MOHAMMED RIAZ SHAMEEM v STATE (AAU0096 of 2005)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, SCOTT and FORD JJA

20, 23 March 2007

Criminal law — adjournment — application to strike out charge — series of 30 adjournments — whether trial conducted was fair because of delay — Appellant did not cause the significant delay — Appellant had to repeatedly recount her experiences and be challenged on them in a public court to no purpose — magistrate neglected to record any reason for the majority of the adjournments — proceedings in Magistrates Court stayed — Constitution ss 29(1), 29(2), 29(3), 41(5) — Criminal Procedure Code as amended by the Criminal Procedure Code (Amendment) Act 1998 s 202 — Penal Code s 154(1).

The Appellant was charged with one count of indecent assault which was committed on 6 October 1999. He pleaded not guilty. There was a series of 30 adjournments before the Magistrates Court. There were 17 adjournments before the trial started on 29 January 2003, by which time more than 4 years had passed since the Appellant's first appearance on 22 October 1999. There were several adjournments made during the course of the trial until 3 February 2005. On that date, the Appellant sought to strike out the charge and for the question of the delay to be referred to the High Court under s 41(5) of the Constitution. The High Court refused to grant the Appellant's application to strike out the charge. The Appellant suggested that the appropriate order was a stay of the proceedings.

Held — (1) Where a person charged with a criminal offence had caused the delay by his own actions, the court would not easily be persuaded that it was unreasonable. However, where the delay was principally and overwhelmingly the result of a failure of the court to conduct the trial, the court would more readily accept that it was unreasonable. In this case, the Appellant did not cause the significant delay. The delays by the court and to a very much lesser extent the lawyers, meant that the Appellant attended the Magistrates Court more than 30 times. The effect on the Appellant's life in respect to court appearances over the past 6 years was hard to assess. Similarly, the complainant had court appearances on a number of occasions. She brought the case because she was seeking justice in what, if proved, was an embarrassing and unpleasant incident. She had to recount her experiences and be challenged on them in a public court to no purpose. Neither party could be satisfied that justice was done because no trial could be held which was fair. In this case, the magistrate simply neglected to record any reason for the majority of the adjournments. Even if the judge's conclusion was correct, it was hard to understand how he could have considered that a fair trial was possible.

(2) The right to have a criminal case determined in a reasonable time should 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 should consider whether the delay was likely to prevent a fair trial. The various factors to be considered were the length of the delay, the reasons for the delay, the nature of the charge and the evidence to be called by the parties. Where considerable delay occurred in the trial itself, the effect of the court's ability to properly assess the evidence would be a relevant factor.

(3) The appeal should be allowed and the order of the High Court set aside. The proceedings in the Magistrates Court are stayed and marked not to be resumed except with the leave of this court.

Appeal allowed.

Cases referred to

R v Horseferry Road Magistrates' Court; Ex parte Bennett [1994] 1 AC 42; [1993] 3 All ER 138; [1993] 3 WLR 90, applied.

Henry Ingivald v State [1996] 42 FLR 187; *Jonetani Rokoua v State* [2006] Crim App CAV 1/06; *Martin v Tauranga District Court* [1995] 2 NZLR 419; (1995) 12 CRNZ 509; 1 HRNZ 186; *Zimmerman and Steiner v Switzerland* [1983] ECHR 9; (1983) 6 EHRR 17, cited.

Apatia Seru and Anor v State AAU 0041&42/1999S; *Re Attorney-General's Reference (No 2 of 2001)* [2004] 2 AC 72; [2004] 1 All ER 1049; [2004] 2 WLR 1; [2003] UKHL 68, considered.

I. Khan for the Appellant

A. Prasad for the Respondent

[1] Ward P, Scott and Ford JJA. The Appellant was charged with one count of indecent assault contrary to s 154(1) of the Penal Code. The offence was alleged to have been committed on 6 October 1999 and he first appeared before the Nadi Magistrates' Court 22 October 1999. He pleaded not guilty.

[2] There followed a series of 30 adjournments before the Magistrates' Court. Seventeen of those were before the trial started on 29 January 2003, by which time more than 4 years had passed since the first appearance. The complainant and one police witness were called and the case was then adjourned to 12 February 2003 to enable the prosecution to summon a further witness. There is no record of any hearing on that date but the case then continued through three more adjournments until 20 August 2003 when the caution statement was tendered and bench warrants were issued for three prosecution witnesses. It was adjourned again to 24 November 2003 for hearing but, on that date, the DPP was absent and it was adjourned to 12 January 2005 to fix a hearing date.

[3] Up to this time all the appearances had been before the same magistrate but, by the next hearing, he had been transferred to Labasa. There followed seven more adjournments before two other magistrates until 3 February 2005 when the original magistrate was again present.

[4] On that date, counsel for the defence moved to have the charge struck out and for the question of the delay to be referred to the High Court under s 41(5) of the Constitution. The magistrate referred it to the High Court in Lautoka. By this time, it was 5 years and 3 months since the first appearance before the magistrate.

[5] It was first called in the High Court on 4 May 2005 but was not actually heard until 26 September 2005 and a decision delivered on 21 October 2005, 1 day short of 6 years since the first appearance in the courts. The delay in the High Court was the result, first, of difficulty in obtaining the record from the Magistrates' Court and then of requests by counsel for further time to file submissions.

[6] In his judgment the learned judge summarised the early history of the case and continued:

> The matter then has an appalling history which culminated in the learned magistrate on the 20 November 2002 stating in the court record "12 hearing dates was fixed to accommodate. Defence counsel always adjournment. Hearing to proceed". The record indicates that on that day the Director of Public Prosecutions did not have his witnesses available and accordingly an adjournment was granted. The record then shows "Court; 29/01/03 — hearing — final".

[7] The judge returns to the history up to the High Court reference and continues:

> In his affidavit in support of the application, the applicant says that an alleged key witness is deceased and that another key witness has migrated. No evidence is given as to the significance of these witnesses or why their evidence is material. I note from the court record that the offences (sic) are allegedly committed in private, when only the complainant and the applicant were present without more evidence being placed before the court, it is impossible to accept that the alleged key witnesses are in fact material to the proceedings.

[8] Having then referred to the decision of this court in *Apatia Seru and Anor v State* AAU 0041&42/1999S (*Seru*), the judge concluded:

> In circumstances of the present case, it is impossible not to have regard to the words of the learned magistrate in his record on the 20th November 2002 where he said:
>
> > 12 hearing dates was fixed to accommodate.
> > Defence counsel always adjournment. Hearing to proceed.
>
> I am of the opinion that from this and other matters, it is apparent that a tactic is developing to delay the prosecution in some instances. Regrettably, the actions of counsel in persistently seeking adjournments is being aided and abetted on many occasions by magistrates. It is absurd to accept that it takes 2 or more years for a matter to proceed to trial through the Magistrates' Court.
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> The Court had a duty to ensure that the interests of justice are met and as was said in *Seru*: "the more serious the charge the greater the interest of the community in ensuring that case goes to trial".
>
> The prosecution should remain ever vigilant to ensure that prosecutions proceed in a timely manner and that the provisions of the Constitution are met …
>
> In the circumstances of the matter before the court, I am of the opinion that the delays are in the main occasioned by the actions of the applicant and/or counsel and accordingly, it follows that I am of the opinion that it is inappropriate for the proceedings to be stayed, notwithstanding the delays that have been occasioned since the applicant first came before the Magistrates' Court. This view is fortified by the lack of evidence of any necessity to call the witnesses referred to in the applicant's affidavit.

[9] In the face of the facts set out in the record the judge had before him, that was a remarkable conclusion. A few moments perusal of the record shows there had been seven hearing dates fixed and then adjourned before the hearing on 20 November 2002. Of the previous seven, no reason for the failure to proceed with the hearing had been noted in respect of two, three showed the prosecution could not proceed (DPP sick; complainant absent; failure to make disclosures and three prosecution witnesses absent) and two where defence counsel was in the High Court. As far as defence counsel's absence is concerned, it is clear that, on one of the two occasions, Mr Khan for the defence had instructed other counsel to warn the court the day before the assigned date that Mr Khan's case in the High Court would overrun and, on both occasions, counsel attended the Magistrates' Court to explain the situation.

[10] Following the part-heard hearing on 20 November 2002, the record shows there were four more hearing dates set; on the last of which the case was referred to the High Court. In two there was no reason given, in one the DPP was sick and the other was 20 August 2003 where, as already mentioned, the caution statement was tendered and bench warrants issued for three absent prosecution witnesses.

[11] It only takes moments to see that the magistrate's note on 20 November 2002, upon which the judge placed such weight, was clearly highly inaccurate. We do not understand how the judge could have failed to realise that was the case but, by that failure, he led himself into serious error.

[12] This case shows a shocking failure of the system of trials in the Magistrate's Court and an equal failure to remedy it in the High Court.

[13] Subsections (1) and (3) of s 29 of the Constitution form part of the Bill of Rights and provide:

> 29. (1) Every person charged with an offence has the right to a fair trial before a court of law …
>
> (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.

[14] Where the principal reason for the delay is the fault of the Accused, even a lengthy delay might be accepted as reasonable. But that was all too obviously not the situation here. Time after time the magistrate simply adjourned the case for no stated reason. Such action is impossible to justify and the High Court should be aware of and enforce the provisions of s 202 of the Criminal Procedure Code as amended by the Criminal Procedure Code (Amendment) Act 1998. Subsection (1) provides:

> (1) During the hearing of any case, the magistrate must not normally allow any adjournment other than from day to day consecutively until the trial has reached its conclusion, unless for good cause, which is to be stated on the record.
>
> (2) For the purpose of subsection (1) good cause includes, but is not limited to, the reasonably excusable absence of a party or witness or of a party's legal practitioner.

[15] In the present case, the magistrate simply neglected to record any reason for the majority of the adjournments, suggesting the distinct possibility that he had none.

[16] Even if the judge's conclusion had been correct, it is hard to understand how he could have considered that a fair trial was possible. The trial started when the case was already more than 4 years old and was adjourned part-head for nearly 7 months more when a further statement was tendered in evidence. Any difficulties the magistrate would have had in recalling the evidence and demeanour and assessing the credibility of the witnesses at that hearing, however, faded into insignificance by the subsequent delay of 1 year and 4 months until the magistrate returned from Labasa to complete the hearing.

[17] The judge's decision not to grant a stay meant that the magistrate would have continued to hear the case. By then it was 9 months later still although the additional delay which resulted from the Appellant's application to the High Court was not a matter to be taken into account by the judge in assessing reasonableness.

[18] Counsel has referred the court to a number of cases to assist us in deciding whether this delay can be considered to be trial within a reasonable time. In the recent Supreme Court case of *Jonetani Rokoua v State* [2006] Crim App CAV 1/06 at [26] (*Rokoua*), the court dealt with a delay of 18 months from committal to trial:

> [26] The petitioner relied on *Zimmerman and Steiner v Switzerland* [1983] ECHR 9; (1983) 6 EHRR 17 (*Zimmerman*) where it was held that the European Convention places a duty on contracting parties, regardless of cost, "to organise their legal systems so as to allow the courts to comply with the requirements of Article 6(1)".
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> [27] The principle expressed in *Zimmerman's* case was based on a construction of the European Convention. Fiji, of course, is not party to that Convention. The

> Fiji Constitution must be construed in the context of all the factors that make up the country and the Fijian nation. Without being exhaustive, these include the history of Fiji, its geographical position, its size and resources, the fact it is a developing country and the makeup of its population. Fiji is not comparable to a Western European country such as Switzerland, and the Constitution is very different instrument to the European Convention. Whilst decisions construing the convention may in some instances aid in construing the Constitution, they can never do more than that.
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> [28] Section 29(3) of the Constitution expressly imports the criterion of reasonableness. Regard must be had, in construing the word "reasonableness", to the resources available in this country to the administration of justice. Otherwise the consequences may be chaotic and the harm to the general community incalculable.

[19] The opening words of s 6(1) of the European Convention incorporate most of the provisions of s 29(1), (2) and (3) of our Constitution:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …

[20] The Supreme Court in *Rokoua's* case points out that any determination by the court of what will or will not amount to unreasonable delay must take into account the problems of a small country with limited resources. However, we find it difficult to accept that those limitations should be used to allow a less than just disposition of an individual case. If that is what *Rokoua's* case is suggesting we cannot, with respect, accept it is a proper interpretation of the protection of s 29 of the Constitution.

[21] The rights under s 29 are personal to every person charged with a criminal offence. Where he has caused the delay by his own actions, the court will not easily be persuaded that it is unreasonable. However where, as is all too clearly the case in the present appeal, the delay is principally and overwhelmingly the result of a failure of the court to conduct the trial, the court will more readily accept it is unreasonable. Of course Fiji has limited resources but this was not the cause of this delay. It was suggested to us that the failure to bring the magistrate from Labasa any earlier was the result of lack of resources. There is no evidence to support that contention and we consider it highly improbable. Overall, the case follows a pattern, all too common in the Magistrates' Courts, where adjournments appear to be given far too easily and for no apparent proper reason.

[22] 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 that it is likely to prevent a fair trial. That will depend on various factors such as the length of the delay, the reasons for the delay, the nature of the charge and the evidence to be called by either side. Where 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. I some cases, the delay will be such that the court may consider it has reached the threshold at which it will be "presumptively prejudicial"; *Seru* and *Martin v Tauranga District Court* [1995] 2 NZLR 419; (1995) 12 CRNZ 509; 1 HRNZ 186.

[23] In *Zimmerman and Steiner v Switzerland* [1983] ECHR 9; (1983) 6 EHRR 17, an appeal in a civil matter, the European Court of Human Rights suggested at [24]:

> The reasonableness of the length of proceedings coming within the scope of Article 6(1) 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.

[24] The judge's order refusing the stay meant that a trial which only started 4 years after the offence was to resume after adjournments in the middle of the evidence of 7 months and 16 months. The judge did not suggest a trial de novo but it is inconceivable that the original magistrate could have carried on with the trial. We have been advised from the bar table that the magistrate has now left Fiji and so such a trial is the only possibility if we should dismiss the appeal.

[25] A further consideration is the effect of the delay on the Appellant's witnesses. We accept that it was reasonable for the judge to comment on the lack of explanation of the relevance of the defence witnesses who were stated no longer to be available but it was not open to him to conclude that it was impossible to accept that they were material to the case. In such a case, the defence would be wise to provide particulars to support its contention that they were material but it must be remembered that the defence is not obliged to reveal its evidence before calling it in a criminal trial. That meant that the judge should at the least have enquired why such information was not being provided.

[26] The appeal must be allowed and the order of the High Court set aside. The Appellant suggests that the appropriate order is for the case to be stayed. The Respondent suggests it may be appropriate to order a fresh trial; the evidence is not complex and it is in the public interest that such offences are tried.

[27] The remarks of Lord Oliver in *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 68; [1993] 3 All ER 138 at 156; [1993] 3 WLR 90 (*Bennett*) that:

> It is, of course, axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for the offence, he should not be tried at all. But is also axiomatic that there is a strong public interest in the prosecution and punishment of crime

have been accepted by the courts in Fiji; see *Henry Ingivald v State* [1996] 42 FLR 187 at 190 (*Ingivald*).

[28] In *Re Attorney-General's Reference (No 2 of 2001)* [2004] 2 AC 72; [2004] 1 All ER 1049; [2004] 2 WLR 1; [2003] UKHL 68; Lord Bingham, with whom the majority agreed, held that, in circumstances such as occurred in *Bennett's* case, the court must stay the proceedings. When dealing with delays caused by action or inaction of a public authority, there must be afforded such remedy as may be just and appropriate and continued, at [24]:

> The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgment of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances.

[29] It is frequently stated that delay defeats justice. Far too many cases are coming to the attention of this court where unacceptable delays have become almost the expected procedure, especially in the Magistrates' Courts. It is not a new problem. In *Ingivald's* case, Scott J referred to the "increasing disquiet" over the failure of the Suva Magistrates' Court to act promptly and efficiently and continued:

> Judges have described the situation as appalling, unacceptable and intolerable; cartoonists have lampooned and editorials have thundered but the plain fact of the matter is that the situation now … is really no better than it was 12 months ago.

[30] It would appear from this case and, it must be added, many others coming before this court from both the Magistrates' Courts and the High Court, that the situation is, if anything, worse now 10 years after *Ingivald's* case. In the present case the delays by the court and to a very much lesser extent the lawyers, meant the Appellant attended the Magistrates' Court more than 30 times. On 21 of those, he appeared with, and no doubt had to pay, a lawyer. The effect on his life of so many attendances over the 6 years this case has drifted through the courts is hard to assess.

Similarly the complainant has attended court on a number of occasions. She brought the case because she was seeking justice in what, if proved, was an embarrassing and unpleasant incident. She has had to recount her experiences and to be challenged on them in a public court to no purpose. Both worked, and possibly still work, in the same department of the public service and a conclusion in this case would, no doubt, have cleared the air.

[31] Instead no one can be satisfied that justice had been done because we do not now consider that any trial can be held which will be fair and no lesser remedy than a stay will be just.

[32] The appeal is allowed. The order of the High Court refusing the application for a stay is set aside. The proceedings in the Magistrates' Court are stayed and marked not to be resumed except with the leave of this court or, if it becomes relevant, of the Supreme Court.

Result

(1) The appeal is allowed.

Appeal allowed.