APAITIA SERU and Anor v STATE

COURT OF APPEAL — APPELLATE JURISDICTRION

EICHELBAUM, GALLEN and SMELLIE JJA

6, 30 May 2003

[2003] FJCA 26

Criminal law — appeals — appeal against conviction — rights of the Accused — whether there was unreasonable delay in charging the Accused — whether the Appellants' rights under s 29(3) of the Constitution have been breached — whether their case has been disposed substantively.

Apaitia Seru being employed in the public service abused his authority of office in assisting one Anthony Frederick Stephens to obtain a loan of $980,000 from the National Bank of Fiji which prejudiced the rights of the National Bank of Fiji. Seru and Stephens were charged. The Appellants appealed to the High Court on the ground that their rights under s 29(3) of the Constitution Act 1997 had been infringed because of delays and that their case had not been disposed of substantively however the then president ruled that it is not within the jurisdiction of a single judge but to a Full Court. The trial proceeded without the appeals being heard.

Held — (1) The determination as to whether a right has been denied is not by 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 that cause delay. A judicial determination is made as to whether the period of delay is unreasonable.

(2) As to prejudice to the Accused, the presence of prejudice can be examined in the context of an actual rather than a projected trial. There was no evidence of actual prejudice like witnesses being dead or unavailable. The judge referred to the witnesses attempting to recall things that had happened "a significantly long time past" suggesting that there had been some difficulties in this regard. It is impossible to say to what extent the delay may have materially affected the ability of particular witnesses to recall relevant events or even influenced Seru's decision not to give evidence.

(3) The more serious the charge the greater the interests of the community in ensuring the case goes to trial. This is particularly relevant to the unusual charge brought against Seru. It follows that dismissing a case on this ground after an actual conviction is an even graver step. Assessors have made a finding and confirmed by a judge that the Accused are guilty of significant offences. In those circumstances, no court would set convictions aside lightly. The fact remains that s 29(3) is one of the fundamental rights of all citizens to have a charge disposed of within a reasonable time. If the court fails to acknowledge unreasonable delay when it occurs, the constitutional right will be violated.

(4) The delay which occurred between the charge and trial was unreasonable. The appeals must succeed on this ground alone. A particular feature of the delay is the time taken over the committal process but also on the total period involved between the date of charging and the conclusion of the trial.

Appeal allowed.

Cases referred to

Bell v Director of Public Prosecutions [1985] AC 937; *Martin v Tauranga District Court* [1995] 2 NZLR 419; *R v B* [1996] 1 NZLR 385; *R v Coghill* [1995] 3 NZLR 651; *R v Morin* (1992) CR (4th) 1; *R v McLean* [1928] NZLR 454; *R v O* [1999] 1 NZLR 347, cited.

R v Smith (1989) 52 CCC (3d) 97, considered.

The 1st Appellant appeared in person.

G. P. Shankar for the 2nd Appellant.

G. H. Allan and *N. Lajendra* for the Respondent.

Eichelbaum, Gallen and Smellie JJA.

Background

Following a joint trial before a judge and assessors in the High Court each Appellant was convicted of one count as follows:

ATTEMPT TO OBTAIN CREDIT BY FRAUD: Contrary to Sections 310(a) and 381 of the Penal, Cap. 17.

Particulars of Offence

ANTHONY FREDERICK STEPHENS on the 21st day of September 1992 at Suva in the Central Division, in incurring a debt of $980,000.00 to the National Bank of Fiji attempted to obtain credit of that amount from the said National Bank of Fiji by means of fraud, namely presenting a Deed of Settlement dated 17th September, 1992 to the National Bank of Fiji representing that the Deed was good and valid security.

ABUSE OF OFFICE: Contrary to section 111 of the Penal Code, Cap. 17.

Particulars of Offence

APAITIA SERU, between 28th August 1992 and 17th September 1992 at Suva in the Central Division, being a person employed in the Public Service to wit the Attorney General and Minister for Justice, did in abuse of the authority of his office, an arbitrary act, namely assisted one Anthony Frederick Stephens to obtain a loan of $980,000.00 from the National Bank of Fiji, which act was prejudicial to the rights of the National Bank of Fiji.

The charge against Seru was laid alternatively to one of aiding and abetting Stephens to attempt to obtain credit by fraud. On that charge, Seru was acquitted.

Having heard the appeals against the convictions, on 16 May 2003 we announced we would allow the appeals, quash the convictions and sentences, and not order a new trial. We stated we would give reasons later and this we now do.

The background to the case was that in 1988 Stephens was sentenced to 18 months' imprisonment after pleading guilty to a charge of possession of a pistol and ammunition when unlicensed. As a result of an error in the charge the High Court allowed an appeal against conviction, but meantime Stephens had spent some weeks in custody. In a civil action against the Attorney-General as nominal defendant, he claimed $30 million damages from the police. In a separate action, the Plaintiff claimed damages against the police in respect of an unrelated incident. It is unnecessary to go into the facts of that matter.

In 1992 Stephens and the Attorney-General signed a purported deed of settlement of the two cases. The document, dated 17 September 1992, provided for a cash payment of $980,000 to the Plaintiff as well as a number of other valuable benefits for him, for example, transfer of title to certain real property, and the discharge of mortgages. On the strength of the deed Stephens tried, in the event unsuccessfully, to obtain a loan of $980,000 from the National Bank of Fiji (NBF). In form, the proposed loan was to a company, Viti Properties Investments Ltd, of which Stephens was the chairman and majority shareholder. Soon afterwards the government denied liability under the deed, maintaining it was legally unenforceable. A Commission of Inquiry into the events surrounding the signing of the deed followed, and after the commission had reported, the Appellants were charged. In bare form, the following is a chronology of the course of events from then on:

30 November 1994	Charges laid
12 December 1994	First court appearance
1 February 1995	A paper preliminary inquiry before the Magistrates' Court
20 October 1995	The Magistrate requests further submissions
27 November 1995	Both Appellants committed for High Court trial
14 March 1997	DPP applies for mandamus to compel the Magistrates' Court to forward the depositions
29 April 1997	Depositions delivered
18 June 1997	Information filed
15 January 1998	First appearance of appellants in High Court
12 January 1999	High Court vacates allocated hearing date of 1 February 1999
12 July–27 September 1999	Trial

Prior to trial the Appellants applied to the High Court that the information be stayed, on the ground that their rights under s 29(3) of the Constitution (Amendment) Act 1997 (the Constitution) had been infringed. This provision states every person charged with an offence has the right to have the case determined within a reasonable time. The judge referred to the committal process as "plainly a very unsatisfactory state of affairs", and described the further delays in the High Court as "unfortunate", saying these were caused by a shortage of judges, delays to accommodate counsel, and the need to ensure the Accused had counsel of their choice. He said the administration of the case had not been a happy one, and that undoubtedly it should have been heard sooner. However, on a balancing of the rights of the Accused against the public interest, he decided the applications for stay should be dismissed. In summarising the case he made a point of saying the prosecution was not to blame for the delay, without however addressing the issue of systemic delay. When the Appellants appealed to this Court, the then President ruled it was not a matter within the jurisdiction of a single judge. He directed the appeals should be referred to a Full Court, but the trial proceeded without that happening. In the result those appeals seeking to overturn the refusal of the stay have not been heard.

Delay

On their conviction appeal both Appellants argued the delays were such as to breach s 29(3), and that the appeals ought to succeed on that ground if no other. While Seru listed the point among those raised by his notice of appeal, Stephens did not, but his counsel included it in his written submissions filed before the hearing in this court. Further, as noted, both Appellants had raised the issue pretrial, and their appeals against the ruling then given had not been disposed of substantively. The course of events has not prejudiced the State, and accordingly, in the orders we made on 16 May 2003, we gave Stephens leave to amend his notice of appeal to cover the delay ground.

Subject to the issue just discussed, the State did not deny the court had jurisdiction to consider the argument based on s 29(3). In the absence of argument we do not express a final opinion on the foundation of the jurisdiction, but the possibilities include regarding it as founded on the miscarriage of justice ground under s 23(1)(a) of the Court of Appeal Act (Cap 12); or the rationale may be that s 29(3) expands the statutory grounds of appeal. A leading decision in the

Supreme Court of Canada, *R v Morin* (1992) CR (4th) 1 dealt with a delay argument after trial and conviction; although the Appellant's contention failed, none of the judgments suggested the argument could not be raised at that stage. Likewise, in *R v Coghill* [1995] 3 NZLR 651, a Full Court of the New Zealand Court of Appeal dealt with a delay argument under the corresponding New Zealand legislation, on an appeal after trial. We consider it is open to an Appellant to raise the delay issue post trial, certainly in cases where, as here, the point has been taken pretrial, and an appeal against dismissal was lodged and remained extant. To what extent this court has jurisdiction to entertain such a ground post trial in different circumstances must remain to be decided in cases where that issue arises.

Next we note that subs (1) of s 29 provides that every person charged with an offence has the right to a fair trial before a court of law. Thus as stated in the leading New Zealand authority *Martin v Tauranga District Court* [1995] 2 NZLR 419 (again a decision of a Full Court) the right to a fair trial and the right to have any charge determined within a reasonable time are treated as distinct. See *Martin* at 420 per Cooke P, at 426 per Richardson J, and at 429 per Casey J. That a fair trial may be available notwithstanding the lapse of time does not exclude the possibility that the delay after charge is such that the prosecution ought to be stayed. See *Martin* at 430 per Casey J. This is emphasised by the many cases under the corresponding provisions in New Zealand where charges have been brought years after the event, most commonly alleged offences of a sexual nature where the complainant only felt able to report the matter to the authorities long afterwards. In many such instances applications to stay on grounds of breach of the fair trial right have been dismissed, notwithstanding delays of an order which, if occurring after the charge, undoubtedly would have led to the case being stayed. See for example *R v O* [1999] 1 NZLR 347 where 14 years elapsed between the last of the offending and the date of charge.

As to how long is unreasonable, *Martin* made the point (at 423) that delays approaching a certain threshold may be regarded as "presumptively prejudicial". Additionally, given sufficient information, appellate courts may be able to lay down guidelines indicating the point of time at which prosecutions may be regarded as "triggering inquiry"; and for this purpose prosecutions may be placed into broad categories, such as uncomplicated charges of lesser offences habitually dealt with in the district court, complex major fraud trials and so on. In the end however, except where the guideline has been breached by a sufficiently wide margin, the outcome will turn on the facts of the individual case. We are in the same position as the court in *Martin*, namely we do not have information that would enable us to issue guidelines. That will have to await another case, when of course the State must have opportunity to place information before the court on topics such as case-flow statistics and available resources. But even in the absence of guidelines (and we note in passing that in *R v B* [1996] 1 NZLR 385 the New Zealand Court of Appeal doubted whether the issuing of guidelines was properly a matter for "judicial legislation") a particular case may involve delay of such proportions that given the facts and the court's general experience based on other cases that have come before it, the court can say with confidence that the delay must be categorised as unreasonable.

What is reasonable or unreasonable, then, will depend on a number of factors individual to the particular case. In *R v Morin*, mentioned earlier, Sopinka J with the concurrence of three other members of the court described the interests which the constitutional right was 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 (and here there was a tension between the Accused's interests and those of the community) there was a societal interest in bringing to trial those Accused of offending against the law. Then, in a passage adopted by two members of the court in *Martin*, Sopinka J continued:

> 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. As I noted in Smith [*R v Smith* (1989) 52 CCC (3d) 97], "(i)t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" … While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:
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> 1. the length of the delay;
> 2. waiver of time periods;
> 3. the reasons for the delay, including
>   (a) inherent time requirements of the case;
>   (b) actions of the Accused;
>   (c) actions of the Crown;
>   (d) limits on institutional resources, and
>   (e) other reasons for delay, and
> 4. prejudice to the Accused. (12–13)

Sopinka J then said (at 13):

> The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in the light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial … The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused.

Section 11(b) of the Canadian Charter is in the same terms as s 29(3) of the Constitution, and we consider the principles enunciated in the passages quoted ought to be applied equally in Fiji. We do not regard the list of considerations set out by Sopinka J (at 12–13 of his judgment, quoted above) as necessarily exhaustive but under one heading or another it encompasses all the factors that may be regarded as relevant in the present case.

Some of the topics we can dispose of briefly. The chronology identifies the length of the delay, 4 years 10 months to the end of the trial. There was no waiver of time periods. As to the actions of the Accused and the State, in submissions to the High Court the State attributed some 7 months of the delay to actions of the defence. However, the trial judge, who was in the best position to assess the position, said it was not a case where blame was attributable to either side and we are content to adopt his conclusion, although as pointed out in *Morin* at 17–18, assignment of blame is not necessarily the issue. Here, basically the delays were systemic in nature. Actions of the defence (a decision to call counsel to give evidence, necessitating a change of trial counsel) in fact contributed some months, but in the overall timescale of this case, we do not regard that as a decisive factor.

We need to deal with the remaining items in greater detail. As to the inherent time requirements of the case, the case raised sensitive issues from a political point of view. Prominent figures, from the Prime Minister down, were involved. The charge against Seru was of a kind that would rarely come before the courts. And as the size of the record before this court demonstrates, the volume of evidentiary material was considerable. That said however it cannot be claimed the case was an unduly complex one. It is notable that except for some routine matters dealt with immediately before the trial commenced, there were no contested pretrial hearings, except the applications to stay which were dealt with immediately before trial. There is no indication that any inherent complexity of the case was responsible for the gross delay. Indeed the delay can be summarised as due to two principal factors; first the lapse of almost two-and-a-half years between the first court appearance and the date of delivery of the depositions, and second a delay of over 2 years from the first appearance of the Appellants in the High Court to the commencement of trial. Looming large was the time taken at the committal stage. We understood that from 1994 there was a Chief Registrar's circular requiring depositions to be transmitted within 7 weeks of the decision to commit, a period shortened to 28 days in 1996. These periods may be contrasted with the 17 months taken in the present cases.

We turn to limits on institutional resources. In the absence of the kind of detailed information that one would expect to be before the court in any subsequent guidelines case, we can only deal with this in generalities. Because the terms in which their respective constitutions confirm the right to be tried without unreasonable delay are to the same effect, in countries such as Canada, New Zealand or Fiji the basic issue is the same, in the sense that uniform questions need to be addressed. However, regard must be had to the background against which the particular case is set, that is the society in which the prosecution is proceeding. A highly sophisticated, wealthy country may reasonably demand higher standards of its public facilities, such as courts. This is not to disparage the public facilities available in Fiji, but plainly it would be impossible to think in terms of some absolute international standard for the case-flow of prosecutions. On the other hand it would be equally wrong for this court to take the attitude that the standard attained in the present prosecution, or any other, must be accepted because based on a court's experience (we are now speaking hypothetically rather than with reference to the case before us) what has been achieved is not greatly out of line with the average. Obviously, possible consequences of successful applications based on breach of s 29(c) include the allocation of greater resources to the courts, or energetic administrative steps to improve case-flow, overcome delays, and focus on the disposal of trials outstanding for unduly long periods. A whole change of culture may result, in that a standard of performance which previously was accepted or at least tolerated may come to be seen as unacceptable in the light of what the Constitution has laid down.

As to prejudice to the Accused, dealing with the delay issue post trial carries the feature that the presence of prejudice can be examined in the context of an actual rather than a projected trial. There was no evidence of actual prejudice, in the sense, for example, of witnesses being dead or unavailable. In his summing up the judge referred to the witnesses attempting to recall things that had happened "a significantly long time past" suggesting that there had been some difficulties in this regard. It is impossible to say to what extent the delay may have materially affected the ability of particular witnesses to recall relevant

events, or even influenced Seru's decision not to give evidence. 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 Director of Public Prosecutions* [1985] AC 937, a Privy Council decision under the Jamaican Constitution, recognised the Accused's rights may be infringed notwithstanding he is unable to point to any specific prejudice.

In any case, prejudice is not limited to fair trial considerations. Any defended prosecution necessarily takes time for its proper disposal but to have serious, high profile charges hanging over one's head for more than 4 years, with the ultimate spectre of a possible prison sentence, is in itself prejudicial. These considerations apply even more strongly to a person such as Seru who had occupied a prominent public position. As Lamer J said in Morin (at 33) there may be stigmatisation 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 costs, and uncertainty as to the outcome and sanction.

Against the background of our consideration of the relevant factors we come to the critical balancing exercise. A decision to stay a prosecution on the ground of delay is a serious matter. A stay clashes with the interests of the State, representing the general body of citizens, in bringing the case to justice. The more serious the charge the greater the interests of the community in ensuring the case goes to trial. This is particularly relevant to the unusual charge brought against Seru. It follows that dismissing a case on this ground after an actual conviction is an even graver step. Assessors have made a finding, confirmed by a judge, that the Accused are guilty of significant offences. In those circumstances no court would set convictions aside lightly. But the fact remains that this country has adopted s 29(3) thus confirming that one of the fundamental rights of all citizens is to have a charge disposed of within a reasonable time. If the court fails to acknowledge unreasonable delay when it occurs, the constitutional right will become a dead letter.

Looking at the sum of the relevant factors discussed above, we are driven to the conclusion that in the circumstances of this case, the delay which occurred between charge and trial was unreasonable. The appeals must succeed on this ground alone. A particular feature of the delay is the time taken over the committal process, but we rely also on the total period involved between the date of charging and the conclusion of the trial.

Other grounds of appeal

The notices of appeal raised a number of other grounds. We will deal with those we regard as significant, but relatively briefly, having regard to the conclusion we have already reached as to the outcome of the appeals.

Dealing first with Seru's appeal, the summing up did not refer at all to his defence. He was represented throughout, although at the concluding stage of the trial, his senior counsel was no longer present, junior counsel making the final address. In the absence of any transcript of the addresses we cannot say for certain what defences were raised. Further, the contents of an affidavit sworn by Seru in civil proceedings, which was before the court at his trial, circumscribed the range of possible defences open to him. It cannot be suggested however (and Mr Allan did not do so) that there was a total absence of available defences. Seru did not give evidence, but in the affidavit he took the position that he believed

Stephens would not attempt to enforce the deed against the government, and that he (Seru) was protecting the government by signing the deed.

Accepting that the Appellant's defence, whatever it was precisely, had not been put to the assessors Mr Allan responsibly said the State could only rely on the provisions (commonly referred to as the proviso) contained in s 22(6) of the Court of Appeal Act, to the effect that notwithstanding the court may be of the opinion that the point in question might be decided in favour of the Appellant, the court may dismiss the appeal if it considers no substantial miscarriage of justice has in fact occurred. As is well established the proviso is applied only where the court considers that had the error in question not occurred, without doubt the Appellant would still have been convicted. By itself, not putting the defence is a signal omission. In the present circumstances which included a failure to identify the evidence (both oral and documentary) which was applicable to each of the alternate charges faced by Seru, we cannot say that conviction would have resulted regardless. On this ground also Seru's conviction must be set aside.

Had the outcome of the appeal depended solely on the deficiencies in the summing up the court would have had to consider the question of a new trial. We would not have ordered the Appellant to be tried again. By now the delay has been increased by the time it has taken to bring the appeal on for hearing. The total delay from the date of charge is now eight-and-a-half years, without allowance for the further time that will elapse before a retrial could be arranged. Although the case was much more heavily dependant on written evidence than the average criminal trial, there was a significant quantity of oral evidence as well. But quite apart from the dimming of memories, the delay is such that it would be unfair and unjust to expose the Appellant to a new trial.

We turn to Mr Stephens's appeal. Of the several issues raised under grounds 1–3 the most significant related to the way the documentary evidence was treated during the trial. Substantial bundles of documents were introduced into the evidence, some of doubtful relevance. No objection was taken at the time, and it seems that some at least were introduced by consent, while others may have been put in by one or other of the Appellants. We were told some of the documents did not have exhibit notes, so even with further investigation, it is doubtful whether, in the case of some of the documents, these matters can be determined conclusively at this stage. In light of the conclusions we have reached, it will not be necessary to do so, although we are not to be taken as implying that either the trial judge or prosecuting counsel are relieved of responsibility for checking the admissibility of documents even in the absence of objection by the defence. What is clear is that unfortunately, the assessors received no sufficient assistance as to what use they could properly make of these documents, insufficient directions as to the issues to which they were relevant, and not enough guidance as to which of the Appellants might be affected by individual documents and in what way.

In fairness to the judge, he went to trouble to assist the assessors with the documentary evidence. He supplied them with a list of the documents to which he would refer in his summing up, and then wove references to these papers into his remarks about oral evidence. It would have been clear to the assessors that they could use the documents to follow a trail of events, to check the timing of particular happenings, and as confirmation or otherwise of recollections given by witnesses in oral evidence. Further, the judge gave an appropriate direction regarding the impermissible use of out of court statements by one Accused against the other.

Other documents however, some containing material damaging to the Appellants, were not mentioned at all. By way of example, among them were the judgments of the Supreme Court on civil proceedings brought by Stephens, seeking (unsuccessfully, in the event) a declaration that the deed was enforceable. These included statements the assessors might have regarded as bearing on the defences, such as that the compromise was "illegal", that the deed was "totally void", and that a question arose whether such a "colossal settlement" could possibly be in the interest of the public. These could be seen as statements of high authority seemingly answering or at least relevant to one of the issues in the case. Another example was an opinion given by the then Solicitor-General. While certainly relevant to the case against Seru, its relevance to Stephens's guilt was marginal at best, and ought to have been explained to the assessors. We refer also the judgment of the High Court quashing Stephens's conviction, which listed his previous convictions and prison sentences. The two latter documents, it has to be said, were admitted with Stephens's consent.

Often, especially in a single Accused case, the proper relevance of a document will be obvious. We are not to be taken as saying that the trial judge need explain the purpose and effect of every documentary exhibit, any more than the judge has to refer to each strand of oral evidence. But in a multi Accused case involving a number of documents, the subject is likely to require greater attention. Here the quantity of documentation was considerable, and some of the documents, such as the judgments already mentioned, may have struck the assessors as authoritative and important. In the circumstances there was a material non-direction in failure to direct the assessors on the points we have raised. Indeed a more general criticism of the summing up is that the judge did not assist the assessors by identifying which parts of the prosecution case related to each of the Appellants respectively.

Under grounds 6 and 8 Mr Shankar submitted the summing up did not make it clear there was no onus on the Appellant to prove anything, and that the judge failed explicitly to direct the assessors that the prosecution had to prove the Appellant did not act in good faith, or with honest and/or reasonable belief that he was entitled to act as he did. We agree there is some foundation for both these arguments, but having regard to our other decisions, it is unnecessary to express a final opinion on them.

Thus, our conclusion is that even apart from the issue of delay, the appeal succeeds on the other grounds discussed under the previous heading. It would not be appropriate to apply the proviso. And for the reasons given in dealing with Mr Seru's appeal, we would not order a new trial.

The information

Section 310(a) of the Penal Code (Cap 17) under which Mr Stephens was charged (with an attempt) provides that a person is guilty of a misdemeanour who:

> (a) In incurring any debt or liability obtains credit by any false pretence or by means of any other fraud …

During the appeal hearing Mr Shankar, basing himself on *R v McLean* [1928] NZLR 454 contended that to constitute an offence under this section, the offender had to obtain (or attempt to obtain) credit for himself personally. In fact, as seen the credit Stephens attempted to obtain from NBF was for one of his companies.

Discussion showed that at the least, the information could have been better worded, not only in this respect but in others. However, the *R v McLean* point was not referred to in the notice of appeal, nor, so far as we are aware, had issue been taken with the form of the information at any stage of proceedings. In the circumstances we do not propose to consider these points further. We note however that the New Zealand text Adams on Criminal Law (on line edition, para CA 247.08) states that *R v McLean* and other cases to similar effect are not compelling authority, and that it may be open to hold that credit in any transaction whereby the accused could be liable personally, whether severally [or] with others, is sufficient to come within the section. Such a view, in the opinion of the learned authors, would accord with both the words and the purpose of the section (which in New Zealand is in the same terms).

Formal orders

The formal orders announced on 16 May 2003 were:

Apaitia Seru

(1) Appeal allowed, conviction and sentence quashed.

(2) No order for new trial.

Anthony Frederick Stephens

(1) Leave to amend Notice of Appeal to add the following ground:

> That the information against the Appellant ought to have been stayed, and the conviction should now be set aside, on the ground that the charge has not been determined within a reasonable time, in breach of section 29(3) of the Constitution.

(2) Appeal allowed, conviction and sentence quashed.

(3) No order for new trial.

Appeal allowed.