IN THE COURT OF APPEAL, FIJI ISLANDS
APELLATE JURISDICTION

MISC. Action No: 17 of 2007

BETWEEN:

MOHAMMED SHARIF SAHIM
f/n Mohammed Janif

Appellant

AND:

THE STATE

Respondent

Coram:	Byrne JA Shameem JA Scutt JA
Hearing:	14th February 2008
Counsel:	Mr. J. Semisi for the appellant Ms A. Prasad for the respondent
Date of Judgment:	25th March 2008

JUDGMENT OF THE COURT

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[1] On the 30th of March 2007, the High Court at Suva refused to stay the criminal trial of the appellant on a constitutional redress application. The appellant appeals against that refusal.

The history of the case

[2] The appellant was charged with offences of obtaining money by false pretences. It was alleged that he obtained more than $60,000 by making false claims that he was in a position to obtain visas to migrate to the United States. He first appeared in the Suva Magistrates' Court on 27th July 2001. He pleaded not guilty. After 31 appearances, in July 2006, he made an application for constitutional redress in the High Court. It was heard on 26th March 2007. The application was that the hearing should not be allowed to continue because the systemic delay between charge and trial was so great that the appellant's common law and constitutional rights to a fair trial were breached.

[3] Counsel for the Attorney-General opposed the application saying that alternative remedies were available to the appellant within the criminal trial process and that the court should refuse to grant a remedy. At the hearing of the application, counsel for the Attorney and for the Director of Public Prosecutions agreed however that the delay was serious but that it was not such that the court should necessarily hold that there had been an abuse of the process.

[4] The history of the adjournments is set out in detail in the High Court judgment. Between July 2001 and March 2003 the case was repeatedly adjourned by the presiding magistrate without any recorded reason. From 12th August 2003 there were further adjournments either for no given reason, or because the accused was sick, or because defence counsel was in the High Court, or because witnesses had not been summoned or because of the absence of either the prosecutor or the accused. It is clear from this analysis, that all parties – the court, the prosecution and the defence, were part of the problem. After the application for constitutional redress was made in the High Court, the court record was called for in July, September, November and December 2006. It finally arrived on 18th January 2007.

The High Court judge rightly referred to this scenario as appalling and as one which demonstrated a shocking failure of Fiji's trial system. Ultimately it showed a failure of the court to conduct the trial.

[5] His Lordship then reviewed the law on criminal trial delay, saying that it was well-settled since ***Apaitia Seru and Anthony Frederick Stevens v. The State*** *Crim. App. AAU0041/42 of 1995S* that where delay was unreasonable, prejudice to the accused could be presumed. This Court in that case adopted the approach of the majority of the Supreme Court of Canada in ***R v. Morin*** *[1992] 1 SCR* and the New Zealand Court of Appeal in ***Martin v. District Court at Tauranga*** *[1995] 2 NZLR 419.*

[6] His Lordship summarized the law in Fiji on delay since ***Seru and Stephens*** as follows:

> ***"In holding the delay to be unconstitutional their lordships commented (at page 9) that the constitutional right was designed to protect both individual and societal rights. The former were the right to security of the person, the right to liberty, and the right to a fair trial. The latter, was that prompt trials enhanced the confidence of the public in the judicial system and that there was a societal interest in bringing to trial those accused of offending against the law. The right was held to be a qualified right, to be balanced with the victim's interests. Pre-charge delay is certainly relevant in considering whether a stay should be granted. Any prejudice caused to the accused by the delay is a critical factor however the lack of it does not necessarily mean that the application is bound to fail."***

[7] After considering all relevant principles, the presiding judge made the following orders, having found there was no evidence of prejudice:

> "(i) I declare that there has been in this case unreasonable delay in bringing these charges to trial.

(ii) I declare the cause of this delay was primarily a failure of the court system to manage the case to a hearing.

(iii) I also declare that the accused and the prosecution significantly contributed to that delay.

(iv) I direct the Chief Magistrate to ensure this trial is heard by a Resident Magistrate within the next 40 days."

[8] The appellant then filed this appeal in the Court of Appeal, and applied to a single judge for stay of the orders pending appeal. The application was heard by Ward P on the 31st of May 2007 and a stay granted on the 4th of June 2007.

The grounds of appeal

[9] There are two grounds of appeal. They are:

"1. That his Lordship erred in law and in fact in failing to grant permanent stay of the proceedings in the Magistrates' Court vide Criminal Case Number 2321 despite making a finding that the delay caused is unreasonable.

2. That his Lordship erred in law and in fact in failing to grant permanent stay in view of the delay caused is unreasonable and thus unfair to continue with the proceedings pursuant to section 29(3) of the Constitution of the Republic of Fiji Islands."

[10] The crux of this appeal is 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. The question requires a recanvassing of the authorities on the subject of delay.

Common Law Delay

[11] The common law on the ability of a court to stay criminal proceedings on the basis of delay stemmed from the inherent powers held by the High Court to regulate and protect its own processes. The leading authority on the position of the common law in England, prior to the passing of the Human Rights Act, was ***Attorney-General Reference No. 1 of 1990*** *[1992] QB 630.* The common law position was that where delay was found to be an abuse of the process, the indictment should only be stayed in the most exceptional circumstances and only if there was evidence that the accused was so prejudiced in the conduct of his or her defence, that a fair trial was no longer possible. In the absence of prejudice, hardship arising from delay was merely a factor to mitigate sentence.

[12] This was the law prior to the passing of the Human Rights Act in England. It is still the approach of the courts in Australia. Arguably, the position after the passing of the Act has not dramatically changed the law. Article 6(1) of the European Convention on Human Rights guarantees a right to a hearing within a reasonable time in both civil and criminal proceedings. The same right exists in the International Covenant on Civil and Political Rights which Fiji has not ratified. Nevertheless, the right to trial within a reasonable time is guaranteed in section 29(3) of the Fiji Constitution.

[13] In ***Stogmuller v. Austria*** *(1979-80) 1 EHRR 155,* the purpose of the right was explained by the Strasbourg Court (the European Court of Human Rights) as the protection of all parties from excessive procedural delays. In ***H v. France*** *(1990) 12 EHRR 74,* the court held that the right emphasizes "the importance of rendering justice without delays which might jeopardize its effectiveness and credibility." In ***Stogmuller***, at (para 5), it was held that in criminal cases, the right protected individuals also from "remaining too long in a state of uncertainty about their fate."

[14] The assessment as to what factors are relevant in deciding when delay becomes unreasonable is remarkably similar in countries which have a constitutional or statutory guarantee of a right to trial within a reasonable time. The principles set out by the majority in ***Morin*** (supra) of the Supreme Court of Canada are identical to the principles adopted by the Strasbourg court, and by the English courts post-1998. In ***Zimmerman and Steiner v. Switzerland*** *(1984) 6 EHRR 17,* paras 27-32, the European court listed the factors as follows:

1. The complexity of the factual or legal issues of the case.
2. The conduct of the parties.
3. The conduct of the judicial authorities and of the administrative arm of government.
4. The effect of the delay on the defendant.

[15] It has been held in a number of cases that the computation of time ran from the point of charge or, in some circumstances from the commencement of a police interview during which the suspect is officially told of the allegations. This last approach is consistent with the **purpose** of the right, that is, to protect the individual from prolonged uncertainty about his or her fate in the criminal justice system *(**Eckle v. Germany** (1992) 5 EHRR 1, **Howarth v. United Kingdom** (2001) 31 EHRR 861).*

[16] In ***Porter v. Magill*** *[2002] 2 AC 357,* the right was recognized 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.

[17] As to how long is too long then depends on each case, and on the balancing of the factors relied on by this court in ***Seru and Stephens*** (supra). The question which is for determination in this case, is whether even in the absence of prejudice, a stay must be granted once delay is held to be excessive. The presiding judge in this case decided it was not, and preferred to grant other remedies instead.

[18] The judicial response to the question of appropriate remedies has not been clear elsewhere in the Commonwealth. In ***Darmalingum v. The State*** *[2000] 2 Cr. App. R. 445*, the Privy Council held that the breach of the right contained in the constitution of Mauritius, does not depend on proof of prejudice and that the ordinary remedy for "inordinate and oppressive" delay was the quashing of the conviction.

[19] In ***Flowers v. The Queen*** *[2000] 1 WRR 2396* a differently constituted Privy Council rejected that approach. Distinguishing ***Darmalingum*** Lord Hutton held that in deciding on the impact of delay and on whether there had been a breach of the right, the courts should consider:

a. The length of the delay;
b. The reason for the delay;
c. Whether or not the defendant had asserted his right to speedy trial;
d. The extent of any prejudice.

[20] In assessing whether or not there was prejudice, the court should take into account evidence of prejudice, the need to prevent excessive lengths of pre-trial detention, whether the defendant had suffered anxiety and concern and whether the conduct of the defence would be impaired.

[21] This approach was inconsistent with the authorities from the European court, but subsequent cases in England failed to clarify the issue. In ***Attorney-General's Reference*** *(No. 2 of 2001) [2003] UKHL 68*, the House of Lords (sitting with 9 members of the court) held by a majority of 7-2, that it will rarely be appropriate to stay proceedings for delay, if the proceedings have not yet begun because of the strong public interest in ensuring that suspects are tried. Lord Bingham held (at para 24):

> ***"The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing, or (b) it would otherwise be unfair to try the defendant. The public interest in this final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing."***

[22] Where the matter is raised after a trial and conviction and on appeal, Lord Bingham adopted a similar approach:

> ***"If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all it will not be appropriate to quash any conviction."***

[23] This approach has been adopted in subsequent cases in England. In ***Boolell v. State*** *[2006] U.K.P.C. 46, 32,* the Privy Council considered a petition from Mauritius. It was held that there was unreasonable delay but that a stay or the quashing of the conviction was not appropriate because the hearing was not unfair, nor was it unfair to try the defendant at all. Instead the court reduced sentence.

[24] In Canada, prejudice is a factor to be taken into account in computing whether the delay is unreasonable. It does not determine the availability of a challenge (Sopinka J in ***Morin*** supra, 12-13). ***Morin*** was followed by the New Zealand Court of Appeal in ***Martin v. District Court at Tauranga*** *[1995] 2 NZLR 419,* and of course applied in Fiji by this court in ***Seru and Stephens,*** and in a number of cases thereafter.

[25] The concept of prejudice was given a broader interpretation in ***Barker v. Wingo*** *407 US 514 (1972) 532* a decision of the Supreme Court of the United States, Justice Powell holding that the right contained in the sixth Amendment was intended, inter alia, to "limit the **possibility** that the defence will be impaired." (our emphasis) This is a much broader test than that laid down by the House of Lords in ***Att-General's Reference*** (supra) that is, that there must be evidence that either there can no longer be a fair trial or it would otherwise be unfair to try the defendant.

[26] In ***Doggett v. United States*** *(1992) 120 L.Ed 520,* the Supreme Court held:

> ***"Between diligent prosecution and bad faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad faith delay would make relief virtually axiomatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him."***

[27] These authorities are not necessarily irreconcilable. While the New Zealand and Canadian authorities suggest that evidence of actual prejudice is not necessary in computing how long is too long a delay, they do not rule out the possibility of alternative remedies to stay where a fair trial is possible or has been conducted.

[28] In the earlier decision of this court, of ***Seru and Stephens***, prejudice was presumed because of the length of the delay and the history of the case. What the court did not address was the availability of alternative remedies in the absence of proof of actual prejudice.

[29] 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.

[30] 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.

This appeal

[31] It follows that his Lordship did not err in his approach. His finding that the delay in this case was unreasonable (with which neither appellant nor respondent disagree) was based on a balancing of all relevant factors, including the absence of specific prejudice. Further, in then deciding which remedy was best-suited to the breach, he chose to make orders to expedite trial. In coming to this conclusion, he was entitled to take into account the gravity of the case, the nature of the charges, the fact that all parties contributed to the delay and the absence of proof that a fair trial was not possible. He did not err in his approach and we dismiss this appeal. His orders are reinstated and are to take effect as if they were made today.

[32] Before we leave this matter, there is one final issue which his Lordship referred to in his judgment in relation to the factors to be taken into account when computing delay. In ***Jonetani Rokoua v. State*** *Crim. App. No. CAV 0001/2006S*, the Fiji Supreme Court advised caution in the developing of Fiji human rights when compared to rights developed in more affluent countries. The court commented that foreign decisions can only aid constitutional interpretations and not supplement them. In considering delay and what must be considered unreasonable, Fiji's limited resources should be taken into account. In particular the limited resources available to the administration of justice is a relevant factor when assessing when a delay becomes oppressive and a breach of section 29(3).

[33] This decision was referred to by the judge in this case. He said that the courts in Fiji were obliged to apply public international law in the interpretation of the rights given in Chapter 4 of the Constitution, and that section 43(2) of the Constitution which prescribed such an obligation could not be ignored.

[34] We agree with him. If human rights are universal, and if the right guaranteed in section 29(3) of the Fiji Constitution is reflected in the body of public international law globally, then the rights of the people of Fiji must have the same meaning as the rights of those in more affluent countries. Rights cannot be "watered down" because Fiji has limited resources. In any event, in the context of delay, the resources available for prosecution are already relevant when the court considers the reasons given by the State for the delay. Each court must decide for itself how significant a factor resources (or the lack of them) is in a particular case. However it can never be the deciding factor in either computing length of delay, or deciding on the appropriate remedy to be awarded.

[35] This appeal is dismissed for the reasons we have given.

Hon. Justice John Byrne
Judge of Appeal

Hon. Justice Nazhat Shameem
Judge of Appeal

Hon. Justice Jocelynne Scutt
Judge of Appeal

FIJI COURT OF APPEAL