AUBERT, RAPHAEL V THE ATTORNEY GENERAL

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1995

Suit No. 97 of 1995

BETWEEN:

RAPHAEL AUBERT

Applicant

and

THE ATTORNEY GENERAL

Respondent

Mr. V. Gill for Applicant

Mr. E. Thomas and Mr. E. Walker for Respondent

1995: February 21;
March 3.

J U D G M E N T

MATTHEW J.

On the day before he was to plead to a charge of carnal knowledge of a female under 13 at the February Assizes which commenced on February 7, 1995, the Applicant gave notice of an originating motion under Section 8(1) of the Constitution asking for a declaration that his right under the section to a fair hearing within a reasonable time had been infringed.

In support of that motion he filed an affidavit on February 6, 1995. In that affidavit he stated that he was charged with the offence of carnal knowledge on September 9, 1991; that the preliminary inquiry in respect of the charge was concluded on April

15, 1992 and he was committed to stand trial at the next practical sitting of the Supreme court in its criminal jurisdiction; and that after 33 months had elapsed he was on January 30, 1995 or there about summoned to attend the 1995 February Assizes.

In paragraph 6 of his affidavit he alleges that the delay in hearing the matter constitutes a denial of justice to him and he is being seriously prejudiced in the presentation of his defence because of fading memories and the unavailability of witnesses who would have been available had the trial proceeded in the normal way.

The Respondent filed four affidavits in opposition. Errol D. Walker, Director of Public Prosecutions, filed a first affidavit on February 15, 1995. In that affidavit he deposed that the depositions relating to the Applicant were received at his office on January 19, 1995 for the first time and he preferred an indictment against the Applicant which was filed in the High Court of Justice on January 30, 1995.

In his supplementary affidavit filed on February 20, 1995 he deposed that the victim of the alleged crime, Olimpia Felicien, was 7 years old at the time of the alleged offence while the Applicant was then 52 years old. He stated that bail was fixed in the amount of $1,000 on the same day the Applicant was charged and bail has been continued up to the time of his trial.

Floreta Nicholas, Senior Magistrate, filed an affidavit on February 17, 1995. Only paragraph 3 is relevant and so I shall reproduce that in full -

> "*That as a result of the filing of suit 97 of 1995 . . . . . I carried out certain investigations at the District Court, Castries and that as a consequence of the said investigations and reports submitted to me I am satisfied that there was negligence or oversight on the part of a certain officer or officers at the District Court Office, Castries which resulted in the delay in the forwarding of the depositions relating to a charge against the said Raphael Aubert being forwarded to the Supreme Court Registry and thence to the Director of Public Prosecutions*".

The affidavit of Christine St. Val dated February 17, 1995 is even more pointing. She was a member of staff of the District Court and her affidavit indicates that a certain Ms. Wilson, acting Senior Executive Officer, wilfully disobeyed the instructions of the substantive holder of the post of Senior Executive Officer and the Senior Magistrate by not sending the depositions to the Registry and that it was early in January 1995 that the depositions relating to this case were found in a cabinet in which depositions are not usually kept.

If what St. Val says is correct that smacks of sabotage and in my days in the civil service would attract some disciplinary action.

On the day set down for the hearing of the motion, that is February 21, 1995 the Applicant filed an affidavit in reply. In that affidavit he deposed that through his solicitor he made several attempts since his committal to inquire as to the status of his case and his solicitor informed him that he had communicated to Inspector Hermingild Francis and that the Inspector said on at least three occasions that he would take up the matter with the Director of Public Prosecutions.

I would ask the question here that if the preliminary inquiry was concluded and he was committed to stand trial what role his solicitor could imagine that Inspector Francis could play? The matter was then out of his hands. Why couldn't the solicitor communicate with the Director of Public Prosecutions himself? They are both lawyers. Why does his solicitor need an intermediary to act between himself and the Director?

At the hearing learned Counsel for the Applicant submitted that the Applicant is alleging that his rights under Section 8(1) of the Constitution of Saint Lucia to a fair hearing within a reasonable time had been unfringed. He referred to Section 16. Counsel submitted that the facts were not in dispute and briefly they were that the Applicant was arrested and charged on September 9, 1991; the preliminary inquiry was completed on April 15, 1992; and some 33 months later on February 2, 1995 he was summoned to attend the Assizes of February 7, 1995. Counsel referred to a passage from a

book written by Dr. Lloyd Barnett Q.C. which says -

> *"It seems that what is a reasonable time would depend on the circumstances of each case. The sub-section is designed to prevent the Accused from being subjected indefinitely to a pending charge."*

Counsel relied heavily on BELL v. D.P.P. of JAMAICA 1985 2 AER 585. He commented on the four factors which were relevant in determining whether an Accused had been deprived of a fair trial by unreasonable delay. Counsel submitted that there was no evidence led by the Respondent as to the legal system in St. Lucia as regards the normal time for a trial but I do not think this is necessarily fatal and that a Court sitting in St. Lucia cannot adjudicate as to when a period of delay is normal or abnormal.

Counsel referred to an unnamed case where the Court of Appeal determined that a delay of eight months in filing a notice of appeal was unreasonable. He also referred to PRATT v. ATTORNEY GENERAL OF JAMAICA 1993 43 WIR where the Judicial Committee of the Privy Council ruled that where an order for execution had been made the execution should take place within five years. I shall make no more reference to these authorities for in my opinion they are not relevant to the matter under inquiry.

Mr. Thomas for the Respondent also relied on BELL v. D.P.P. although he traced the right in the Sixth Amendment to the

Constitution of the U.S.A. He made frequent reference to BARKER v. WINGO (1972) 407 US 514 which provided guidance to the Privy Council in D.P.P. v. BELL.

He submitted that negligence per se cannot amount to a denial of the right to a fair hearing and that the delay must result in some detriment to the Applicant with respect to his trial.

Counsel also commented on the four factors referred to above and cited the following additional authorities:

1. Civil Appeal No. 5 of 1978 WRIGHT GEORGE v. KEITHLEY SPENCER;
2. D.P.P. JAMAICA v. FEURTADO (1979) 30 W.I.R. 206;
3. No 1485 of 1990 H.C. BARBADOS HARDING v. D.P.P.
4. High Court Guyana R v. EDWIN OGLE (1968) 11 W.I.R. 439
5. STANLEY MUNGA GITHUNGURI v. THE REPUBLIC, High Court Criminal reported in Commonwealth Law Bulletin Vol. 12, No. 4 October, 1986.

I did not find the last case relevant to the present inquiry.

Section 8 (1) of the Constitution of Saint Lucia provides that if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court

established by law.

Section 16(1) provides that if any person alleges that any of the provisions of sections 2 to 15 has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

Section 16(2) vests original jurisdiction in the High Court to hear and determine any application made by any person in pursuance of subsection (1) but the proviso to the subsection enacts that the High Court may decline to exercise its powers under the subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

Mr. Thomas submitted at the commencement of his submissions that he was relying on the proviso and in that context made reference to HARDING v. D.P.P; D.P.P. v. FEURTADO; and HARRIKISOON v. ATTORNEY GENERAL 1980 A.C. 265.

In a St. Vincent Case, No. 108 of 1987 WINWARD PROPERTIES LTD. and Another v. CLIFFORD L. WILLIAMS and Another, decided on October 19, 1987 I applied the proviso in a similar section of the Saint Vincent Constitution and I also referred to HARRIKISOON but I am afraid that I shall not be arriving at the proviso in this suit.

As I stated earlier alot of reliance was placed on BELL v. D.P.P. and its predecessor, BARKER v. WINGO. In Barker's case there was a delay of five years before trial. The United States Supreme Court held that in the particular case the Petitioner was not denied his right to a speedy trial.

In passing it is important to note that in giving the judgment in the case of WRIGHT GEORGE, Berridge J.A., Ag. observed that the Sixth Amendment of the Constitution of the U.S.A. was substantially the same as Section 8(1) of the Antigua Constitution except that the former makes use of the expression "speedy . . . trial" whereas the latter uses the expression "a fair hearing within a reasonable time."

In my judgment this difference in terminology though slight, must have legal significance. In Spencer's case there was a delay of approximately 2 years between the date of first arrest and the date eventually set for the preliminary inquiry. Bishop J. at first hearing held that Spencer's right had been infringed but the Court of Appeal reversed the decision.

In Bell's case there was a delay in excess of five years between the date of arrest and the date set for the retrial but the critical period was from March 1979 when the Court of Appeal of Jamaica quashed the convictions and ordered a retrial. The Appellant was re arrested and ordered to be retried on May 11,

1982. The Judicial Committee of the Privy Council held -

"*On the facts, the operative period of delay began on March 7, 1977 when the Court of Appeal ordered a retrial. Although the delay thereafter of 32 months in the Gun Court would not have amounted to an unreasonable delay in a normal trial, given the conditions prevailing in Jamaica, it was unreasonable in the case of the Appellant's retrial and it infringed his right to a fair hearing within a reasonable time.*"

At page 593 letter (f), Lord Templeman who delivered the judgment of the Board stated -

"*Provided that the Courts of Jamaica recognised that a retrial required urgency, the Board would not normally interfere with a finding of those courts that a particular period of delay after an order for a retrial did not contravene the constitutional right of an accused to trial within a reasonable time. But in the present case their Lordships conclude that the decisions of the courts of Jamaica were flawed by failure to recognise the significance of the order for a retrial and the significance of the discharge by the Magistrate. In these circumstances their Lordships will hereby advise Her Magesty that the appeal should be allowed and that the Appellant is entitled to a declaration that Section 20 (1) of the Constitution which afforded the Appellant the right to a fair hearing within a reasonable time by an independent and impartial court established by law has*

been infringed."

Although the cases of BELL and BARKER arrived at different conclusions so far as the particular Applicant was concerned they set out the same principles.

Indeed at page 591 letters (h) - (i), Lord Templeman stated -

> *"Their Lordships acknowledged the relevance and importance of the four factors lucidly expanded and comprehensively discussed in BARKER v. WINGO. Their Lordships also acknowledge the desirability of applying the same or similar criteria to any constitution, written or unwritten which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case."*

In Bell's case the Privy Council stated that in determining whether the accused had been deprived of a fair trial by reason of unreasonable delay the factors which were relevant were the length of the delay; the reasons given by the Prosecution to justify the delay; the efforts made by the accused to assert his rights; and the prejudice to the accused.

In the case under review the delay complained of was about 33 months. I adopt the quotation from Dr. Barnett's book referred to

earlier on.

The Court of Appeal of Jamaica in Feurtado's case also held that -

> "*What was a reasonable time depended on the circumstances of each case including the nature of the case, the formalities of the pre-trial procedures, the facilities existing and the efforts made to conclude the proceedings.*"

In Barker's case the Supreme Court held that until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.

I would therefore say that in this case there is some delay which is presumptively prejudicial to the Applicant. And so I go on to consider the reasons given for the delay. The learned Senior Magistrate has said it was negligence or oversight. Miss Christopher St. Val indicates it was sabotage by Miss Wilson. Whichever the reason the Prosecution must bear the blame as the Accused cannot be said to be responsible. In Barker the Supreme Court stated that a deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the Government but a more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than the Defendant.

The third factor is the responsibility of the Applicant to assert his rights. I have already commented on what he said in his affidavit in reply. In the Barbados case of HARDING v. D.P.P. the Appellant was convicted of certain offences under the Road Traffic Act on March 17, 1983. On the same say he appealed. The appeal record was not ready for hearing before June 1990 and the delay seems to have been caused by the Magistrate and such other authorities who had the responsibility for making ready and setting down the appeal for hearing.

The Appellant instituted proceedings in the High Court claiming that his constitutional right to a fair hearing within a reasonable time by an independent and impartial court established by law had been infringed. In his affidavit in support the Appellant stated that he had been consulting his lawyer from time to time enquiring when his appeal would be heard and his lawyer had informed him that the reasons for the Magistrate's decision had not been given and consequently the appeal could not be heard.

The efforts of Aubert are similar to that of the Appellant. Chief Justice, Sir Denys Williams in his judgment stated that a circumstance which is most material is that the Applicant took no legal step towards expediting the appeal. By that the learned Chief Justice was referring to the availability of an order of mandamus to compel the Magistrate to give his reasons.

He stated further -

> *"When he completed the formalities of appealing he would have been set free and I regard it as significant that recourse to this Court about the delay only took place after he discovered that the appeal was set down for hearing. It seems clear to me that had his appeal not come on for hearing, the Court would not have heard a word of complaint about delay from him."*

I entertain the same view of the Applicant in this case as expressed by the learned Chief Justice above.

Sir Denys went on to find that the Applicant's constitutional right to have the case brought against him heard within a reasonable time had been infringed but he declined to grant the relief which the Applicant sought, no doubt applying the proviso. He said in that respect:

"His appeal is now listed for hearing by the Divisional Court which is quite capable of making whatever order the justice of the case required in the circumstances".

In D.P.P. JAMAICA v. FEURTADO the Court of Appeal of Jamaica held that where a resident Magistrate refused or neglected to carry out his statutory functions the proper remedy did not lie in a motion under the Constitution, but in the invocation of the

supervisory jurisdiction of the Supreme Court by the seeking of the appropriate prerogative order.

The fourth factor is the prejudice to the Accused. In Bell it was stated that the Accused did not have to show any specific prejudice before being entitled to have charges against him dismissed because of unreasonable delay in bringing him to trial.

At page 591 letters (d) - (e) Lord Templeman cites Powell J. of the U.S. Supreme Court in BARKER v. WINGO as follows -

> *"Prejudice, of course, should be assessed in the light of the interests of the Defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the Accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last . . . . . If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown:*

In the circumstances of this case the Applicant has been on bail since his arrest on September 9, 1991 according to the supplementary affidavit of the Director of Public Prosecutions. In

his affidavit in support of his notice of motion he has merely asserted that he has fading memories. I notice he is only 52 years of age and has no supporting medical certificate. He also alleges that there is an unavailability of witnesses. He does not state who they are and I cannot conceive of the charge being committed in the public eye.

I seriously doubt the veracity of the witness and what he states in paragraph 6 of his affidavit filed on February 6, 1995. In Barker's case the Supreme Court held that a claim that a Defendant has been denied his right to a speedy trial is subject to a balancing test, in which the conduct of both the Prosecution and the Defendant are weighed and the Courts should consider the four factors that I have mentioned above.

Applying that balance the Court held in the particular case that while the Petitioner's case, involving as it did such an extraordinary delay, was a close one, the facts that prejudice to him was minimal and that the Petitioner himself did not want a speedy trial outweighed the deficiencies attributable to the State's failure to try the Petitioner sooner. The Court held in the final analysis that the Petitioner was not denied his right to a speedy trial.

The U.S. Supreme Court also held that the right to a speedy trial is a more vague and generically different concept than other

constitutional rights guaranteed to accused persons and cannot be quantified into a specified number of days or months, and it is impossible to pinpoint a precise time in the judicial process when the right must be asserted or considered waived.

In BEAVERS v. HAUBERT the Court said

> *"The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice".*

That case was referred to in Barker's case and I adopt that statement and apply it in the balancing test that I shall be engaging to arrive at my conclusion in the case under review.

I do not find that the delay here was extraordinary as was found in Barker's case but I do find that there was an unusual delay. I do not find that the Applicant was prejudiced to any extent and it seems clear to me that he was quite contented to allow things to drag on and any anxiety and concern he may have experienced only arose after January - February 1995.

I agree with the submission made by Mr. Gill in his reply that the application is not frivolous or vexatious, and that is why although I shall refuse to grant the declaration sought under Section 8(1) of the Constitution of Saint Lucia I shall make no order as to costs.

I do so to emphasize what was stated in BARKER v. WINGO that the primary burden remains on the courts and the prosecutors to assure that cases are speedily brought to trial. I put that into practice when on Tuesday February 7 the Applicant mentioned he had filed a notice of a constitutional motion the previous day and I arranged for the motion to be heard 14 days later.

The same point was mentioned in R v. EDWIN BOGLE (1968) 11 W.I.R. where Crane J, as he then was, held that the onus is on the Prosecution to establish that the case is being proceeded with fairly and within a reasonable time after committal.

It seems to me that those responsible for the control of public prosecutions will need to put a system in place whereby an eagle's eye will be kept on the progress of cases from the date of commission of the offence until the final disposition of the case.

The date tentatively set for the hearing of the criminal matter shall be Monday April 10, 1995.

The application is dismissed. There shall be no order as to costs.

A.N.J. MATTHEW

Puisne Judge

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