IN THE SOLOMON ISLANDS

COURT OF APPEAL

Civil Case No. 67 of 1990

Connolly P
Savage JA
Goldsbrough JA

BETWEEN THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and ROLLAND KIMISI

Respondent

JUDGMENT OF THE COURT

Delivered the day of 1991.

This is an appeal by the Director of Public Prosecutions from the judgment of the High Court given in its civil jurisdiction on the 28th May 1990. The respondent had sought an order in the High Court under the Solomon Islands Constitution in respect of an alleged breach of the Constitution in relation to a criminal prosecution that had been commenced against him. The High Court had ordered that a verdict of acquittal be entered.

The respondent, Rolland Kimisi, had been employed from 1984 to 1987 by the National Insurance Company of New Zealand Ltd and had attained the position of Branch Supervisor in charge of the Solomon Islands branch. In September 1987 on his return to Honiara from annual leave he was given a letter of dismissal. His supervisor in the company informed him later in the day that money was missing and that the matter had been reported to the Police who would tell him what money was involved. However he was not approached and further enquiries that he made to his supervisor and to the General Manager in Port Moresby merely led to rebuffs. Two weeks later he approached the officer in charge of the CID at the Police Station in Honiara and was told by him that he knew nothing of the case. Two months later, being unemployed, he sent his family home which appears to be at Mono, Shortland, and 2 weeks later went there himself, still not having heard anything about the matter from anyone.

He heard nothing further about the matter for two years and then in November 1989, 27 months after his dismissal he was handed a copy of a number of charges laid against him. During those 2 years he had on a number of occasions been at Korovou,

where there is a Police Station, and had often stayed at Gizo with a police officer there. Police officers when on patrol in the area stayed at his house in Mono. Clearly there had been ample opportunity to notify him of developments in the matter and to interview him about it.

On the 24 January 1990 he eventually appeared before the Central Magistrates Court at Honiara, pleaded not guilty to the six charges presented and was bailed. Subsequently he sought and was granted, leave to apply to the High Court for a declaration that his right to a fair trial within a reasonable time under S.10 of the Constitution had been contravened. He sought also a writ to prohibit the Central Magistrates Court from trying the charges. That application was heard on the 3rd May 1990 and as already noted judgment was given in his favour on the 28th May 1990.

It is convenient at this point to set out the relevant provisions of the Constitution.

Section 10(1) -

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, that person shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law"

Section 18(1):-

"Subject to the provisions of subsection (6) of this section, if any person alleges that any of the provisions of section 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of the preceding subsection;

(b) to determine any question arising in the case of any person which is referred to it in pursuance of the next following subsection,

and may make such orders, issue such writs and give such directions, including the payment of compensation, as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution:

(3) .....

(4) Any person aggrieved by any determination of the High Court under this section may appeal therefrom to the Court of Appeal."

In the High Court the respondent had not contended that the hearing of the charges would not be fairly conducted by an independent and impartial court but he did contend, and indeed had by affidavit expressly deposed, that it was unfair to him at that late stage to be put in the position of having to defend himself in respect of matters that had occurred a considerable time before. The basis of this contention is concisely summarised by the Chief Justice as follows:-

"His case is simply expressed; these charges relate to six specific transactions amongst many others that were conducted by him during the course of his work. Had he been told in 1987 and particularly when he had access to the office files, he would have been able to recall these matters but, told of them for the first time 27 months later and relating to transactions the earliest of which took place 32 months before, it is virtually impossible to defend himself in court."

The learned Chief Justice in his judgment first considered the requirement contained in S.10 for a hearing within a reasonable time. A similar provision to S.10 appears in a number of constitutions and the Chief Justice referred to *Bell -v- DPP* (1986) LRC (Const.) 392 in which the Privy Council considered such a provision in the Constitution of Jamaica. Lord Templeman, in giving the opinion of the Board, said some guidance was provided by the judgments of the Supreme Court of the United States in *Barker -v- Wingo* 407 US 514 (1952) and he referred to the judgment of Powell J. where he pointed out that:-

".....the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate ....."

"A speedy trial" is the formula contained in the sixth amendment to the Constitution of the United States. Mr Justice Powell had then gone on to identify four factors which in his view the Court would assess in determining whether a particular defendant had been deprived of his right to a speedy trial. Those factors were the length of the delay, the reason for the delay, the defendant's assertion of his right and any prejudice to the defendant. Lord Templeman referred to the adoption of the four factors by McDonald J. sitting in the Alberta Queens Bench Court in *R. -v- Cameron* (1982) 6 WWR 270 and acknowledged the relevance and importance of the four factors and the desirability of applying the same or similar criteria to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings.

In the light of the foregoing the Chief Justice considered the four factors in relation to the facts of this case. He held that the delay was inordinate, the reasons for it were unexplained, the third factor was of limited relevance but to the extent that it did apply the respondent had done what he could and the fourth factor was particularly strong because the respondent could not really be expected to recall the incidents charged so long afterwards. If they were, as the respondent suggested by his plea, perfectly innocent and unremarkable transactions, there was no possibility he could now recall them. If guilty of course the position would be quite different but for an innocent person the prejudice was all the greater because of the innocence of the matter he had to recall.

The Director of Public Prosecutions had submitted that the respondent's application should be dismissed because he had been charged in November 1989 and the trial could have proceeded within a matter of weeks. It could thus scarcely be said that a hearing was not to be had within a reasonable time in terms of S.10. The learned Chief Justice accepted that in principle S.10 was to protect a person charged with a criminal offence from inordinate delays between charge and trial but went on to point out that the reasons that such a protection is needed is because of the problems that arise from any delay which starts to affect the issue from the moment of the alleged offence. He went on to discuss the effect of delay in the circumstances of this case and the prejudice it could cause. He concluded that, considering all four factors suggested by Mr Justice Powell, he was satisfied that this was a case where the respondent's rights under S.10 had been contravened. A little later at the end of his judgment, when considering the relief to be granted, he said:-

> *"I have already ruled that the evidence here would, if produced, be unfair to the accused because of the delay"*

Before us the learned Director of Public Prosecutions repeated his submission that the requirement of a hearing within a reasonable time meant within a reasonable time of a person being charged. Time did not run from the date the offence was committed but from the date of the charge. This, he submitted, was the plain meaning of the language used in S.10(1). He also relied upon the judgment of the Court of Appeal of Jamaica in *DPP -v- Michael Fuertado* (1981) 7 CLB 67, where the case is somewhat briefly reported. In Jamaica S.201(1) of the Constitution contains a provision very similar to S.10(1) of the Solomon Islands Constitution. The respondent in that case had been arrested on a number of charges of forgery, uttering and conspiracy. A draft indictment was not presented for a period of 22 months after his arrest though he had attended before the Resident Magistrates Court on some 16 occasions. At some stage the Resident Magistrate made a "No Order", the effect of which is not clear from the report but which appears to amount to some kind of dismissal of the charges though not so as to give a right to claim autrefois acquit. Later still a fresh indictment was presented which contained 33 counts, only 4 of which related to the respondent and of which only one was the same as one of the original counts. The full Court of the Supreme Court ordered that the respondent be unconditionally discharged by reason of unreasonable delay in breach of S.20(1). The Director of Public Prosecutions appealed. The Court of Appeal held that regard must be had to realities and if by the manoeuvre of laying new information the prosecution could delay the commencement of the computation as to reasonable time, the requirement in S.20(1) would have no practical meaning. The Court thus held that the time contemplated by the provision relates to the period between the date of arrest and the date of trial.

Mr Muria for the respondent submitted that S.10 should be given a wider interpretation than its actual words might suggest. He relied for this proposition upon the judgment of the Privy Council delivered by Lord Wilberforce in *Minister of Home Affairs -v- Fisher and Anor* [1979] 3 All E.R. 21. That case related to a question of the interpretation of certain provisions of the Bermuda Constitution Act 1967 of the U.K. Parliament in relation to the status in Bermuda of certain illegitimate children of the respondents. The relevant passage is at p.26.

> *"When therefore it becomes necessary to interpret the subsequent provisions of Chapter I (in this case II) the question must inevitably be asked whether the appellants' premise, fundamental to their argument, that these provisions are to be construed in a manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the*

particular question this could require the court to accept as a starting point the general presumption that 'child' means 'legitimate child' but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.

It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences. In their Lordships' opinion this must mean approaching the question what is meant by 'child' with an open mind."

Mr Muria submitted that S.10 should properly be interpreted with less rigidity and greater generosity in accord with the expressed view of the judicial committee than would be the case with ordinary legislation and that in this case, with its special facts, it should be interpreted to mean that the relevant period was the time from when the offence was alleged to have been committed and not the time when the accused was charged.

We think that the learned Director of Public Prosecutions' submission that the period to be considered is the period that starts when the person is charged is correct. In our view no matter how liberally one interprets the language of S.10(1) Mr Muria's interpretation is not tenable. As Lord Wilberforce said in the passage just cited respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. There is some scope, we think, to give a wide interpretation to the word "charged". Just as in *Minister of Home Affairs -v- Fisher and Anor* the word child was given an extended meaning so might the same be done with the word "charged". In our view that, in effect, was what was done by the Court of Appeal of Jamaica in *DPP -v- Michael Fuertado* referred to earlier where it was held that "charged" might be equated with "arrested". In our view to come within "charged"

it is sufficient if some formal step in the prosecution process is taken such as arrest, the laying of an information, the issue of a court summons or the making or presenting of a formal charge.

However the view just expressed of S.10 (1) does not conclude the matter in this case. We point out that S.10(1) is not concerned solely with ensuring a hearing of a charge within a reasonable time. There are other requirements contained in the section and in particular, so far as this case is concerned, there is the requirement that there shall be a fair hearing. There might well be, in some circumstances, a hearing within a reasonable time of a person being charged but which was not a fair hearing. In our view that is the position here. Clearly the learned Chief Justice was of the view that any hearing would not be fair because, as we have already noted, he expressly said that he had ruled that the evidence in the case, if produced, would be unfair to the accused because of the delay. The effects of the passage of time, in particular circumstances, between the date of an alleged offence and the hearing of the charge arising from it may mean that the trial cannot be fair even though the S.10(1) requirement of trial within a reasonable time of being charged is satisfied. As we have said, in the particular circumstances of this case, for the reasons the Chief Justice has given, that is the position here.

The circumstances here are exceptional. In most instances an accused person would not be faced with unfairness of the kind that exists here because of the passage of time. The law ordinarily permits a person to be charged with offences committed years before, and there may be many justifiable reasons for the delay. Obvious ones, for example, are that the very offence is not discovered for years or that a witness disappears. In this case, however, the learned Chief Justice has clearly determined that there could not, on the facts, be a fair trial and that therefore there would be a breach of S.10(1). In our view his decision is, therefore, correct though the route by which we reach that result may be slightly different to that taken by him. We add that, in any event, apart from S.10(1) the Court would have had an inherent jurisdiction to stay the criminal proceedings in the manner adopted in *Connelly v. DPP* (1964) AC 1254. In *Bell v. DPP* (supra) Lord Templeman said at p.399 when referring to a passage from the speech of Lord Devlin that he "was there speaking of the power of the Court to stay on second indictment if satisfied that its subject matter ought to have been included in the first. But similar reasoning applies to the power of the Court to prevent an oppressive trial after delay".

We add a final comment. This was a civil proceeding but the Chief Justice's order was to direct an entry of acquittal in a criminal prosecution in a magistrates court. No argument was addressed to us on the question of whether there was power under S.18(2) of the Constitution for the Court to make such an order. We have reservations upon the point. We do not propose, however, to explore the question for in the circumstances it has no practical importance. The Court could undoubtedly have made an appropriate declaration, granted an order prohibiting the Magistrates Court from hearing the charge or issued an order to the Magistrates Court to enter an acquittal.

The appeal is dismissed.

BY THE COURT.

(P. D. CONNOLLY P.)