

**HENRY INGIVALD**

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v.

**THE STATE**

[HIGH COURT, 1996 (Scott J) 4 October]

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## Criminal Jurisdiction

*Constitution- fundamental rights and freedoms- provisions to secure protection of law- right to a fair hearing within a reasonable time- right to bail pending trial. Constitution (1990) Sections 11 (1) and 6 (5).- Criminal Procedure Code (Cap 21) Section 244.*

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Over 7 months after being charged with murder and remanded in custody the committal papers had still not been received by the High Court from the Magistrates' Court. The applicant then sought bail. The High Court refused bail but stressed the importance of committal procedures being completed without undue delay. It pointed out that the constitutional consequences of unreasonable delay could include release on bail and the avoidance of the trial altogether no matter how serious the charge.

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Case cited:

*Davendra Singh v. The State* HAM 9/95

E *Filimoni Tikoisuva v. The State* HAM 12/96

*Martin v. Tauranga DC* [1995] 2 NZLR 419

*R v. B* [1996] 1 NZLR 385

*Rahey v. Queen* [1987] 33 CCC 289

Application for bail in the High Court.

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*A. Gates* for the Applicant

*Ms. E. Rice* for the Respondent

**SCOTT J:**

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On 3 February 1996 the applicant was charged with murder. He has remained in custody ever since. This is an application for bail which is opposed by the DPP.

Following his arrest the Applicant appeared in the Suva Magistrates' Court. On 28 May, after committal proceedings which extended over several days the Chief Magistrate committed him for trial in the High Court.

On 1 July the Applicant applied for bail. This application was heard by the Chief Justice on 2 August. Although the Chief Justice did not deliver a written Judgment it is not in issue that the application was rejected on the ground that the committal papers (commonly known as depositions) had not yet been received from the Suva Magistrates' Court.

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On 18 September the application for bail was renewed and came before me for hearing. Three affidavits were filed in support and I heard both counsel on 25 September, Miss Rice opposing. I also heard the Chief Registrar. In view of what I was told about the processing of committal papers by the Suva Magistrates' Court and given that I did not have the Magistrates' Court file before me I adjourned the application for bail part heard until 1 October. I ordered the Court to deliver "all files, papers, documents and other materials relating" to the matter to the Chief Registrar by no later than 27 September.

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On 27 September the file was produced. It contained four statements marked "Exhibits" but not signed, one medical report neither marked nor signed, one charge sheet, 26 pages of hand written notes and what appeared to be 4 loose bundles of depositions paginated 1 to 28, 29 to 37, 1 to 7 and 90 to 103. Some time later the same day I was also handed a 17 page document which appeared to be a first unchecked draft typed copy of the handwritten notes. I was advised on 1 October that there were 34 exhibits in all but of them there is, contrary to section 244 of the Criminal Procedure Code (Cap. 21), no sign. It appears that 51 pages of depositions may be missing; whether this is in fact the case and if so whether they can be located or replaced is at present not known. It appears that the evidence of two witnesses may not have been recorded at all.

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In support of his application Mr. Gates suggested that on careful analysis of the prosecution case the chances of the Applicant being convicted of murder were extremely small. If not acquitted entirely then the most likely result was a conviction for manslaughter. Given the circumstances of the killing the Applicant could expect no more than 18 months imprisonment which was the equivalent of the 12 months imprisonment which he would have served even if the trial was to take place at the earliest possible date which, it was agreed, was February 1997. In fact, Mr. Gates submitted, the prospects for trial within the foreseeable future were much more gloomy. Taking into account the state of the Magistrates' Court file there was no means of predicting when if at all the depositions would reach the High Court. Even when they did, they would have to take their place in the queue. Ahead of the Applicant were no less than 36 sets of depositions some dating back as far as 1987 which were still awaiting delivery to the High Court. In addition there were a further 26 other cases in which depositions had actually been received and which were awaiting fixture of trial. Records showed that it was not at all unknown for accused persons to remain on remand in custody for over 2 years. Unless granted bail the Applicant faced a similar prospect.

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In opposing bail Miss Rice conceded that the condition of the Magistrates' Court

A file was a cause for very considerable concern. She also accepted that the process of committal for trial from the Suva Magistrates' Court was subject to routine, inordinate and inexcusable delay. On the other hand the State did not accept Mr. Gates interpretation of the evidence against the Applicant and in particular did not agree that the State was unlikely to be able to prove the charge of murder. For this reason she did not accept that there was a valid comparison to be drawn between the 12 months imprisonment that it was known that the Applicant was sure to have to serve on remand and the sentence that was likely to be imposed upon him following conviction.

B At the conclusion of the hearing on 1 October I refused bail. I indicated that I was deeply concerned at the wider issues raised and that I would give my reasons later in full. I now do so.

C Over the last year or so there has been increasing disquiet at the inability of the Suva Magistrates' Court promptly and efficiently to process committals to the High Court. Judges have described the situation as appalling, unacceptable and intolerable (see Davendra Singh v. The State HAM 0009/95 and Filimoni Tikoisuva v. The State HAM0012/96), cartoonists have lampooned and editorials have thundered but the plain fact of the matter is that the situation now, as we approach the end of the legal year is really no better than it was 12 months ago.

D In these circumstances and in an effort to clarify the serious consequences of this continuing state of affairs I think I should explain how the committal procedure works and why it is necessary that the steps laid down by law be promptly followed.

E First, it should clearly be understood that we are here concerned with persons facing the most serious charges known to the criminal calendar such as murder and manslaughter which must by law be tried in the High Court. Although the trial itself is to take place in the High Court proceedings against a person charged with such a serious criminal offence must first take place in a Magistrates' Court. The purpose of these proceedings is to decide whether the person charged should stand trial. In most cases such proceedings are quite straightforward and perhaps

F take 30 minutes. The prosecution tenders a bundle of statements taken from witnesses and, with the consent of the accused an order is made committing him to the High Court.

Once the committal has been ordered the law requires that:-

G "the written charge (if any), the depositions, the statement of the accused person, the recognisances of the complainant and the witnesses, the recognisances of bail (if any) and any document or things which have been put in evidence *shall be transmitted without delay* by the committing court to the Chief Registrar of the High Court ..."

(Criminal Procedure Code - Section 244 - emphasis added).

Complying with this provision of the Criminal Procedure Code usually involves no more than typing out a copy of the Magistrates written notes and having them certified correct by the Magistrate who is also required to authenticate the depositions (witness statements) and any statement of the accused person. From my own experience as a Resident Magistrate I can say that preparing a certified record of all that is required by the Code need not take more than 2 hours at most while the checking and authenticating process might at most take another hour. In other words a reasonably efficiently run Magistrates' Court should have no difficulty whatever in complying with the committal procedures required by the Code. I am not aware that Magistrates' Courts have ever had this problem before. Almost a year ago Mr. Justice Pain suggested a method for simplifying and speeding up the transmission of committal papers still further (see Davendra Singh's case supra). So far as I am aware this excellent new system which would save a considerable amount of time and effort has still not been introduced.

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Given the straightforward and simple nature of the committal process I cannot understand and indeed do not know why the Suva Magistrates' Court is unable to comply with the requirements of the Criminal Procedure Code. Whether the problem is one of personnel or equipment or both is not for me to determine. What I do however wish to point out, so there can no longer be any doubt about it, are the consequences.

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The supreme law of Fiji is the Constitution 1990. Under section 11 (1):-

"If any person is charged with a criminal offence then, unless the charge is withdrawn, the case shall be given a fair hearing *within a reasonable time ...*"

(emphasis added).

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Every person has a constitutional right to be tried within a reasonable time. If he is not to be tried within a reasonable time he is entitled to require that he not be tried at all (see Martin v. Tauranga District Court [1995] 2 NZLR 419 and R. v. B [1996] 1 NZLR 385. In the words of Lamer J in Rahey v. Queen (1987) 33 CCC 289:-

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"If an accused has the constitutional right to be tried within a reasonable time he has the right not to be tried beyond that point in time and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest possible trial is permissible. To allow a trial to proceed after such a finding would be to participate in a further violation of the Charter."

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I will not attempt to lay down what constitutes "a reasonable time". It is clear from the authorities that such a concept may well vary from country to country

and from case to case and cannot be mathematically defined except by a statute. But the result is entirely clear and can be simply expressed:-

- A           A person facing the most serious charges will escape trial altogether if he is not brought to trial within a reasonable time.

The second section of the Constitution which falls for consideration is section 6 (5). This section provides that:-

- B           “if any person ... (who is detained) ... is not tried within reasonable time then ... he *shall be released* either unconditionally or upon reasonable conditions ...”  
(emphasis added)

- C           This means that an accused person awaiting trial has a constitutional entitlement to be granted bail if he cannot be tried within a reasonable time of his arrest. Once again I will not attempt to define exactly what is meant by “within a reasonable time” for the reasons already given. But once again the effect of this section of the Constitution can be simply and clearly expressed:-

- D           No matter how serious the charge a person faces he has a constitutional right to bail if he is not brought to trial within a reasonable time.

- E           This matter of delay in the transmittal of depositions is not merely an arcane debate centering on abstruse legal procedures. It is not even, in my view primarily a question of the rights of prisoners on remand. What it raises is a much more important question to which I believe the victims of crime, their relatives, the police and the general public are entitled to demand a satisfactory answer. It is this:

- F           Are we any longer prepared to accept persons charged with the most serious offences being released on bail into the community and even escaping trial altogether merely because of shortcomings in the Suva Magistrates' Court?

- G           Returning to the present case, the papers before me reveal the circumstances of the killing with which the Applicant is charged to have been particularly violent, harrowing and gruesome. While the responsibility for these events can only properly be determined at trial they do, in my view, dictate that very great caution must be exercised before any release on bail. Upon examination of the tables and statistics presented to me by the Chief Registrar it can be seen that in fact only 4 persons charged with murder and remanded in custody and ready for trial are awaiting trial. The remaining 22 persons awaiting trial following receipt of depositions are either on bail or facing less serious charges. In these circumstances

and on the assumption that the depositions in this case could be received within the next 2 weeks and on the assumption that priority for trial is given to those persons facing the most serious charges who are remanded in custody then there is a real prospect of a trial of the Applicant in March of next year. That prospect, in my view, amounts to a prospect that the Applicant can be tried "within a reasonable time". For these reasons I refused bail. I will however direct the Chief Registrar to return the file to the Chief Magistrate with the request that the completion of the preparation of the record of the committal proceedings be undertaken with the utmost despatch. I will also have this matter mentioned before me again on 8 November 1996 at 9.30 a.m. in Chambers in order to consider progress and with a view to fixing a date for trial.

*(Application dismissed.)*

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