

**IN THE HIGH COURT
OF SOLOMON ISLANDS**

Civil Jurisdiction

<u>BETWEEN:</u>	CLEMENT BASE	First Claimant
<u>AND:</u>	JOSEPH DOUGLAS	Second Claimant
<u>AND:</u>	ALFRED KAEHUNA	Third Claimant
<u>AND:</u>	DIRECTOR OF PUBLIC PROSECUTIONS	First Defendant
<u>AND:</u>	ATTORNEY GENERAL	Second Defendant

Date of Hearing: 7 September 2010

Date of Decision: 10 September 2010

Mr. Tegavota for first claimant

Mr. Rano for second claimant

Mrs. Folaumoetui for defendants

**DECISION ON APPLICATION TO PERMANENTLY
STAY CRIMINAL PROCEEDINGS**

Cameron PJ:

Introduction:

- 1 Both the first claimant Clement Base and the second claimant Joseph Douglas ("the claimants") face criminal charges of official corruption, obtaining funds by false pretences, conversion of funds, and demanding property with menace.
- 2 The alleged offences occurred in 2002, 2003 and 2004, and all our denied by the claimants. No trial relating to the charges has yet taken place in the Magistrate's Court.
- 3 The claimants now seek to have the charges permanently stayed by the High Court under section 18 of the Constitution. The grounds for the application are an alleged breach of their rights

under section 10 of the Constitution to "a fair hearing within a reasonable time".

Background:

- 4 The charges relate to a period of time when the first claimant Clement Base was the Premier of the Western Province of Solomon Islands. He held this position from 2002 to 2005. Over this same period the second claimant Joseph Douglas was a consultant engaged by the Western Province, and as such worked closely with the Premier. During this period the claimants spent a considerable amount of time in Honiara, negotiating matters pertaining to the Western Province with the Solomon Islands Government pursuant to a memorandum of agreement signed in 2002. It appears that the charges relate to the activities of the claimants while in Honiara representing the Western Province.
- 5 According to the sworn statement of Clement Base, as early as late 2002 the claimants were approached by a member of the Police from the CID division and advised that they were under investigation for alleged misuse of funds. Clement Base also stated that the same officer from the Police approached the claimants in 2004 and advised that there was insufficient evidence following the investigation to lay charges.
- 6 Nevertheless, in late August 2005 official corruption and conversion charges were laid against the claimants (apparently then a total of 7 charges in the case of the first claimant Clement Base, and 3 charges in the case of the second claimant Joseph Douglas). The offending alleged by these charges was said to have occurred in 2002 and 2003.
- 7 Between the laying of the charges in late August 2005 and October 2007, there followed a series of court mentions of the matters, which will return to later. No hearing of the charges took place. Then in October 2007 there was an application to dismiss the charges in the Magistrate's Court based on delay. This was heard in November 2007, and a decision declining to dismiss the charges was issued on 3 December 2007.
- 8 Then on 6 December 2007 a further and additional 71 charges against the first claimant Clement Base were laid, alleging variously instances of the obtaining of funds by false pretences, conversion of funds, and demanding property with menace. Of these 71 offences, 11 were joint charges laid also against the second claimant Joseph Douglas. These 71 charges related to

alleged offending said to have occurred between various periods, including periods in 2002, 2003 and 2004.

Law:

- 9 The leading case in Solomon Islands relating to abuse of court process as a result of delay is the Court of Appeal decision in *Robu v. Regina* [2006] SBCA 14. The Court stated, para 15:

"15. It is well established and not disputed a trial judge may order a stay of proceedings either before or during trial provided an accused can show on balance of probabilities the delay complained of has resulted or will result in his suffering serious prejudice to the extent that he has not or will not receive a fair trial. In other words the continuation of the proceedings amount to an abuse of the process of the Court."

- 10 The Court in *Robu's* case stated that factors to be taken into account in determining whether a defendant has been afforded a fair hearing within a reasonable time included the length of the delay; the reason for the delay; the defendant's assertion of his rights; and any prejudice to the defence. I consider these in turn.

Length of Delay:

- 11 As to the delays between the alleged commission of offences and the laying of charges in August 2005, and then December 2007, I accept that the passage of time prior to a charge being laid can be a factor in assessing the reasonableness or otherwise of delay after a charge is laid. However, the relevant delay the subject of section 10 of the Constitution is that which occurs after a charge is laid.
- 12 Under that section the right to a fair trial within a reasonable time is a right given to an accused once a charge is laid. In this case, the first charges were laid in late August 2005. The delay in respect of those charges to date is some 5 years.
- 13 In respect of the charges laid on 6 December 2007, the delay is approaching 3 years.
- 14 Those delays, considered against the background of delays in laying the charges, do not by themselves mean that a continuation of the proceedings will constitute an abuse of process of the Court.

*Reasons for Delay:
August 2005 – December 2007*

- 15 I consider this in two parts, the first being the delay between the laying of the original charges in August 2005 and the decision in the Magistrate's Court dated 3 December 2007 not to dismiss the charges.
- 16 During that period of a little over two years, there were numerous mentions of the case in the Magistrate's Court. Counsel referred in detail to the sequence of events in the court over that period, and the reasons why no trial took place. To summarise, a trial date was identified by the Court on 6 occasions. In respect of three of those occasions (26 June 2006, 12 October 2006 and 7 May 2007), the prosecution was not in a position to proceed with the trial, for differing reasons. In respect of two further trial dates (23 August 2006 and 19 February 2007), the defence was unable to proceed because of the unavailability of defence counsel. In respect of the sixth trial date, allocated for 6 August 2007, it would appear that the prosecution were not in a position to proceed but neither was one of the defence counsel at the time (Mr. Ashley).
- 17 From the material it does not appear that the occasions upon which the prosecution was not in a position to proceed were as a result of a lack of diligence on its part. I note in this respect that at that time some 32 witnesses were proposed to be called for the prosecution, some of whom lived in the Western Province, and hence there were logistical difficulties associated with the case.
- 18 I am of the view that the delays over this period of a little over two years were caused or contributed to by both the prosecution and the defence, a conclusion which the learned Magistrate came to in his decision dated 5 December 2007, when he refused to dismiss the charges.

December 2007 – October 2009:

- 19 The second period I consider is the period from the laying of the 71 new charges (6 December 2007) until the filing in this Court on 8 October 2009 of the present application for a stay.
- 20 Once again, counsel referred in detail to the many Court mentions of the matter over this period. Significantly, once it became apparent that the decision of the learned Magistrate declining to dismiss the charges was not being appealed, all parties then

agreed to await the outcome of a potentially relevant Court of Appeal decision. That decision became available in June 2008, at and the Court then allocated a 3 week period for the trial, commencing 22 September 2008. The trial was not able to proceed on that date because of the unavailability of the counsel for Clement Base, that counsel being otherwise engaged on a land appeal matter in the Western Province.

21 Then at Court on 3 March 2009, when the Crown had been intending to seek a further trial date, the prosecution advised that it had received a letter from Clement Base's then counsel advising that she had withdrawn as his counsel due to non-payment of legal fees. When the matter next came to Court on 7 April 2009, the Crown sought and was allocated a 3 week trial date, commencing 13 July 2009. There was no objection to this from the defence, including the new counsel then appointed by Clement Base.

22 On the date for the trial of 13 July 2009, counsel for the second claimant Joseph Douglas informed the Court that for personal reasons he could no longer represent him. On that day the Court was made aware that Clement Base's counsel would be making an application to the High Court because of the delays. The present application was then filed on 8 October 2009.

23 It can be seen from this summary of events that the reason why the trial, scheduled for 22 September 2008 and then 13 July 2009, did not proceed was because of the unavailability of counsel for the defence. It is also clear that the prosecution was ready and willing to proceed with the trial on both occasions.

24 It is self-evident that the claimants cannot rely on delays caused or contributed to by their own actions (or the actions of their counsel) to support their claim of not being afforded a fair trial within a reasonable time.

Defendant's Assertion of their Rights:

25 The claimants first assertion of their rights was to apply to the Magistrate's Court in October 2007 for a dismissal of the charges. That was unsuccessful, and the decision was not appealed. A further 71 charges were laid following that decision, alleging offending over varying periods from 2002 to 2004. The claimants then acquiesced in the fixing of two trial dates, one in 2008 and the other in 2009, and the reason the trial did not proceed on either of those dates had nothing to do with the Crown. Despite

this, the current application was signalled to the Court on the very day (13 July 2009) that defence counsel for the second claimant Joseph Douglas effectively aborted the start of the trial. Thus the current application for a stay of the criminal charges is founded in part on the delay caused by the inability of the defence itself to proceed with the trial commencing 13 July 2009. To that extent the application is flawed.

Prejudice:

- 26 It is necessary to demonstrate serious prejudice as a result of delays, such that a fair trial can no longer take place (Robu's case). It is incumbent on the claimants to identify actual prejudice.
- 27 The claimants assert that with the lapse of time there are problems for them recalling matters and in identifying witnesses who can recall past events, and in gaining access to relevant documentation to prepare their defence. They point out that the administration led by Clement Base as Premier ended its term in about July 2005, following the dissolution of the Provincial Assembly, and that such dissolution triggered the end of Joseph Douglas' term as consultant. They claim that as they were not facing charges at that time, there was no reason for them to take steps while in office to locate records which would have been relevant to their defence. They assert that as they were no longer part of the administration when charged in August 2005, they lost the opportunity to gain access to the office records.
- 28 However, the evidence of the claimants simply generalises heads of potential prejudice, without actually identifying how that prejudice arises. For example, there is no evidence from the claimants identifying specific documents which would be relevant to the defence, specifying where those documents were last located, specifying the steps taken by them to gain access to those documents, and explaining why they are said to be not now available. The closest the claimants come to any such specificity is in Joseph Douglas' sworn statement of 11 May 2010, when he states that he used to have instruction notes to carry out tasks, and that he no longer has possession of such notes (paras 10 and 11 sworn statement 11 May 2000). This assertion, of course, fails dismally to identify actual prejudice said to have arisen by delay, let alone actual serious prejudice.
- 29 I make the point, too, that the delay is likely to operate to disadvantage the prosecution as much, if not more, than the

defence, because the onus of proof remains with the Crown.

Conclusion:

- 30 In the event, I am not satisfied that there has been a breach of section 10 of the Constitution, and therefore I decline to grant a stay of the criminal charges faced by the claimants.
- 31 Because the delays have in part been caused or contributed by the Crown, I decline to make any award as to costs.

BY THE COURT

**Justice IDR Cameron
Puisne Judge**