trial within a reasonable time had been incorporated into our Constitution.

I respectfully disagree. I have not had the benefit of the plethora of cases cited to Baird J. I am further of the view that I am bound by the decision of the Privy Council in **DPP v Tokai** (1996) 48 WIR 376 [PC] which considered the question whether in Trinidad and Tobago, long delay in bringing accused persons to trial constitutes an infringement of their constitutional rights, with the result that the indictment must be quashed, and no further proceedings taken. Lord Keith of Kinkel, in comparing constitutions which included the fundamental right to a speedy trial or trial within a reasonable time, to our Constitution which did not, stated at page 414g:

> "It is noticeable that this Constitution, unlike some of those in other Caribbean countries and elsewhere, particularly the USA and Canada, does not include in the catalogue of fundamental rights and freedoms the right to a speedy trial or trial within a reasonable time. The only relevant rights are the right not to be deprived of life, liberty or property except by due process of law and the right to the protection of the law, which include, as section 5 (2) makes plain, the right of those accused of criminal offences to a fair trial. Further, the opening words of section 4 indicate that the rights in question are rights which existed at the coming into force of the Constitution. The present Constitution is that of 1976, but the relevant wording in the original Independence Constitution of 1962 was identical. It follows that the rights in question are rights which were enjoyed at common law before the 1962 Constitution came into force. **Neither Constitution purports to vary or enlarge the common law rights**." **[Emphasis Added.]**

It seems therefore that it is to the common law that I must turn in determining the question in issue, namely whether the proceedings ought to be stayed on the ground of delay. I do not think that it is in dispute that this Court has a general power to prevent

unfairness to an accused: **Connelly v DPP** [1964] A.C. 1254, 1347. The leading case on the common law principles applicable is **Attorney-General's Reference (No. 1 of 1990)** [1992] 3 All E.R. 169 where Lord Lane CJ set out the test at page 176, namely that " no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer prejudice to the extent that no fair trial can be held..."

In analysing the different forms an abuse of process might take, Lord Lane considered abuse of process on the ground of delay and stated at pages 174-175:

> "However, the most usual ground is that based on delay, that is to say the lapse of time between the commission of the offence and the start of the trial. The number of applications based on this ground has increased alarmingly over the past few years.
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> The decision of the Divisional Court in **R v Derby Crown Court, ex p Brooks** (1985) 80 Cr. App. R. 164 for some time seems to have provided the guidelines for courts faced with this problem of delay. Sir Roger Omrod, delivering the judgment of the Court in that case, said (at 168-169):
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> 'In our judgment, bearing in mind Viscount Dilhorne's warning in **Director of Public Prosecutions v Humphrys** [1976] 2 All E.R. for 97 at 511, that this power to stop the prosecution should only be used "in most exceptional circumstances,"... the effect of these cases can be summarised in this way. The power to stop the prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and the preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service... The ultimate

objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, for, as Lord Diplock said in **R v Sang** [1979] 2 All E.R. 1222 at 1230, "... the fairness of a trial... is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted." '

We would like to add to that statement of principle by stressing a point which is sometimes overlooked, namely that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay."

Lord Lane went on at page 176 to analyse the burden of proof and to emphasize that stays should only be imposed in exceptional circumstances:

"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. We respectfully adopt the reasoning of Brennan J. in J. **Jago v District Court of New South Wales** (1989) 168 C.L.R. 23.

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.

In answer to the second question posed by the Attorney General, 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 that the continuance of the prosecution amounts to a misuse of the process of the court. In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind. First, the power of the judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict. It follows from what we have said that in our judgment the decision of the judge to stay the proceedings in the instant case was wrong. The delay, such as it was, was not unjustifiable; the chances of prejudice were remote; the degree of potential prejudice was small; the powers of the judge and the trial process itself would have provided ample protection for the defendant; there was no danger of the trial being unfair; in any event the case was in no sense exceptional so as to justify the ruling."

In the instant case, the delay between committal and the filing of the Indictment was approximately six years and 11 months. However the affidavit of the prosecution's witness stated that **the file was found in June 2001 party typed**. It does seem to me that after the file was found in June 2001, the prosecution moved reasonably quickly in having the Notes of Evidence typed, the same being completed and forwarded to the DPP on 13 Jul 2001, with the Indictment being filed by the DPP on 13th of March 2002. Realistically therefore the operative period of delay attributable to the file being "misfiled" would be at best from committal (6 Apr 1995) to the time it was found (June 2001), **a period of approximately six years and two months. This by any stretch of the imagination was an exceptionally long period**. But I must also consider that the accused is being tried approximately 11 years after his arrest. A significant feature of this case as well is that the accused has set out on affidavit that he was a " casa" at Dallas Recreation Club and proposed to rely on the defence of alibi. It is to be noted that there

is some support for that contention in the deposition which revealed that the accused took the police to Dallas Recreation Club and handed over to them a notebook which contained his handwriting. In support of his alibi he proposed to call both his employer, Dharampaul Ramsingh, and the manager, Nanhoo Mangra. His employer died on 26 June, 2000 and the manager died in April 2000.

In **Barker v Wingo** (1972) 407 US 514, the sixth amendment of the Constitution of the United States of America provided that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury..." Powell J. identified four factors which a court should consider in determining whether a defendant has been deprived of his right to a speedy trial: (i) the length of the delay; (ii) the reasons given by the prosecution to justify the delay; (iii) the responsibility of the accused for asserting his rights; and (iv) prejudice to the accused. In **Bell v DPP** [1985] 2 All E.R. 585 [PC], the Privy Council confirmed the relevance and importance of those four factors and their applicability "to any Constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings."

It is therefore to those four factors identified by Powell J. at pages 530 to 532 in **Barker v Wingo** ibid. that I turn in analysing the delay in the instant case.

1. The length of the delay.

> "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."

I do not think it can be denied that the length of time from the date of arrest to now, almost 11 years, is by any stretch of the imagination presumptively prejudicial.

2. The reasons given by the prosecution to justify the delay.

> "A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay."

In the instant case the file was " misfiled", and found approximately seven years later in a filing cabinet not normally used for those types of matters. Whilst negligence should be weighed less heavily, there must obviously come a time when the delay is so great as to be oppressive and unconscionable. This is one of those rare cases.

3. The responsibility of the accused for asserting his rights.

> "Whether, and how a defendant asserts his rights is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain."

In the instant case the accused has not set out in his affidavit whether he took any steps after committal to ascertain why his matter was taking so long to come on for trial. However I bear in mind that the accused was unrepresented at the preliminary enquiry. I also consider that it is not uncommon in Trinidad and Tobago for accused persons who are unrepresented to take the view that the setting of a trial date is really a matter exclusively within the purview of the prosecution. Perhaps at this juncture it might be

appropriate to remind accused persons, whether represented or not, that they bear some responsibility, where the delay is such as would affect their right to a fair trial, in asserting their rights: See **Barker v. Wingo** ibid. at p. 528.

4. Prejudice to the accused.

> "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these the most serious is the last... If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what he has forgotten can rarely be shown."

In the instant case, the accused was granted bail and was not in custody. However both the employer and the manager of the club, where he worked, and whom he intended to call in support of his defence of alibi, are now deceased. So that the prejudice to the accused is obvious. I should however make the point that in cases such as these, the Court will more readily draw the inference that an accused has suffered prejudice where statements have been recorded from the alibi witnesses.

Now when one looks at the relative strength of the case, the prosecution proposes to lead evidence from the handwriting expert to the effect that it was the accused who forged the cheque. This would support the evidence of the identifying witness that it was the accused who committed the offences. When one looks at the case for the accused, the accused, as a result of the death of his two alibi witnesses, would at trial have only his testimony to rely on. A jury might well convict the accused in the absence of his alibi witnesses, notwithstanding the strongest directions by the trial judge.

In considering the circumstances of this case, I am of the view that this is an exceptional case warranting the staying of the Indictment. There will therefore be an order that the Indictment be stayed.

DATED this 16th day of March, 2004.

PRAKASH MOOSAI
JUDGE