Vanuatu

Public Prosecutor v Emelee and Others

[2005] VUCA 11

Court of Appeal
Lunabek CJ, Saksak and Treston JJ
2, 6 June 2005

Constitutional law – Fundamental rights – Right to fair trial – Right to fair hearing within reasonable time – Criminal proceedings – 18 months between laying of charges and trial – Application by accused for judicial review in that time – Consent of accused to three-month adjournment – Whether constituting waiver of right – Whether delay reasonable – Public interest considerations – Penal Code Act (Cap 135), s 15 – Constitution of the Republic of Vanuatu 1980, art 5(2).

In November 2003 criminal charges of conspiracy to defeat the course of justice were laid against the respondents, E, S, N, B and K. In May 2004 N and B filed an application for judicial review of the committal procedure in the magistrates court, which application was withdrawn in November 2004. In November 2004 counsel for E and S filed an application to strike out proceedings for want of prosecution. In February 2005 the appellant Public Prosecutor made an application for an adjournment with the consent of all parties. On that same day counsel for E and S asked for the application to strike out proceedings to be held over until the next hearing date. On 9 May 2005 the Public Prosecutor sought a further adjournment of one week and the respondents made an application to the Supreme Court to have the proceedings against them struck out for want of prosecution. The application was advanced on grounds that, pursuant to art 5(2) of the Constitution of the Republic of Vanuatu, the accused were entitled to a fair hearing within a reasonable time and they could not at that stage have such a hearing because the events alleged to have given rise to the charges had occurred 18 months before. It was contended that the defendants had at all times been ready to proceed with a hearing. It was argued that the judicial review application should not have prevented the case against the respondents proceeding in accordance with their constitutional rights. The judge in the Supreme Court discharged the respondents from the charges laid against them. The Public Prosecutor appealed to the Court of Appeal, submitting that the trial had been brought within a reasonable time, as part of the delay was due to the judicial review proceedings, and also that the respondents had waived their rights to a trial within a reasonable time by consenting to the adjournment in February 2005. The Public Prosecutor also argued that s 15 of the Penal Code Act (Cap 135) should have been considered, which allowed the prosecution five years in which to commence a prosecution for such offences as those with which the respondents were charged.

HELD: Appeal allowed.

The constitutional concept of the right to a fair hearing within a reasonable time meant the right to be tried without undue delay. It was the right of the respondents to review the committal procedure of the magistrates court. However, any delay in the ultimate trial, which in the instant case amounted to six months, could not be held against the prosecution. Although the respondents E and S were not parties to the application for review, they had taken no active steps during the course of that action to press for an earlier trial for themselves and had made no application for separate earlier trials. Counsel for E and S could have argued the application to strike out in February 2005 but he chose not to do so. Consequently, the period of approximately three months between February and May 2005 should not have been considered to be delay operating against the prosecution, as the defendants could have been said to have waived any question of delay by their application for adjournment or at least by their consent to such an adjournment and by the non-prosecution of the application to strike out at their own request. The application for adjournment by the prosecution on 9 May 2005 for one week was not unreasonable, first, because of the short time involved and, second, because of the difficulties that were clearly present in the office of the prosecution at that stage. The period of 18 months could not be said to be unreasonable and could, in fact, have been reduced to approximately nine months if the above periods were taken out of contention. That was certainly not an unreasonable time and would not infringe the constitutional right of the accused to a hearing within a reasonable time. The consideration of delay was not a mathematical calculation but had to be determined according to the particular facts of each case. The charges of conspiracy to defeat the course of justice were serious ones and the accused respondents were persons of some substance holding offices of significance. There was a legitimate public interest in public order in ensuring that such matters be dealt with appropriately by the court. There had to be a balance struck between consideration of human rights protection and the legitimate public interest in bringing offenders to account. The judge in the Supreme Court had given an entirely disproportionate response to the delay as alleged where there was no prejudice established. The appropriate balance clearly favoured the legitimate public interest because the delay generated by those other than the respondents was minimal and certainly not unreasonable. The accused respondents should therefore stand trial (see pp 86–88, below). *Martin v Tauranga District Court* [1995] 2 LRC 788 and *Moti v Public Prosecutor* (Criminal Case Appeal No 01 of 1999, unreported) applied.

Per curiam. Section 15 of the Penal Code Act is relevant only to when a prosecution must be commenced and irrelevant to a consideration of a fair hearing within a reasonable time as set out in art 5(2)(a) of the Constitution, because the reasonable time assessment must start whenever the charges are laid within the five-year-period (see p 86, below).

[*Editors' note*: Article 5 of the Constitution of the Republic of Vanuatu 1980, so far as material, is set out at p 85, below.

Section 15 of the Penal Code Act (Cap 135), so far as material, is set out at p 86, below.]

Cases referred to in judgment

Martin v Tauranga District Court [1995] 2 LRC 788, [1995] 2 NZLR 419, NZ CA
Moti v Public Prosecutor (Criminal Case Appeal No 01 of 1999, unreported), Vanuatu CA
R v Morin [1992] 1 SCR 771, 71 CCC (3d) 1, Can SC
Swanson v Public Prosecutor (Criminal Appeal No 6, unreported), Vanuatu CA

Legislation referred to in judgment

New Zealand
New Zealand Bill of Rights Act 1990

Vanuatu
Constitution of the Republic of Vanuatu 1980, arts 5–6
Constitutional Application Rules 2003, r 2.3(2)(a)
Penal Code Act (Cap 135), ss 15, 79

Appeal

The appellant, the Public Prosecutor, appealed against the decision of the Supreme Court (Bulu J) on 25 May 2005 discharging the respondents, Christopher Emelee, John Simbolo, John Less Napuati, Guy Bernard and Steven Kalsakau, from charges laid against them. The facts are set out in the judgment.

Mr Hillary Toa (Acting Public Prosecutor) for the appellant.
Mr Robert Sugden for the first and second respondents.
Mr Nigel Morrison for the third and fourth respondents.
The fifth respondent did not appear and was not represented.

6 June 2005. The following judgment was delivered.

LUNABEK CJ.

This is an appeal against the decision of the learned Supreme Court judge discharging the respondents from charges laid against them. Each of the above-named respondents was charged with conspiring to defeat the course of justice contrary to s 79 of the Penal Code Act (Cap 135).

In his written decision his Lordship said that the application before him was for an order that the proceedings against the accused be struck out for want of prosecution.

The application was advanced on grounds that, pursuant to art 5(2) of the Constitution of the Republic of Vanuatu, the accused were entitled to a fair hearing within a reasonable time and they could not at that stage have such a hearing because the events alleged to give rise to the charges had happened 18 months before. It was contended in the application that a preliminary hearing had not taken place until late February 2004 and that the results of that preliminary hearing were handed down on 6 April 2004. It was contended that the defendants had at all times been ready to proceed with a hearing but that had not occurred.

It was submitted that although an application for judicial review of the decision of the learned magistrate at the preliminary hearing was brought by two of the respondents that should not have prevented the case against the applicants proceeding in accordance with their constitutional rights. It was contended that the constitutional right to a hearing within a reasonable time embodied the rights of the accused to live their lives free from fear and anxiety and without having pending criminal charges hanging over their heads and free from harm to their reputation that all unresolved criminal charges caused.

It was further contended that their constitutional rights also protected the respondents from prejudice to their defence that was inevitably caused by delays as memories become dimmer and witnesses become unavailable.

The primary judge in the Supreme Court said that the crucial issue for determination was whether delay in having a trial up to the date of the application was in violation of the respondents' fundamental rights under art 5(2) that requires 'a fair hearing within a reasonable time'.

His Lordship referred to the submissions and authorities advanced by the applicant and to the submissions made by the prosecutor.

His Lordship undertook an analysis of what had occurred including the difficulties the Public Prosecutor's office had had prior to the hearing before him and said that, although the nature of the case was serious, it was not unduly complex.

His Lordship analysed the question of unreasonable delay and concluded that the delay in getting the matter to trial by some 17 or 18 months since the laying of charges was not reasonable and, accordingly, he discharged the accused.

An accurate chronology was set out by the learned Acting Public Prosecutor as follows, although in noting it we have reversed the date order for reasons of clarity and have added dates after 22 February 2004 to complete the narrative.

DATE	COURT	OUTCOME
28 Nov 2003	Kewei, Magistrate	Forgery charge adjourned to 03.12.03
3 Dec 2003	Magistrates Court (Boe)	Emelee first charged with conspiracy. Charge of forgery withdrawn.
11 Dec 2003	Magistrates Court (Boe)	Defendants other than Emelee first summonsed, case adjourned to 23.2.04 for preliminary inquiry.
23 February 2004	Magistrates Court (Boe)	Matter listed but magistrate not available, adjourned to 24.2.04 for mention.
24 February 2004	Magistrates Court (Boe)	Case adjourned to 01.3.04 for preliminary inquiry, BTC.

1 March 2004	Magistrates Court (Boe)	Preliminary inquiry commenced by tender of prosecution materials; adjourned to 08.3.04.
8 March 2004	Magistrates Court (Boe)	2.45 pm prosecution address concerning preliminary inquiry. Then counsel for Emelee (Sugden) addressed.
10 March 2004	Magistrates Court (Boe)	Case adjourned, as counsel for Kalsakau (Kalsakau) sick, to 12.3.04.
12 March 2004	Magistrates Court (Boe)	Counsel for Benard and Napuati addressed, Sugden addressed for Kalsakau in his counsel's absence, adjourned to 22.03.04 for prosecution reply.
22 March 2004	Magistrates Court (Boe)	Prosecution made an address in reply. Adjourned to 06.4.04
6 April 2004	Magistrates Court (Boe)	Committed for trial.
15 April 2004	Supreme Court (Lunabek CJ)	Bail variation concerning Emelee.
4 May 2004	Supreme Court (Bulu J)	Appeal by Bernard and Napuati dismissed with costs order of VT10,000 in favour of PPO (CCA13/04: JLN & GB–v–Boe & PP filed on 13.4.04). Criminal case adjourned to 18.5.04 at 10 am. BTC Judicial review filed by LJN and GB.
18 May 2004	Supreme Court (Treston J)	Adjourned to 12.07.04 as judge ill and claim for judicial review to be heard prior to trial. BTC
9 June 2004	Supreme Court (Bulu J)	Bail variation for CE. Attending a fisheries conference in Lima, Peru. (Allowed to travel and be absent from the country from periods 12.6.04 to 24.6.04.)

9 July 2004	Supreme Court (Bulu J)	Bail variation for CE. Attending a fisheries conference/workshop in Sapporro, Japan. Emelee bail varied to provide solely that he is to appear on the next occasion at court (26.7.04). Allowed to travel and be absent from country 11.7.04 to 21.7.04.
12 July 2004	Supreme Court (Bulu J)	Offender other than Emelee adjourned to 26.7.04 @ 8 am. Criminal case adjourned to 26.7.04.
14 October 2004	Supreme Court (Bulu J)	Morrison and Sugden attend to PPO and discuss JR. Advise that JR to be withdrawn and criminal case to proceed. Application for orders by consent of parties and signed by all parties.
03 Nov 2004	Supreme Court (Bulu J)	Sugden files application to strike out proceedings for want of prosecution.
04 Nov 2004	Supreme Court (Bulu J)	Sugden and Morrison present. No appearance by PP (including Kalsakau). JR discontinued with no orders as to costs (CC91/2004). Listed for pretrial conference on 13.12.04. Trial to commence on 21.2.05. Note: PPO affected by the COI and has suspended its appearances to deal with the COI.
13 Dec 2004	Supreme Court (Bulu J)	Conference. Morrison present. (Sugden and Kalsakau not present.) No appearance by PP. Trial fixed for 21.2.05. Application for striking out also adjourned to 21.2.05.

14 Dec 2004		Morrison advises PPO of the trial date and advises that 'unless the matter is ready to proceed on the listed date there will be joint applications from all defendants to have the matter struck out'. The letter was copied to Messrs Sugden and Kalsakau. PPO responded on 16.12.05 informing Mr Morrison that the prosecution will have all witnesses available.
22 February 2005	Supreme Court (Bulu J)	PP present. Sugden for CE and JS. Morrison for JLN and GB. Kalsakau unavailable due to Parliament session. (Ishmael Kalsakau advises by facsimile of his unavailability.) All defendants present except for Kalsakau. Defendants make application for adjournment. BTC In chambers: court adjourns case to 09.5.05 @ 9 am. Strike out application to be argued. PP is ready. All prosecution witnesses served with summons and forensic expert is in country.
22 February 2005	Supreme Court (Bulu J)	Emelee—bail variations on approaching prosecution witnesses, 4 pm.
9 May 2005	Supreme Court (Bulu J)	Application to strike out heard.
10 May 2005	Supreme Court (Bulu J)	Oral decision discharging accused.
25 May 2005	Supreme Court (Bulu J)	Written reasons for decision.

At the hearing in this court the respondents said they took no issue with the chronology.

It is clear that the adjournment sought by the prosecutor on 9 May 2005 was for one week only. The primary judge did not refer to this fact in his decision. It had been equally made clear that the strike out application would

be made on 9 May 2005, despite the application for adjournment on 22 February 2005 which all parties agreed had been made by consent.

In this court the Acting Public Prosecutor submitted that His Lordship's decision was outside the legitimate exercise of his discretion and that insufficient regard was paid to the public interest in ensuring that the charges were serious criminal offences against the state which should be brought to trial.

It was submitted that none of the delays prior to 9 May 2005 had been caused or occasioned by the Public Prosecutor who had been ready to proceed with the trial on 22 February 2005 and because of the large number of witnesses considerable time would be necessary to allocate a trial date and finding the time in the court calendar meant that it was inevitable that there would be some delay.

The learned Acting Public Prosecutor submitted that too much significance had been placed on presumed prejudice to the respondents and that the primary judge had failed to have regard to the proviso to art 5 of the Constitution that fundamental rights and freedoms of individuals are subject to respect for the rights and freedoms of others and to the legitimate public interest in, among other things, public order.

It was submitted that one of the major causes of the delay was the civil action taken by two of the respondents to review the committal procedure of the magistrates court and that none of the other respondents had raised any objection to the delay thereby caused and they could have sought a separate trial to avoid such delay. The adjournment sought by the prosecutor on 9 May 2005 was for one week only. It was submitted that there is no presumption of the law of Vanuatu that the respondents' right to a fair trial is prejudiced by dimming of memories over time and there was no violation of the respondents' presumption of innocence. It was submitted that the provisions of s 15 of the Penal Code Act (Cap 135) were not considered and that there was another misdirection of the learned trial judge when he failed to consider the merits of the case and the waiver of delay.

In this court, counsel for Napuati and Benard submitted that the trial on 9 May could not in any practical sense proceed and the concern was that the adjournment for one week could have had the effect of delaying the trial by considerably longer than that time because past history had revealed that a lead time of between 10 and 17 weeks was needed to obtain a three-week block of time for trial suitable to all parties.

Counsel submitted that even if the court found that a fair hearing would be available there remained the possibility of going beyond a reasonable time. Reference was made to the Canadian case of *R v Morin* [1992] 1 SCR 771 and to *Martin v Tauranga District Court* [1995] 2 LRC 788, both of which authorities were considered relevant to the context of Vanuatu by the Court of Appeal in *Swanson v Public Prosecutor* (Criminal Appeal No 6 of 1997, unreported) at 18.

It was submitted that although the question of length of delay should not be a mathematical or administrative formula, the length of delay in this matter was 18 months. Counsel conceded that a period of six months should be deducted from that time to recognise the application made by Napuati and

Benard for review of the magistrates' committal.

It was submitted that the reason for delay was within the Public Prosecutor's office and exacerbated by the prosecutor not appearing at a pre-trial conference on 13 December 2004 and by service and delivery of further witnesses statement directly before the listed trial date of 21 February 2005 which inevitably led to delay. Criticism was made of the former Public Prosecutor setting a trial date when he must have known of the likelihood that he might not be in the country by then, because his contract was ending. It was submitted that the Public Prosecutor had failed to properly brief any officer to take over the trial once he left. It was further submitted (at 7) that prejudice to the accused was not limited to a fair trial consideration and that, in accordance with the *Morin*:

> 'To have serious high profile charges hanging over one's head for more than four years with the ultimate spectre of a possible prison sentence is itself prejudicial. These considerations apply even more strongly to a person such as Seru who had occupied a prominent public position ... there may be stigmatization of the accused; loss of privacy; and stress and anxiety from a multitude of factors including possible disruption of family, social life and work, legal cost and uncertainty as to the outcome and sanction.'

It was submitted a question of reasonable time was a matter of statutory interpretation and application of the law to the facts and that the decisive factors here were the actions of the Public Prosecutor which tripped the balance in this case. It was submitted that the inactivity of the prosecution office had caused 'unreasonable delay' and the accused were entitled to the benefit of art 5(2) of the Constitution.

On behalf of Emelee and Simbolo it was submitted that they were not a party to the application for judicial review and were at all times ready and willing to proceed with their trial. It was their application filed on 3 November 2004 which ultimately resulted in the striking out of the case.

Counsel submitted on behalf of those respondents that there were certain criteria for the exercise of judicial discretion in the circumstances of this case and that the relevant period as to whether there had been delay was the time which elapsed from the date of the charge to the end of the trial (see *Martin v Tauranga District Court* [1995] 2 LRC 788, above). It was submitted that there had been between 17 and 18 months prior to the application for adjournment for one week by the prosecution on 9 May 2005 and that further consequential delay would inevitably follow until the end of the trial. It was submitted that the delay would have been beyond the one week until commencement of trial to fit the three-week trial, which might even take longer, into the calendars of the judge and counsel.

Counsel submitted that from an analysis of the cases the time of 18 months was too long and that individuals' rights should prevail over the legitimate public interest under the Constitution in the circumstances and that the more serious the case the speedier the trial should be.

Submissions were made as to certain erroneous factual assertions and it was

submitted that on an analysis of the primary judge's decision there was no improper exercise of the discretion.

It was submitted that s 15 of the Penal Code Act was not relevant and prejudice from the delay was presumptive as stated by the primary judge and that the facts spoke for themselves. It was submitted there was no waiver by the respondents Emelee and Simbolo as any waiver must be clear and unequivocal with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver would have on those rights (see *R v Morin* [1992] 1 SCR 771 per Sopinka J). It was submitted that the primary judge took into account all relevant factors and was aware of the history of the matter and that his decision was unassailable because delay, which would have been in excess of 18 months, was well beyond a reasonable time and that sheer administrative negligence by the prosecution had caused a significant amount of the delay.

The fundamental rights of persons within the Republic of Vanuatu are set out in art 5 of the Constitution as follows:

> *'Fundamental Rights and Freedoms of the individual*
>
> 5(1) The Republic of Vanuatu recognizes, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedom of the individual without discrimination on the grounds of race, place of origin, religious on traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health.
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> (a) life;
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> (b) liberty;
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> (c) security;
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> (d) protection of the law;
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> (e) freedom from inhuman treatment and forced labour;
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> (f) freedom of conscience and worship;
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> (g) freedom of expression;
>
> (h) freedom of assembly and association;
>
> (i) freedom of movement;
>
> (j) protection for the privacy of the home and other property and from unjust deprivation of property;
>
> (k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.
>
> (2) Protection of law shall include the following:—
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> (a) everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence;
>
> (b) everyone is presumed innocent until a court establishes his guilt according to law;

(c) everyone charged shall be informed promptly in a language he understands of the offence with which he is being charged;

(d) if an accused does not understand the language to be used in the proceedings he shall be provided with an interpreter though the proceedings;

(e) a person shall not be tried in his absence without his consent unless he makes it impossible for the court to proceed in his presence;

(f) no-one shall be convicted in respect of an act or omission which did not constitute an offence known to written or custom law at the time it was committed;

(g) no-one shall be punished with a greater penalty than that which exists at the time of the commission of the offence;

(h) no person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence with he could have been convicted at his trial.'

The limitation in criminal prosecutions is set out by s 15 of the Penal Code Act (Cap 135) and is as follows:

'No prosecution may be commenced against any person for any criminal offence upon the expiry of the following periods after the commission of such offence—

(a) in the case of offences punishable by imprisonment for more than 10 years—20 years.

(b) in the case of offences punishable by imprisonment for more than 3 months and not more than 10 years—5 years

(c) in the case of offences punishable by imprisonment for 3 months or less or by fine only—1 year.'

Charges under s 79 of the Penal Code Act have a maximum term of imprisonment of seven years and thus the prosecution has five years in which to commence a prosecution.

We consider that s 15 is relevant only to when a prosecution must be commenced and irrelevant to a consideration of a fair hearing within a reasonable time as set out in art 5(2)(a) of the Constitution because the reasonable time assessment must start whenever the charges are laid within the five-year-period.

It was, of course, the right of the respondents Napuati and Benard to review the committal procedure of the magistrates court and they eventually discontinued that action after some six months. The Court of Appeal has confirmed that right in *Moti v Public Prosecutor* (Criminal Case Appeal No 01 of 1999, unreported). However, if they chose to do so any delay in the ultimate trial cannot be held against anyone else such as the prosecution. Mr Morrison accepted that the six months involved in that application should be taken out of any calculation of delay. Although the appellants Emelee and Simbolo were not parties to the application for review they took no active steps during the duration of that action to press for an earlier trial for themselves and made no application for separate earlier trials.

The constitutional concept of the right to a fair hearing within a reasonable time means the right to be tried without undue delay. We quote with

approval what Hardie Boys J said in *Martin v Tauranga District Court* [1995] 2 LRC 788 at 805:

> 'None the less I do not think that a person should be entitled to plead undue delay unless he or she has taken such earlier opportunity as there may have been to protest at the delay up to that point.'

And McKay J said in the same case (at 806):

> 'That is not to suggest that an accused person has any duty to bring himself to trial. It is merely saying that he must assert his right if he is to obtain a remedy for its infringement.'

Martin dealt with the New Zealand Bill of Rights Act 1990, which concerned 'the right to be tried without undue delay'.

As the learned Acting Public Prosecutor has submitted, the other respondents who did not apply to review the committal procedure could have applied to have the trial against them heard at an earlier date but they did not elect to do so. They also did not object to any earlier adjournments.

Furthermore, it is clear that the prosecution was ready to proceed with the trial on 22 February 2005 but the respondents made an application for adjournment, which was granted until May 2005. It seems that there had been some confusion as to the hearing date in February 2005, which had originally been set for 21 February, but a public holiday had been declared. Nevertheless the parties appeared on 22 February and the respondents asked the Public Prosecutor to apply for an adjournment to which they consented because they said they were taken by surprise and prejudiced by the fact that the prosecution had filed seven significant new sworn statements on the Friday before and, as a result, they could not proceed.

In addition, counsel for Emelee and Simbolo had a commitment for another eight-day trial on 23 February and he could not have proceeded anyway.

Furthermore, although the application to strike out the proceeding by Emelee and Simbolo has been filed on 3 November 2004, their counsel did not seek to have that matter argued on 22 February 2005 but asked for it to be stood over to the next hearing date. He could have argued it on that day and conceded during the hearing in this court that he would not have even pursued the application on 9 May 2005 had the prosecution not applied for the seven days adjournment of the trial.

Consequently, the period of approximately three months between February 2005 and May 2005 should not be considered to be delay operating against the prosecution as the defendants could be said to have waived any question of delay by their application for adjournment or at least by their consent to such an adjournment and by the non-prosecution of the application to strike out at their own request.

Furthermore, the application for adjournment by the prosecution on 9 May 2005 for one week was not unreasonable, first, because of the short time involved and, second, because of the difficulties that were clearly present in the office of the prosecution at that stage.

In all the circumstances, the period of 18 months referred to by the learned

judge could not be said to be unreasonable and could, in fact, be reduced to approximately nine months if the above periods were taken out of contention. That is certainly not an unreasonable time and would not infringe the constitutional right of the accused to a hearing within a reasonable time. The consideration of delay is not a mathematical calculation but must be determined on a consideration of the particular facts of each case.

The charges of conspiracy to defeat the course of justice are serious ones and it seems that the accused are persons of some substance holding offices of significance. It is our view that there is a legitimate public interest in public order in ensuring that such matters against such individuals are dealt with appropriately by the court. There must be a balance struck between consideration of human rights protection and the legitimate public interest in bringing offenders to account. The judge, in discharging the respondents, gave an entirely disproportionate response to the delay as alleged where there was no prejudice established, to which we shall shortly refer. In the instant case the appropriate balance clearly favoured the legitimate public interest because the delay generated by those other than the respondents was minimal and certainly not unreasonable.

Unfortunately, the learned Supreme Court Judge exercised his discretion on a wrong basis and the delay to which he referred was either caused by or contributed to or acquiesced in by the respondents. We consider that his Lordship exercised his discretion on wrong principles and that the accused should stand trial.

We are also unanimously of the view that the original application to strike out was misconceived. The issue was an alleged breach of a fundamental right enshrined in the Constitution, namely art 5(2)(a), which provides for the right to a fair hearing within a reasonable time. Such a breach must be considered under the terms of art 6 of the Constitution, which provides:

> 'ENFORCEMENT OF FUNDAMENTAL RIGHTS
>
> (1) Anyone who considers that any of the rights guarantees to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.
>
> (2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right.'

The application must be formulated and heard in terms of the Constitutional Application Rules 2003, which require a sworn statement by the applicant under r 2.3(2)(a). No such document was ever filed in this case and consequently there was no evidence of any other detrimental or prejudicial effects to the respondents other than the delay complained about. This must be the process to be followed in future cases where there are questions of breaches of constitutional rights raised.

Accordingly, the appeal is allowed and the charges are reinstated and the accused will now stand trial on the charges against them before the primary judge as soon as possible.

We make no order as to costs.