Vanuatu

Public Prosecutor v Benard and Others

[2005] VUSC 61

Supreme Court

Bulu J

1 May 2005

Constitutional law – Fundamental rights – Right to fair trial – Right to trial within reasonable time – Lapse of 17–18 months between charges and criminal trial – Whether unreasonable delay – Whether prejudicial to accused – Whether affecting right to fair trial – Penal Code (Cap 135) – Constitution of the Republic of Vanuatu 1980, art 5(2) – Constitution of Fiji (as amended), s 29(3).

The applicants, defendants in criminal proceedings, had been charged in November and December 2003 with offences under the Penal Code Act. In January 2004 the Office of the Public Prosecutor acknowledged that it would need outside assistance in the prosecution. After a preliminary inquiry in February 2004 the case was committed in April 2004 for trial in the Supreme Court. Between May and November 2004 civil action was commenced and eventually discontinued challenging the committal. In December 2004 at the trial preparation conference all parties stated that they were ready for trial. In February 2005 the parties agreed in court that the trial would commence in May 2005. In April 2005 there was still a public prosecutor in the Office of the Public Prosecutor. In May 2005 the criminal trial had taken 17–18 months to come to court and the representative from the Office of the Public Prosecutor applied for a further adjournment due to the fact he was the only officer left in that department. The applicants applied to the Supreme Court for the charges laid against them to be discharged under art 5(2) of the Constitution, which required 'a fair hearing, within a reasonable time'. Further, the applicants submitted that their right to a fair hearing could not be guaranteed as memories faded with time and witnesses became unavailable.

HELD: Application granted. Defendants discharged.

The Office of the Public Prosecutor in its prosecutorial function (and other offices responsible for the administration of criminal justice) represented the public interest in ensuring that those who were charged with having committed criminal offences were tried before a court of law. That public interest was balanced with the fundamental right of the accused person under art 5(2) of the Constitution to a fair trial within a reasonable time. Article 5(2) was designed to ensure speedy trials of those charged with criminal offences. There had to be a balance between the criminal administration system and the rights of accused under art 5(2) of the Constitution. If the court struck out the instant matter it would affect the public view on the Office of the

Public Prosecutor and confidence in the criminal justice system. It was clear that no proper arrangements were put in place prior to the departure of the most senior officer of the Office of the Public Prosecutor to ensure that the trial commenced in May 2005 as agreed. The duty was on all institutions responsible for the administration of criminal justice to ensure that those charged with criminal offences received speedy trials. The case was not unduly complex. The delay could be summarised as due to two principal factors. First, the lapse of some four months after the laying of charges and committal to the Supreme Court. Second, the lapse of some further seven months as a consequence of the civil action. Prejudices in the delay were presumptive: one did not have to show actual prejudices to be entitled to relief under art 5(2)(a) of the Constitution. The delay by some 17 to 18 months without disposing of the charges was not a reasonable time. The approach to a determination whether the rights of the defendants under art 5(2)(a) of the Constitution had been infringed had to be by judicial determination, as opposed to the application of a mathematical or administrative formula. The question in the instant case was at what time the delay became unreasonable. The defendants had had the charges hanging over their heads for approximately 18 months and the likelihood of witnesses remembering events that occurred at that time with accuracy grew dimmer by the day. The defendants had been ready for trial for some time and the cause of the delay lay elsewhere and not with them. As such the applicants could not obtain a fair trial within a reasonable time. The applicants were therefore discharged of the charges laid against them (see pp 427–428, below). Dicta of Sopinka J in *R v Morin* [1992] 1 SCR 771 at 787 and *Seru v State* [2003] FJCA 26 applied.

Per curiam. Section 29(3) of the Fiji Constitution is similar to art 5(2) of the Vanuatu Constitution, providing that every person charged with an offence has the right to have the case determined within a reasonable time (see p 423, below). *Seru v State* [2003] FJCA 26 considered.

[*Editors' note*: Article 5 of the Constitution of the Republic of Vanuatu 1980, so far as material, is set out at pp 424–425, below.

Section 29 of the Constitution of Fiji (Constitution Amendment Act 1997), so far as material, provides: '... (3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time ...']

Cases referred to in judgment

Bell v DPP [1986] LRC (Const) 392, [1985] AC 937, Jam PC

R v Morin [1992] 1 SCR 771, Can SC

Republic of Kiribati v Teoiaki [1993] 3 LRC 385, [1993] KIHC 1, Kiribati HC

Seru v State [2003] FJCA 26, Fiji CA

Swanson v Public Prosecutor [1998] VUCA 9, Vanuatu CA

Legislation referred to in judgment

Fiji

Constitution of Fiji (as amended), s 29(3)

Jamaica
Constitution of Jamaica 1962

Vanuatu
Constitution of the Republic of Vanuatu 1980, art 5
Penal Code (Cap 135), ss 79, 141

Application
The applicants, Guy Benard, John Simbolo, John Less Napuati, Steven Kalsakau and Christophe Emelee, applied for criminal charges against them under the Penal Code (Cap 135) to be struck out for want of prosecution under art 5(2)(a) of the Constitution as the trial had not been commenced within a reasonable period of time. The Office of the Public Prosecutor opposed the application. The facts are set out in the judgment.

Lent Tevi for the Public Prosecutor.
Mr Sugden for Christophe Emelee and John Simbolo.
Nigel Morrison for Napuati and Benard.
Mr Steven Kalsakau in person.

1 May 2005. The following judgment was delivered.

BULU J.
This is the decision in the application by Christophe Emelee and John Simbolo heard on 9 May 2005. The application was filed on 3 November 2004.

The applicants apply for an order that the proceedings against them be struck out for want of prosecution. Mr Morrison who appears for Messrs Napuati and Benard supports the application on behalf of his clients.

The defendant, Mr Steven Kalsakau, was not in court. The prosecution admitted that Mr Kalsakau had not been served personally with the summons for hearing on 9 May 2005. It is believed that Mr Kalsakau is currently outside the country.

It is not contested that if the application is granted, it will apply to all the defendants as they are all charged of conspiracy to defeat justice contrary to s 79 of the Penal Code Act (Cap 135) and the charges arise out of the same incident.

The grounds advanced for the application is as follows:

'(i) Pursuant to Article 5(2) of the Constitution of Vanuatu the Defendants are entitled to a fair hearing within a reasonable time and *they cannot now have a hearing within a reasonable time* in that:—

(a) The events alleged to give rise to this charge are alleged to have occurred at the end of October and beginning of November, 2003 (18 months) ago.

(b) The Public Prosecutor produced witness statements in early December 2003 but the Preliminary Inquiry was not held until late February.

(c) The result of the Preliminary Inquiry was handed down on 6 April, 2004 committing the Defendants for trial.

(d) The Defendants have at all times been ready to proceed with the hearing but it has still not occurred.

(e) A motion for Judicial Review of the decision of the Preliminary Inquiry was brought by two other Defendants but this should not have prevented the case against the Applicants being proceeded with in accordance with their Constitutional rights.

(f) The Defendants' Constitutional right to a hearing within a reasonable time embodies their right to live their lives free from the fear and anxiety of having pending criminal charges hanging over their heads and free from the harm to their reputations that an unresolved criminal charge causes.

(g) The said Constitutional right also protects the Defendants from the prejudice to their defence that is inevitably caused by delay as memories become dimmer and witnesses become unavailable.' (My emphasis.)

ISSUE

The crucial issue for determination in this application is whether the delay in having a trial up to this point in time, since the laying of charges on 15 November 2003 and on 3 and 5 December 2003, some 17 to 18 months ago, amounts to a violation of the defendants' fundamental rights under art 5(2) of the Constitution that requires 'a fair hearing, within a reasonable time'.

I set out below the chronology of events leading up to this application.

On 15 November 2003 Christophe Emelee was charged with the offence of uttering forged documents contrary to s 141 of the Penal Code Act (Cap 135).

On 3 December 2003 Mr Emelee was further charged with the offence of conspiracy to defeat justice contrary to s 79 of Penal Code Act (Cap 135).

On 5 December 2003 Guy Benard, John Simbolo, John Less Napuati and Steven Kalsakau were charged with the offence of conspiracy to defeat justice contrary to s 79 of the Penal Code Act (Cap 135).

A preliminary inquiry was conducted in the magistrate's court from 11 December 2003 to 6 April 2004. The magistrate's court found that a prima facie case is disclosed and committed the defendants to the Supreme Court for hearing on 4 May 2004.

On 3 May 2004 the claim for judicial review was registered with the court as Civil Case No 91 of 2004. Mr Napuati and Mr Benard sought an order of the court to quash the decision of the magistrate's court dated 6 April 2004 committing the claimants to stand trial in the Supreme Court.

On 4 May 2004 the criminal matter was adjourned to 12 July 2004.

On 12 July 2004 the matter was further adjourned to 26 July 2004.

On 12 May 2004 the amended claim for judicial review in Civil Case No 91 of 2004 was filed with the court.

On 26 July 2004 the criminal matter was adjourned pending the decision in the Civil Case No 91 of 2004.

On 15 September 2004 a conference in the civil matter was held. Parties were not ready and the matter was stood over to 13 December 2004.

On 18 October 2004 Mr Morrison wrote to the court advising the court that due to the delay in finalising the civil matter all parties to the proceedings have agreed to have the Civil Case 91 of 2004 be discontinued and struck out with no order as to costs.

On 4 November 2004 the court issued orders in the terms as agreed to by the parties that the Civil Case No 91 of 2004 is discontinued and struck out with no order as to costs. The court further issued directions for the trial in Criminal Case No 12 of 2004 to commence on 21 February 2005. That the application by Mr Emelee and Mr Simbolo be heard on that day also. That the pre-trial conference in Criminal Case No 12 of 2004 be heard at 9.00 am on 13 December 2004.

On 13 December 2004 no one appeared for the public prosecutor. Trial was again set for 21 February 2005.

The court did not sit on 21 February but sat on 22 February. There was some confusion as to whether the trial was still on or whether the sitting that day was to set a new trial date. The confusion arose due to the fact that 21 February was subsequently declared a public holiday by the head of state.

The defendants also wanted time to consider further witness statements that have been produced by the public prosecutor and served on the defendants a few days prior to 22 February. The court issued further directions for the trial to commence on 9 May and to run for three weeks.

On 9 May 2005 the prosecution advised the court that it further wants time to prepare for the trial. This is due to reorganisations in recent weeks in the Office of the Public Prosecutor. Mr Tevi, who is the only officer left in that office, had suddenly found himself in a position where there is no one else to run the case, but him.

It is now over 17 months ago since the defendants were charged. For Mr Emelee it is now over 18 months since the first charge of uttering forged documents was laid. The trial is yet to start.

THE APPLICANTS' CASE

The applicants, through their counsel, have urged this court that the delay has now reached a point in time where their rights under art 5(2) of the Constitution have been infringed. That is the right to a fair hearing within a reasonable time. Further, that their right to a fair hearing cannot be guaranteed as memories fade with time and witnesses become unavailable.

Mr Sugden, on behalf of the applicants, submitted that a delay of 12 months is not a reasonable period. In a case in New South Wales where a decision was not issued after the completion of a trial for over 12 moths, it was held that the delay of 12 months was not a reasonable period. Mr Sugden, however, could not name the case he was citing. I treat this simply as a submission that a delay of 12 months is not a reasonable time.

The court was further referred to *Swanson v Public Prosecutor* [1998] VUCA 9. In that case the verdict was not given for over eight months after the hearing. A motion to quash the indictment was filed under art 5(2) of the Constitution on the allegation of a failure to afford the appellant a trial within a reasonable time. At p 14 of the judgment their Lordships, in their discussions on the need for *speedy justice* said—

> 'BUT given the need to supply reasons, the verdict must still be delivered within a reasonable time after the conclusion of the hearing. Any accused is entitled to speedy justice and should not have to wait any longer than is absolutely necessary to learn of his/her fate.'

The court went on to say that a delay of two months in the circumstances of that case between conclusion of the hearing and verdict was the most that could have been reasonably justified. It went on say that—

> 'one must refrain from laying down a tariff, but a delay of 8 months was plainly excessive by any standard.'

Republic of Kiribati v Teoiaki [1993] 3 LRC 385 was also cited as authority that the delay prejudices the defendant's case as they are entitled to a fair trial. Mr Sugden further submitted that the delay in itself is prejudicial to the case of the defendants as memories become dimmer and witnesses become unavailable. And that it is not necessary to establish actual prejudice. Prejudice is presumed to exist. *Seru v State* (2003) FJCA 26 was cited as authority. The relevant parts of those judgments are set out below.

In *Republic of Kiribati v Teoiaki* [1993] 3 LRC 385 at 385 the High Court of Kiribati said:

> 'Although it was not in the public interest that persons charged with criminal offences went free without trial, an accused person was presumed innocent and was entitled to a fair trial. If an accused was unable to receive a fair trial through no fault of his own then he was entitled to an acquittal. In the present case it could be presumed that the applicants would be prejudiced by the delay in establishing their defences as the allegations in the charges concerned events going back a number of years which would have the result that the applicants, or any rate any witness, would be unable to recollect with accuracy what had really happened. Accordingly, the court would find that the applicants were unable to obtain a fair trial within a reasonable time and would therefore order that the charges against them be discharged.' (See headnote.)

In *Seru v State* (2003) FJCA 26 the Court of Appeal said:

> 'We take the view, however, that the delays are of an order where the presence of prejudice may be inferred. In any event we agree with Casey J (Martin at 430) that if prejudice or its absence is regarded as the dominating factor, the purpose behind s 29(3) of ensuring the speedy disposal of charges is deflected. Likewise *Bell v DPP* [1986] LRC (Const) 392, a Privy Council decision under the Jamaican Constitution, recognized the accused's right may be infringed notwithstanding he is unable to point to any specific prejudice.'

Section 29(3) of the Fiji Constitution is similar to our art 5(2) of the Constitution. It states that *every person charged with an offence has the right to have the case determined within a reasonable time.*

THE PROSECUTION'S CASE

Mr Tevi, on behalf of the public prosecutor, accepted that the matter has taken a long period of time. However, due to changes that have occurred

recently in the Office of the Public Prosecutor, he is applying for an adjournment to enable him to prepare for the trial.

Mr Tevi further acknowledged the position the defendants are facing. However, he submits that the defendants do not suffer any prejudices despite their circumstances. They are all employed and continue to be employed. *Teoiaki* is different. The applicant in that matter suffered prejudice. He could not find employment due to his situation. That is not the situation in the present case.

There must be a balance between the criminal administration system and the rights of accused under art 5(2) of the Constitution. If the court strikes this matter out it would affect the public view on the Office of the Public Prosecutor and confidence in the criminal justice system.

Mr Tevi went on to submit that 'reasonable time' should be given some meaning by this court. The meaning will differ on a case-by-case basis, due to the circumstances of each case and the local conditions of the offices responsible for the administration of the criminal justice system. That this again goes back to the issue of an effective administration system.

Mr Tevi referred the court to *Swanson* v *Public Prosecutor*, where the Court of Appeal held that the delay of eight months before a verdict was given was excessive. However, Mr Tevi referred the court to *Seru* v *State* [2003] FJCA CR, p 4, last paragraph, where the Court of Appeal of Fiji pointed out that the—

> 'interest which the constitutional rights are designed to protect as comprising 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. As to the latter, prompt trials enhanced the confidence of the public in the judicial system. Further, there was a societal interest in bringing to trial those accused of offending against the law.'

Mr Tevi concluded that to give meaning to 'reasonable period' the court must weigh the individual right as against society's to have the defendants tried to reach a decision whether to grant the application of the defendants.

THE LAW

The Constitution—art 5(1)–(2)

> '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 or 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 ... (*d*) *protection of the law* ...
>
> (2) Protection of the law shall include the following:—
>
> (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 guilty according to law ...' (My emphasis.)

Penal Code Act (Cap 135) ss 79 and 141

> 'CONSPIRACY TO DEFEAT JUSTICE
>
> No person shall—
>
> (a) conspire with any other person to accuse any person falsely of any offence or to do anything to obstruct, prevent, pervert, or to defeat the cause of justice;
>
> (b) in order to obstruct the due course of justice, dissuade, hinder or prevent any person lawfully bound to appear and give evidence as a witness from so appearing or giving evidence, or endeavour to do so; or
>
> (c) obstruct or in any way interfere with or knowing prevent the execution of any legal process civil or criminal.
>
> Penalty: Imprisonment for 7 years ...
>
> UTTERING FORGED DOCUMENTS
>
> 141. No person, knowing a document to be forged, shall—
>
> (a) use, deal with, or act upon it as if it were genuine;
>
> (b) cause any person to use, deal with, act upon it as if it were genuine.'

DISCUSSIONS

Road to trial since charges were laid

Christophe Emelee was charged with uttering forged documents contrary to s 141 of the Penal Code Act (Cap 135) on 15 November 2003. He was further charged with conspiracy to defeat justice contrary to s 79 of the Penal Code Act (Cap 135) on 3 December 2003. The defendants, Guy Bernard, John Simbolo, John Less Napuati and Steven Kalsakau, were charged with the offence of conspiracy to defeat justice contrary to s 79 of the Penal Code Act (Cap 135) on 5 December 2003. For Mr Emelee, in relation to the first charge, it is now approximately eighteen months since that charge was laid. In relation to all the defendants it is approximately seventeen months since the charges were laid.

The preliminary inquiry took over four months to complete (from 11 December 2003 to 6 April 2004, about four months).

Proceedings in Civil Case No 91 of 2004 commenced on 3 May 2004. Two of the defendants, Napuati and Bernard, sought orders of the court to quash the decision of the court below that committed them to stand trial in the Supreme Court. On 4 November 2004 Civil Case No 91 of 2004 was discontinued and struck out by consent of all parties. The reason for that was the concern at the delay in having the civil matter disposed of and the criminal matter get to trial. It was a clear statement of intent by all parties that the delays could be prejudicial to the case, particularly to the defendants in the criminal matter. And that it is in the best interest of everyone that the trial take place urgently. It took some seven months approximately to dispose of the Civil Case No 91 of 2004.

As at 13 December 2004 (the trial preparation conference) all parties were ready for trial. No one submitted or advised the court then that they were not

ready for trial. The trial was set down to commence on 21 February 2005 and to run for a period of three weeks. Due to some confusion as to whether a new date was to be set for trial as that date was subsequently declared a public holiday and more so because the public prosecutor had introduced further witness statements so close to that date, that the defendants had not had the time to consider and prepare any responses to them, that the trial was moved to 9 May 2005.

On 9 May 2005 the court sat. However, Mr Tevi, on behalf of the Office of the Public Prosecutor, applied to have the trial adjourned to another date as he was not ready to prosecute the case.

INSTITUTIONAL RESOURCES

As early as January 2004 the Office of the Public Prosecutor recognised that it would need outside assistance to prosecute the conspiracy case. In a letter dated 19 January 2004 the public prosecutor made it clear that the office would require outside assistance because—

> 'we became directly involved during the course of monitoring the prosecution against the two masters of the Taiwanese fishing boats without a licence.'

In early April of this year there was still a public prosecutor in the Office of the Public Prosecutor. The date and time set for trial in this matter was made on 13 December 2004. The recognition that outside assistance will be needed was made in January 2004. Why none was made is a matter for the Office of the Public Prosecutor.

On 22 February 2005, when the new trial date was set for 9 May 2005, the public prosecutor was in court and agreed this date with the other parties. The public prosecutor and the defendants were ready for trial on 9 May.

On 9 of May Mr Tevi informed the court basically that he picked up the file last Wednesday and tried to make some sense of it as he is the only officer left in the Office of the Public Prosecutor. This is a sad day indeed. It is clear that no proper arrangements were put in place prior to the departure of the most senior officer of the Office of the Public Prosecutor to ensure that the trial in this matter commenced on 9 May 2005, as agreed by all the parties in court on 22 February 2005. The duty is on all institutions responsible for the administration of criminal justice to ensure that those charged with a criminal offence have a speedy justice.

NATURE OF THE CASE

I turn now to the nature of the case. All the defendants were charged with the one and same offence, which is conspiracy to defeat justice. Besides Mr Emelee who was also charged with uttering false documents arising out of the same incident.

Briefly, in early November 2003, the masters of two foreign fishing vessels purportedly chartered by John Simbolo operating under the business name *'Sound Fishing'* were charged with having conducted fishing operations without a fishing licence. Simbolo's office was within the offices of the Tuna Fishing Company, a company run by Christophe Emelee. The two vessels had

fishing licences but those licences had not commenced operation at the time they were caught fishing in Vanuatu waters. It is alleged that the vessels had not been registered with the Vanuatu Maritime Authority. Christopher Emelee was at that time the Chairman of the VMA Board. John Less Napuati, Acting Commissioner of the VMA, had refused to supply police with requested information and would only do so on being summoned. Three days after the masters were charged two documents appeared. One was the second licence granting the vessels permission to conduct 'test fishing' during the period when they were caught. The second was a backdated letter from the Acting Commissioner of VMA granting the vessels temporary registration. In two separate meetings held previously concerning the activities of the vessels at which Mr Emelee, Simbolo and Napuati were present nothing was ever said about the existence of those documents.

It cannot be said, in my view, that this is an unduly complex case. The delay can be summarised as due to two principal factors: first the lapse of some four months since laying of charges and committal to the Supreme Court by the Magistrate Court. Secondly, lapse of some further seven months as a consequence of Civil Case No 91 of 2004.

No submissions were made or authorities on the issue whether any period should be waived in the calculation of the period of delay in having a trial. As such I make no comments.

No submissions were made as to the length of proceedings usually in cases of this nature. No data was introduced into the court to indicate current trends, if any. As such I cannot make any comparative assessment as to whether this has taken longer than usual.

PREJUDICE

Prejudices in the delay are presumptive. One need not show actual prejudices to be entitled to the relief under art 5(2)(a) of the Constitution, in my view. I agree with the view expressed by the Fiji Court of Appeal in *Seru v State*, where their Lordships said—

> 'we take the view, however, that the delays are of an order where the presence of prejudice may be inferred. In any event we agree with Casey J (Martin at 430) that if prejudice or its absence is regarded as the dominating factor, the purpose behind s 29(3) of ensuring the speedy disposal of charges is deflected.'

This, in my view, equally applies to art 5(2) of the Vanuatu Constitution. That provision was designed to ensure the speedy trial of those who are charged with an offence. To hold otherwise would have the effect echoed by the Fiji Court of Appeal. The delay by some 17 to 18 months without disposing of the charges, in my view, is not a reasonable time. I take into account the fact that activities from which were laid occurred in late October, early November of 2003.

At what point does the delay become unreasonable?

The approach to a determination whether the rights of the defendants under art 5(2)(a) of the Constitution have been infringed must be by a judicial

determination as opposed to an application of a mathematical or administrative formula. I agree with the dicta in *R v Morin* [1992] 1 SCR 771 at 787 where Sopinka J said:

> 'The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.'

(Article 5(2) of the Constitution does not itself provide any guideline as to the meaning of 'reasonable time'. As such the court needs to look to other aids to assist it to reach an opinion as to what is a 'reasonable time' and especially, in the circumstances of this case, whether the delay of some 17 to 18 months is excessive and therefore not a reasonable time.)

The question in this case is: at what point does the delay becomes unreasonable? In the case of Peter Swanson the Court of Appeal held that a delay of eight months in handing down the court's verdict after completion of the trial was excessive when considering a motion to have the matter struck out under art 5(2)(a). This is a matter that is yet to reach trial. The defendants have had the charges hanging over their heads for some 17 to 18 months now. It is now approximately 18 months and the likelihood of witnesses remembering events that occurred at that time with accuracy grows dimmer by the day. As such the applicants cannot obtain a fair trial within a reasonable time in my view.

The Office of the Public Prosecutor in its prosecutorial function (and other offices responsible for the administration of the criminal justice) represents the public interest in ensuring that those who are charged with having committed criminal offences do get tried before a court of law to determine their guilt according to law. That public interest is balanced with the fundamental right of the accused person under art 5(2) of the Constitution to have a fair trial within a reasonable time. Article 5(2) is designed to ensure speedy trials of those charged with criminal offences. The public interest, I repeat, is that those charged with criminal offences must be tried. Set against this is their fundamental right to a fair hearing within a reasonable time. That right includes the presumption of innocence until proved guilty before a court of law in accordance with the Constitution.

The application by the prosecution on 9 May 2005 for further adjournment to get ready for trial, in my view, has reached that point where the delay is breaching the rights of the defendants under art 5(2) of the Constitution. Why should the defendants continue to suffer the stigma of criminal charges hanging over their heads daily when the cause of the delay lies elsewhere and not with them? The applicants have been ready for trial for some time now.

CONCLUSION

In all the circumstances of this case, I have no doubt that the delay in getting this matter to trial by some 17 to 18 months is not a reasonable time. The application is granted. All the defendants are discharged of the charges laid against them.

Trinidad and Tobago

Jairam and Another v State

[2005] UKPC 21

Privy Council

Lord Rodger of Earlsferry, Lord Slynn of Hadley, Lord Hutton, Lord Walker of Gestingthorpe and Sir Andrew Leggatt

14 February, 11 May 2005

(1) Criminal evidence – Admissibility – Murder – Weapon – Gun used in murder – Evidence of accused having possession of a gun – Whether evidence increasing probability that accused killed deceased – Whether probative force of evidence sufficient to justify admission.

(2) Criminal procedure – Trial – Judge and jury – Summing up – Directions – Whether directions given by judge confusing and/or containing misdirection – Whether directions leading to substantial miscarriage of justice – Whether conviction should be quashed – Appropriate test – Relevant considerations – Supreme Court of Judicature Act, s 44(1).

(3) Criminal procedure – Appeal – Substitution of conviction – Appellant convicted of murder as accomplice – Court of Appeal substituting conviction of manslaughter – Whether such substitution valid – Whether jury must have been satisfied of facts proving manslaughter – Whether satisfied that shooting foreseeable by appellant – – Issue not raised at trial – Whether manslaughter conviction should be quashed – Supreme Court of Judicature Act, s 45(2).

On 4 April 1985 M was shot dead and his fiancé, C, was raped. C alleged that a white Datsun pick-up van had pulled up beside the vehicle that M and C were in, that the driver made them get out of the vehicle and, when joined by another man, shot M. C was then driven off with the two men who took her jewellery and raped her. The appellants, J and P, were arrested and tried for the murder of P. At trial Y gave evidence to the effect that in 1985 J had access to a Datsun pick-up van and that on one occasion Y had found a gun concealed in the van. Y stated that he had removed the gun from the van and the same evening J had told Y that the gun was his and taken it away in the van. The prosecution evidence against J was: (1) that C identified J as the murderer, (2) that C said that the murderer had emerged from a Datsun pick-up van, (3) that Inspector DM said that he had found certain items of jewellery in J's home, (4) that C identified them as items which had been taken from her on the night of the murder, (5) that Inspector DM said that, in his presence, J's wife said that he had given her the jewellery in April 1985, (6) that Inspector DM said that J admitted being present when M was killed, (7) that Inspector DM said that J had told him that he had driven the Datsun