KIMISI -v- DIRECTOR OF PUBLIC PROSECUTIONS

In the High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 67 of 1990
Hearing: 3rd May 1990
Judgment: 28 May 1990

J. Muria for the Applicant
F. Mwanesalua, DPP in person

WARD CJ: From 1984 to 1987 the applicant in this case worked for the National Insurance Company starting as a claims clerk and reaching the position of Branch Supervisor in charge of the Solomon Islands branch.

Having taken his annual leave, he returned to Honiara in September 1987 but was met at the airport and given a letter of dismissal.

That afternoon he rang his supervisor, Graham Thorne, and was told that money was missing, the matter had been reported to the police and the police would tell him which specific sums were involved. Three days later he telephoned the General Manager in Port Moresby and was told to ask Mr Thorne again but, when that was done, he was rebuffed and told to stop telephoning.

Having heard nothing more for a two further weeks, the applicant approached the officer in charge of CID (Central) and was told he also knew nothing about the case. For a further two months, the applicant waited and eventually, being unemployed and unable any longer to keep his family in Honiara, he sent them home and followed himself two weeks later.

He heard nothing more until November 1989, two years later and 27 months after his dismissal. During all that time he could have been readily contacted and frequently stayed with the police or had police officers staying with him and, indeed, there has been no claim by the respondent that the applicant was not available. In November 1989 he was handed a copy of a number of a number of charges and the case eventually came for plea on 24th January 1990 when the applicant pleaded not guilty to all charges.

There are six charges of embezzlement and the offences are alleged to have occurred in March, May, June, July and August, 1987.

Having been granted leave, he now comes to this Court by notice of motion for a declaration that his right to a trial within a reasonable time under section 10 of the Constitution has been contravened. He seeks, also, a writ to prohibit the Central Magistrates Court from trying these charges. It is clear the Court has the power to hear this matter under section 18 of the Constitution and make such order as it considers appropriate.

Section 10(1) of the Constitution provides -

> *"If any person is charged with a criminal offence, then, unless the charge is withdrawn, that person shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."*

No suggestion is made by the applicant that the hearing would be anything but fairly conducted by an independent and impartial tribunal. His case is simply expressed; these charges relate to six specific transactions amongst many others that were conducted by him during the course of his work. Had he been told in 1987 and particularly when he had access to the office files, he would have been able to recall these matters but, told of them for the first time 27 months later and relating to transactions the earliest of which took place 32 months before, it is virtually impossible to defend himself in court.

The requirement that a trial should be heard within a reasonable time appears in a number of constitutions. A similar provision in the Constitution of Jamaica was considered by the Privy Council in the case of *Bell v. DPP & Another* (1986) LRC (Constitutional) 392 and Lord Templeman, giving the opinion of the Board, quoted Powell J of the United States Supreme Court in *Baker V. Wingo* 407 US 514 (1972) who commented -

> *"the right to a speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate".*

He then adopts four factors which Powell J suggested should be considered in deciding whether the accused had been denied the right to a "speedy trial" (the words used in the United States Constitution). Those four factors are length of delay, the reason for the delay, the defendant's assertion of his right and any prejudice to the defendant. The judgment in *Bell's* case also sets out some of the comments of Powell J and I do not repeat them here.

In considering the first factor, Powell J pointed out that the length of delay necessary to provoke an enquiry will depend on the circumstances of the case. In this case, the nature of the charges, as I have already explained, is such that the delay here must be considered inordinate.

The reasons for the delay have not been explained. The learned Director of Public Prosecutions tells the Court that the file reached his office for the first time in February 1989 and that since then it has proceeded with reasonable expedition. Why it took so long to reach him in the first place he is unable to explain but it is clear the police did not look at the necessary documents until after the Director of Public Prosecutions directed they should do so.

The third factor is of limited relevance in this case. Had the accused been charged earlier, he could have asserted his right to a quick trial. He tried but no charges were forthcoming.

However, the last factor of prejudice strongly supports the applicant's case. How can he really be expected to recall the incidents charged so long afterwards? If these were, as he suggests by his plea, perfectly innocent and unremarkable transactions, there is no possibility he could now recall them. Of course, if he is guilty, they may well remain in his mind etched by his guilty knowledge, but he is presumed to be innocent and how could an innocent man recall such matters? In fact, the prejudice to an innocent defendant is all the greater because of the innocence of the matters he has to recall.

The learned Director of Public Prosecutions is unmoved by such things. He asks the Court to reject this application because of the wording of section 10. That suggests that, when assessing whether the trial takes place within a reasonable time, the Court need only measure the time from the moment of charging the accused man. In this case, he was only charged in November 1989 and the trial could have proceeded only a few weeks later.

I accept that, in principle, section 10 is to protect a person charged from inordinate delays between charge and trial. In all the cases cited to the court the delay complained of followed the institution of charges. However, the reason such a protection is needed is because of the problems that arise from any delay not least of which is the increasing difficulty in recalling the events that will be experienced by prosecution and defence witnesses alike.

That factor starts to affect the issue from the moment of the alleged offence. Had this man been charged at that time, he could have clearly claimed undue prejudice by the delay. That would have been so even though he would probably have been interviewed and thus would, from an early stage, have known which incidents were being charged. In this case he was, by the inaction of the police, denied even that information and so the prejudice is far greater.

As was stated in *Bell's* case @ 399, it is not necessary for the applicant to prove specific prejudice. In this case it is clear the delay is of such a length that it is presumptively

prejudicial.

Considering all four factors suggested by Powell J, I am satisfied this is a case where the applicant's rights under section 10 have been contravened.

That being so, the Court is asked to make a prohibition order. This Court may make such orders, issue such writs and give such directions as it shall consider appropriate.

In this case, the applicant has had the threat of these charges over his head for a long time. He is entitled to some finality in the matter. In the case of *Connelly v. DPP* (1964) 2 All E.R. 401, it was suggested the proper course in a similar case was to mark the file not to be proceeded with without the leave of the court. That course was followed by Frost C.J. in *The State v. Peter Pinke (No.2)* (1977) PNGLR 141 but I feel it is not appropriate here as it leaves the matter unresolved.

Under section 10 the Court has a wide discretion. I bear in mind that, under section 202 of the Criminal Procedure Code, the accused is entitled to a final decision. Whilst marking the file will effectively conclude the matter as far as the Court is concerned it does not do so in reality for the accused. An order of prohibition will have a similar effect. This Court also has an inherent jurisdiction to prevent the reception of evidence that would be unfair. I have already ruled that the evidence here would, if produced, be unfair to the accused because of the delay. In those circumstances I conclude that the proper order is to acquit the applicant on all charges.

(F.G.R. Ward)
CHIEF JUSTICE