IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

APPEAL NO. AAU0075 OF 2007

BETWEEN : **ABDUL AHMED ALI, UMA DUTT & ROSHNI DEVI**

Appellants/ Respondents

AND : **THE STATE**

Applicant/Respondent

Coram : Byrne J. A.
Pathik J. A.
Mataitoga J. A.

Counsel : Ms Asishna Prasad for the Applicant
W. Vosarogo for the 1st & 3rd Respondents
A. Sen for the 2nd Respondent

Date of Hearing : 6th February 2008
Date of Judgment: 14th April 2008

JUDGMENT OF THE COURT

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[1] On the 27th of July 2007 Shameem J. refused to grant a Stay of the prosecution of the three Respondents who appeared before her on a charge of Murder of one Rukhmani on the 18th of February 2001 in Labasa. The Respondents have appealed against Shameem J's Ruling. The history of the charges is set out in the first seven pages of Her Ladyship's Ruling and it reveals a sorry story of delays both by the State

in prosecuting the case, the Respondents in taking various procedural objections to the proceedings and of the inability of the authorities to allocate a Judge to hear the trial in Labasa. Some examples of the delays are worth noting. The Respondents/Appellants appeared in the Labasa Magistrates' Court on the 26th of February 2001 on the first call of the charges, and Shameem J. said in her Ruling that the trial was not likely to commence until October or November of 2007. The Respondents applied to the Judge to stay the trial on the ground of unconstitutional delay. The application were made by Motion and Affidavits.

[2] The Affidavit of the first Respondent stated that he was charged on the 24th of February 2001. He was then taken to the Labasa Hospital where he was admitted for twelve days. On the 6th of March 2001 he was taken to the Labasa Magistrates' Court and remanded in custody. He was released on bail on the 28th of November 2002. No trial date was set because the second Respondent requested an oral preliminary enquiry. He deposed that as a result of the delay his two alibi witnesses *"have moved on with their lives"* and that the delay was caused by the Prosecution. Further he and the third Respondent are now in a de-facto relationship and the third Respondent is expecting their third child. Finally, he said there would be prejudice to him in a joint trial because the other two Accused have incriminated him in their statements to the police. It should be noted here that 21 months elapsed between the time the first Respondent was charged and the date on which he was released on bail on the 28th of November 2002.

[3] The second Respondent stated that he was in custody from the 26th of February 2001 to the 28th of November 2002, a delay of 21 months also. He wanted to have an oral preliminary inquiry but was eventually *"forced to accept a paper inquiry to avoid delay"*. He complained about the delay

to the Human Rights Commission. In the seven years delay since the charge was filed, four of his alibi witnesses have died. These were witnesses he said who had seen him fishing on the high seas on the 18th of February 2001. He complains of prejudice as a result of the delay.

[4] The Affidavit of the third Respondent states that she was in custody from the time of her arrest, that she was charged with rape and murder, that she was released on bail on the 25th of November 2002 and that her trial was delayed because the 2nd Respondent had elected an oral preliminary inquiry. She claims that the cause of the delay was that of the prosecution and that the trial would be prejudicial to her because her co-accused have made confessions which incriminate her. She agrees that she and the first Respondent are now living in a de-facto relationship.

[5] In making their application to Shameem J., and in their submissions to this Court, the three Respondents say that their constitutional rights under Section 29(3) of the Constitution have been ignored. Section 29(3) provides that every person charged with an offence has the right to have the case determined within a reasonable time. They also claim that the High Court has an inherent discretion to stay proceedings on the ground of unreasonable delay and/or abuse of its process.

[6] The learned Judge then referred to the following cases in the Court of Appeal and the High Court:

1. **Apaitia Seru** -v- **The State** [2003] FCA AAU0041, 99S
2. **James Praneel Singh** -v- **The State** HAA132/04S,
3. **State** -v- **Visanti Makrava** Misc. Action 008/03,
4. **State** -v- **Waisake Ravutubanitu & Another** HAC007/1999L

5. **State -v- Ajipote Koroi & Peniasi Lee** HAC003 of 1999.

[7] In all these cases, the Courts applied a different test for pre-charge delay (in the investigative process) and for post-charge delay (systemic delay). For the former there must be evidence of prejudice to the Accused. For the latter, such prejudice can be presumed where the delay is unreasonable.

[8] The State in response submitted to Shameem J. that although the Court has inherent discretion to stay a prosecution, it should only be exercised in exceptional cases, and that this was not one of them. It was submitted that the Respondents had not demonstrated any specific prejudice and *"the established processes by the High Court to regulate the trial will alleviate or eliminate any prejudice to the Respondents on the risks of an unfair trial".*

[9] On page 5 of her Ruling, Shameem J. then lists various delays which occurred between the 11th of September 2001 and the 9th of October 2002 when the Prosecution asked for an adjournment. On the 14th of November 2002, the second Respondent was committed to the High Court for trial.

[10] On transfer to the High Court, the matter was adjourned to the 10th of February 2003. There is then no record of what occurred in 2003, but on the 25th of February 2004, the State had not filed any Information because it was deciding on the grant of immunity.

11] There were further delays until on the 28th of November 2005, the matter was called before the Chief Justice who ordered that the confessions

could not be read out in Court as they were prejudicial. He ordered the prosecution to edit them, and stayed the trial indefinitely until the interviews were edited. Counsel for the first Respondent withdrew and Legal Aid appeared for all Respondents.

[12] On the 23rd of March 2006, a hearing date was set for the 7th of November 2006 for ten days but no Judge was available in November, so a new trial date was set before Winter J. for the 2nd of April 2007. That trial date was later vacated by Winter J. and a new mention date set before Shameem J. on the 21st of May 2007. On that date counsel for the second Respondent informed her Ladyship that he would be making application to her.

[13] **The Law**

Shameem J. then states the relevant principles governing Stay on the ground of delay on pages 8 to 11 of her Ruling. We accept her statements as being good law. It is however desirable that we should quote the judgment of Lord Lane C. J. in the English Court of Appeal Decision of **Attorney-General's Reference (No. 1 of 1990)**. There the Court considered pre-charge delay of two years in the prosecution of a police officer charged with assault. The Attorney-General asked the Court of Appeal for its opinion on whether proceedings could be stayed on the ground of prejudice resulting from delay in the bringing of proceedings. Lord Lane C. J. said at p.176(f):

> ***"Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would only be a short time before the public, understandably, viewed the***

> *process with suspicion and mistrust. We respectfully adopt the reasoning of Brennan J. in Jago -v- District Court of New South Wales [1989] 168 CLR 23. In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a Stay can properly be imposed in the absence of any fault on the part of the complainant or Prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation of a Stay".*

[14] Then at paragraph (g) Lord Lane said :

> *"In answer to the second question posed by the Attorney-General, no Stay should be imposed unless the Defendant shows on a balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held, in other words that the continuance of the prosecution amounts to a misuse of the process of the Court".*

[15] At page 10 of her Judgment Her Ladyship asked herself these questions - How long is too long? And what are the relevant criteria for assessing reasonableness? She then quotes part of the Judgment of the Court of Appeal in **Shameem -v- The State** No. AAUOO96/05 where the Court considered a delay of 4 years before

the trial commenced on the 29th of January 2003. The passage reads:

> *"The right to have a criminal case determined in a reasonable time must be determined by reference to the right of the individual to a fair trial process leading to a just result. In considering any such application the court will consider whether the delay is such it is likely to prevent a fair trial. That will depend on various factors such as the length of delay, the reasons for the delay, the nature of the charge and the evidence to be called by either to a fair trial process leading to a just result. Whether considerable delay occurs in the trial itself, the effect of the court's ability properly to assess the evidence at the conclusion will also be a relevant factor. In some cases, the delay will be such that the court may consider it has reached the threshold at which it will be "presumptively prejudicial"; Apaitia Seru's case and Martin -v- Tauranga District Court [1995] 2 NZLR 419".*

[16] At page 11 of her Judgment she quoted part of the Court of Appeal Judgment in Shameem which referred with approval to the decision of the European Court of Human Rights in **Zimmerman**, and cited in particular paragraph 24 which is as follows:

> *"The reasonableness of the length of proceedings coming within the scope of Article 6(1) [of the European Convention of Human Rights] must be*

> ***assessed in each case according to the particular circumstances. The Court has to have regard, inter alia, to the complexity of the factual or legal issues raised in the case; to the conduct of the applicants and the competent authorities and to what was at stake for the former; in addition, only delays attributable to the State may justify a finding of failure to comply with the "reasonable time" requirement".***

[17] The question of Stay of a criminal trial was only recently re-considered by this Court in Miscellaneous Action No. 17 of 2007, Mohammed **Sharif Sahim (f/n Mohammed Janif) -v- The State** in a judgment delivered on the 25th of March 2008.

[18] It is unnecessary for us to refer to this case at this juncture because by a Notice of Motion dated 28th August 2007 the Applicant/Respondent seeks Orders that the Decision of Justice Shameem was interlocutory in nature and that consequently, by virtue of Section 3(3) of the Court of Appeal Act, Cap. 12, this Court has no jurisdiction to hear an appeal against an interlocutory decision. Section 3(3) of the Court of Appeal Act which was amended by Act No. 13 of 1998 reads as follows:

> ***"Appeals lie to the Court as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court".***

[19] Section 121 of the Constitution provides for a right of appeal from the High Court to the Court of Appeal but in accordance with such requirements as the Parliament prescribes. Parliament has prescribed the circumstances in which an appeal lies from the High Court to the Court of Appeal in Section 3(3). The Respondents however contend that this Section must be read subject to Section 29(3) of the Constitution. It is submitted by the Respondents that any application for constitutional redress, of which this is one, must have priority over any other legislation. The Respondents contend that their constitutional rights have been breached by the failure of those responsible to bring their case on for trial within a reasonable time.

[20] The question of what constitutes a final judgment has been considered often in the Courts both here and overseas. In the Ruling of Byrne J. A. in Criminal Appeal No. AAUOO99 of 2007, **Francis Bulewa Kean -v- The State**, many of these authorities were considered. Thus the then President of the Court Sir Moti Tikaram said at page 7 of his Decision in **Seru -v- The State** No. AAUOO41 of 1999 given on the 3rd of August 1999 that *"the problem of determining whether a Judgment, Decision or Order is final or not has bedeviled the Courts for decades".*

[21] In **Nata -v- The State** [2004] F.J.C.A. 39, the Court considered Section 21 of the Court of Appeal Act also. This provides for the rights of appeal in criminal cases on conviction and therefore no appeal lies unless there has been a conviction. In this case it is submitted that there has been no conviction so far, which is accepted by the parties, and so no appeal can be brought.

[22] In Nata the question raised for the Court was a judgment of Wilson J. in the High Court in which the Judge rejected a submission made on behalf of the Appellant that the crime of treason with which the Appellant had been charged, was not a crime known to the law of Fiji. The Court of Appeal held that the judgment of Wilson J. was not *'a final judgment'* and therefore no right of appeal laid to the Court.

[23] In **Seru -v- The State**, the trial Judge had refused an application for a permanent Stay of the charges against the Applicant on the ground of infringement of Section 29(1)(3) of the 1997 Constitution.

[24] Surman J. refused the application in a Ruling dated 17th July 1999.

[25] Sir Moti Tikaram accepted the submission by the Respondent that the decision of Surman J. was not *'a final judgment'*. He held that it was an interlocutory decision made in a criminal trial which had not yet run its full course. It is submitted by the Applicant here that this case is on all fours with the decision of Sir Moti Tikaram.

[26] In Osborne's Concise Law Dictionary 17th Edition the term *'interlocutory order'* is defined as follows:

> ***"While a final order determines the right of the parties an interlocutory order leaves something further to determine those rights".***

[27] Alverstone C. J. said in **Bozsom -v- Altrincham Urban District Council** 1903 1KB 547 and 548-549 **'It seems to me that the real test for determining this question ought to be this':**

> ***"Does the Judgment or Order, as made finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order".***

[28] In our Judgment the decision of Shameem J. is simply an intermediate step in the trial proper. It does not finally determine the rights of the Respondents. Certainly, the Constitution enjoins the hearing of trials both civil and criminal within a reasonable time but it is important to bear in mind that each case must depend on its own facts. In this case Shameem J. said at page 13 of her Ruling:

> ***"This is a case of great seriousness. Further, none of the delay (other than one in the Magistrates' Court) was caused by the Prosecution. It was not the Prosecution's fault that the Defence asked for an oral Preliminary Inquiry, that the Magistrates' Court could not accommodate such an inquiry, that the defence later changed its mind, that counsel for the second Accused withdrew, that there was no Judge in Labasa for criminal trials for almost 4 years, that counsel from the Legal Aid Commission shifted their position in relation to representing the Applicants, that defence counsel was not available in 2005 and 2006, and that the trial is not likely to proceed until October 2007. Defence counsel's***

> ***submission that the Prosecution was not ready for the Preliminary Inquiry is contradicted by the record. It was the Court which listed a hearing date on the 6th of March 2001 (only two weeks after the charges were laid) for the 10th of September to the 14th of September 2001. In these circumstances I do not consider that a Stay of proceedings will be justified".*** Nor does this Court.

[29] It is very easy for Accused persons, and we know from experience that a good many of them do so, to consider that theirs are the only rights involved in a criminal trial. This is not so. The public, represented by the State has an important right in seeing that justice is done both to accused persons and to the public represented by the State. As this Court said in paragraph 30 of its judgment in **Mohammed Sharif Shameem**:

> ***"It must be remembered that delay is often a strategy to avoid justice. The law on Stay must not make an abuse of the processes of the Courts, a successful strategy under the guise of a human rights shield".***

[30] For these reasons we grant the order sought in the Respondent's Notice of Motion and hold that no appeal lies to the Respondents/Appellant's from the Decision of Shameem J. There will be an order in these terms.

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Byrne J. A.

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Pathik J. A.

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Mataitoga J. A.

At Suva

14th April 2008

Solicitors:

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