SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV2005/0090

BETWEEN:

NAZEREUS ANDREW

Claimant

AND

THE ATTORNEY GENERAL

Defendant

Appearances:

Collis Robert Barrow for Claimant
Georgis Taylor – Alexander and Deale Lee for Attorney General

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2005: JUNE 9, 17

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JUDGMENT

[1] SHANKS J: On 2 March 1998 the Claimant was arrested and charged with having caused grievous bodily harm on 15 February 1998. He was granted bail in the sum of $15,000 subject to the condition that he report to the La Caye police station twice a week. On 2 October 1998 he was committed to stand trial at the next practicable sitting of the High Court. His bail was continued on the same terms. Over six years later on 28 December 2004 he was summoned to appear at the High Court on 28 January 2005. On that day he brought this constitutional motion under section 16 of the Constitution of St Lucia alleging that his right to "…be afforded a fair hearing within a reasonable time by an independent and impartial court" under section 8(1) of the

Constitution was being infringed and that the criminal proceedings against him should be stayed. The criminal trial was adjourned pending the resolution of this motion.

[2] There are two issues to resolve:

(1) whether section 8(1) of the Constitution has been contravened in relation to the Claimant?
(2) if so, what remedy the court should grant?

In my view it is important to keep these two issues distinct.

Issue (1)

[3] The traditional approach to the question of whether a criminal defendant has been deprived of his constitutional right to a hearing within a reasonable time was that set out in *Bell v DPP* [1986] LRC (Const) 392, an appeal from Jamaica, which was followed in *Flowers v The Queen* [2000] 1 WLR 2396, another appeal from Jamaica. In *Bell* the Privy Council stated that the three elements in the section 8(1) right (namely (a) a fair hearing (b) within a reasonable time (c) by an independent and impartial court) "…form part of one embracing form of protection afforded to the individual" (see p399f). The Privy Council went on to adopt the guidance of the Supreme Court of the United States in *Barker v Wingo* (1952) 407 US 514 in deciding whether a particular criminal defendant had been deprived of his right to a speedy trial the court was to have regard to (1) the length of the delay, (2) the reasons given by the prosecution to justify it, (3) the responsibility of the accused for asserting his rights and (4) the prejudice to the defendant (see pp399g to 401h). The most important form of prejudice to be considered was prejudice to the defendant in the conduct of his defence at trial flowing from the delay (see p401c).

[3] However, in *Darmalingum v The State* (Privy Council, 10 July 2000), an appeal concerning the Constitution of Mauritius (which is identical to that of St Lucia in the material respects), the approach was different. The Privy Council emphasised that there were three separate guarantees contained within the section 8(1) right and stated that it was no answer to a complaint of breach of the guarantee of a hearing within a

reasonable time to say that the defendant was convicted after a fair hearing by a proper court, even if his guilt was manifest. It follows from this conclusion that it is not necessary for the defendant to show that he has suffered (or will suffer) actual prejudice in the conduct of his defence. The issue was again considered by the Privy Council in the context of appeals from Scotland in relation to Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (which is almost identical in this respect to section 8(1)) in *Dyer v Watson* [2004] 1 AC 379 (decided 29 January 2002) and in *Mills v Her Majesty's Advocate* (decided 22 July 2002). In both those cases the Privy Council indicated that in the context of an alleged violation of Art 6(1) they preferred the *Darmalingum* approach which is consistent with the jurisprudence of the European Court of Human Rights (see eg: *Dyer v Watson* at para 94).

[4] Mr Lee for the Attorney General says that the approach adopted by the Privy Council in *Darmalingum* and the Scottish cases is not applicable in the Caribbean and really relates only to the European Convention (and, presumably, Mauritius). Mr Barrow for the Claimant says I should adopt the *Darmalingum* approach in this case. Although *Flowers* (which followed *Bell*) was decided after *Darmalingum* it seems to me that the question remains open (see: *Dyer v Watson* [2004] 1 AC 379 per Lord Bingham at para 29) and that I should, as invited, decide between the two approaches.

[5] I have no hesitation in preferring the *Darmalingum* approach for the following reasons:

(1) The position under the European Convention is abundantly clear and has been followed by the House of Lords and the Privy Council in many cases where they must apply the terms of the Convention. Since the wording of section 8(1) of the Constitution and Art 6(1) of the European Convention are practically identical and they have a common origin it seems to me very unsatisfactory that they should be interpreted differently in different but closely related legal systems.

(2) The background to the decision in *Bell* that prejudice in the conduct of the defence was a highly relevant factor in deciding whether a defendant had been deprived of his right to a hearing within a reasonable time appears to have been the assumption that it automatically followed from a finding that the right

had been infringed that there must be a stay of the prosecution. This assumption appears to underlie the decision US Supreme Court in *Barker v Wingo* on which the Privy Council relied and in which Powell J stated at p522 "The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived". The fact that the Privy Council assumed that a finding of infringement of the right automatically led to a stay of the prosecution is apparent from the final paragraph of the judgment in *Bell* at p404d where, having made a declaration of infringement, they declined to make an order preventing the retrial of the defendant because that was unnecessary in light of the fact that the Jamaican authorities always respected the spirit and letter of advice from the Privy Council. Given that assumption it is not surprising that there should be a requirement of prejudice imposed on the existence of the right. But if, as I find below, a stay is not the automatic remedy for an infringement of the right, the need for the requirement of prejudice no longer applies.

(3) For what it is worth, the approach supported by the Claimant seems to me to be right as a matter of pure construction of section 8(1). The section gives a right to be tried within a reasonable time (or, to put it the other way round, without unreasonable delay); nowhere does it suggest that the right requires specific prejudice to be suffered before the right is infringed.

[6] I conclude therefore that the right to a hearing within a reasonable time is a separate and distinct right from the right to a fair hearing and that there is no requirement on the Claimant to show that he will be prejudiced in the conduct of his defence at his criminal trial in order to establish that the former right has been infringed. In the light of this conclusion I turn to consider whether the Claimant has been denied his right to a hearing within a reasonable time.

[7] From the numerous authorities cited to me I deduce the following propositions in relation to the assessment of what is a reasonable time for the purposes of section 8(1) of the Constitution of St Lucia:

(1) A "reasonable time" is not defined in advance in years and months: it depends on all the circumstances of the individual case;

(2) Time runs from the date of charge not the date of commission of the alleged offence;

(3) The first step is to consider the length of the delay: if it gives "grounds for real concern" the court must go on to consider the detailed circumstances, including any explanation or justification put forward; if not, the delay is very unlikely to be excessive (see: *Dyer v Watson* [2004] 1 AC 379 para 52);

(4) Relevant circumstances in assessing whether a reasonable time has passed are:

(a) the nature and complexity of the case: the more complex and involved the case, the longer it will take to prepare;

(b) the conduct of the prosecution: this must be looked at in the context of local conditions as to which see (5) below;

(c) the conduct of the defendant: it will tell against him if he has himself indulged in procedural time wasting or has acceded to requests for adjournment or failed to assert his rights to a trial within a reasonable time;

(d) the effect (or likely effect) of any delay on the defendant: if the Defendant is incarcerated or is very young or unwell or there is particular evidence which may disappear if the matter is not dealt with quickly greater expedition may be required;

(5) The circumstances must be considered in the light of local conditions, legal, economic, social and cultural. The court can take account of economic realities, in particular lack of resources and skilled staff on the part of the prosecuting authorities, but there are limits to this: the constitutional rights of the individual defendant cannot be placed at the mercy of Government inefficiency (see: *Bell v DPP* [1986] LRC (Const) 392 at 401i to 402d and *Mungroo v The Queen* [1991] 1 WLR 1351 at 1354F to 1355C).

(6) As already indicated the defendant need not show that his defence of the criminal charges will be prejudiced by the delay and/or that he will not receive a fair trial in order establish a breach of the right to have his case heard within a reasonable time (though such considerations

may be relevant factors in assessing the how long is reasonable under paragraph above.

[8] In this case the delay between the Claimant being charged and the beginning of the trial was nearly seven years. This length of time undoubtedly gives grounds for real concern and the Attorney General's representatives conceded as much. I turn therefore to consider the detailed circumstances in so far as the evidence reveals them.

[9] There is no evidence about the case against the Claimant but I deduce from the charge and the fact that he was arrested soon after the alleged offence that it is a fairly straightforward matter.

[10] There is no evidence that the Claimant contributed to the delay at all. He has complied with his bail conditions and reported to the police station twice a week. When the trial was finally called he made this application at the first opportunity. There was a faint suggestion on the part of the Attorney General that he ought to have applied earlier to stay the prosecution; I find that a totally unrealistic suggestion. The Claimant says he has felt anxiety, hopelessness and depression. I do not doubt that is true in general terms but no medical or other independent evidence was produced and I conclude that he has suffered in the same way as any other criminal defendant of reasonable fortitude would have. There was no specific evidence of prejudice being caused to the Claimant's defence save that Mr Barrow submitted that memories would have faded generally and that the Claimant had lost the advantage with the jury of being a teenager and was now a man in his mid-twenties. In the absence of detailed evidence, I do not think either of those points carries much weight.

[11] It was agreed that the time which passed between charge and committal for trial (seven months) was acceptable. The explanation proffered by the DPP in her affidavit for the balance of the delay (six years and four months) was that there was a backlog of cases in 1999 which resulted from a shortage of lawyers in the DPP's office. She explains that during 1999 the then DPP was the only person dealing with the prosecution of all matters in St Lucia. The shortage of staff issue was however solved in 2000 when two other lawyers were appointed. Another lawyer left in 2003 and one

joined in 2004. She assumed office in April 2002 and took an inventory of all cases and found that the Claimant's was one of several awaiting trial. At that time attempts were made to contact the complainant and attempts to reach him were unsuccessful. Eventually (the affidavit notably fails to say when) he was contacted through La Caye police station and the matter was listed to proceed. She also mentions the fact that until 2005 there were no continuous sittings of the High Court in its criminal jurisdiction.

[12] I am afraid none of this provides a very satisfactory explanation. There is no indication that the problems with the staffing of the DPP's office were caused by insurmountable financial or other difficulties. Those problems were in any event solved in 2000 according to the affidavit. The difficulties with the contacting the complainant are described in the vaguest terms and if they resulted from the failure to record a contact number for him, that is hardly excusable.

[13] Taking account of all these matters and in particular the length of the delay and the fact that nothing whatever appears to have happened between October 1998 and December 2004 to progress matters, I am of the clear view that the delay was unacceptable and the case was not listed for hearing within a reasonable time. It follows that I find that the Claimant's right to be afforded a hearing within a reasonable time has been infringed. I turn therefore to the appropriate remedy, a matter on which there was much debate.

Issue (2)

[14] The starting point must be section 16 of the Constitution. Section 16(1) provides that the application is "for redress". "Redress" is defined in the Shorter Oxford English Dictionary as "reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this…remedy for, or relief from, some trouble…" Section 16(2) says that if the court finds a contravention of sections 2 to 15 of the Constitution it may:

> "…make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of [the fundamental rights and freedoms in Chapter I of the Constitution]

> Provided that the High Court may decline to exercise its powers…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."

Under section 16 therefore the court has the widest possible discretion as to the appropriate remedy.

[15] Mr Barrow submitted that the only appropriate remedy in a case like this is a stay of the criminal proceedings. He based this submission on the decisions of the Privy Council in the *Darmalingum* case, *Dyer v Watson* [2004] 1 AC 379 and *R v Her Majesty's Advocate* [2002] UKPC D3. I am quite satisfied that his submission is not correct. It is true that at the end of the *Darmalingum* decision Lord Steyn stated that the "…normal remedy for a failure of this particular guarantee, viz the reasonable time guarantee, would be to quash the conviction", which would imply of course that a stay of a case yet to be heard was also the appropriate remedy. However, the very same paragraph of that decision states that their Lordships do not wish to be overly prescriptive and that they do not suggest that there may not be circumstances in which it might be appropriate to affirm a conviction and reduce the sentence. More importantly, the Privy Council in *Mills v Her Majesty's Advocate* (22 July 2002) made it perfectly clear that the suggestion that the "normal remedy" was to quash the conviction was an error (see paras 17 and 18 per Lord Steyn himself and para 49 where Lord Hope says that quashing the conviction is "one of a variety of possible remedies, the choice between which must depend on the circumstances of the case"). As to *R v Her Majesty's Advocate* it is quite clear that the decision in that case to stay the prosecutions was based on the particular wording of section 57(2) of the Scotland Act 1998 (see eg Lord Clyde at para 85) and in any event a majority of 7 to 2 in the House of Lords in *Attorney General's Reference (No 2 of 2001)* [2004] 1 AllER 1049 has clearly indicated that the decision was wrong in their view and should in due course be overruled (see eg: Lord Bingham at para 30). *Dyer v Watson* was an earlier case from Scotland involving a child where special considerations applied (see: per Lord Bingham at paras 60-64 and 68 per Lord Hope paras 102-107 and 112).

[16] The correct position in my judgment should be the same as that adopted in relation to Art 6(1) of the European Convention by the majority in the House of Lords in *Attorney General's Reference (No 2 of 2001)* [2004] 1 AllER 1049 (a case which was

unfortunately not cited to me although decided well over a year ago by a nine member House of Lords). There is no automatic remedy in a case where the right to a trial within a reasonable time is contravened and the appropriate remedy will depend on all the circumstances. If the contravention of the Constitution is established after the criminal trial, the appropriate remedies may be a declaration, a reduction in any penalty imposed, an order for the payment of compensation or the quashing of the conviction. If a constitutional motion is brought before the criminal trial the remedies may include a declaration, an order for a speedy trial, release on bail if the defendant is in custody, compensation to be assessed after the conclusion of the criminal trial or a stay of the proceedings. But a stay should be granted only if a fair hearing is no longer possible or if it is for any compelling reason unfair to try the defendant. Cases where the delay was of such an order or the prosecutor's breach of professional duty was such as to make it unfair that criminal proceedings against a defendant should continue would be very exceptional, and a stay would never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's constitutional right. The same would apply *mutatis mutandis* to the quashing of a conviction in a case where the motion was brought after the criminal trial had taken place.

[17] As already indicated no evidence of any specific prejudice in relation to the Claimant's defence of the criminal case has been put before the court; if there had been such evidence it could in any event have supported a traditional application for a stay based on abuse of process made to the trial judge. He has given evidence of anxiety, hopelessness and depression but as I have already said it is vague and unspecific and it does not carry very much weight; the matter may have been different if he had been kept in custody during the period of delay. The serious length of the delay itself and the inadequacy of the explanations given are serious matters but by themselves I do not think they are sufficient to make it unfair for the Claimant to be tried at this stage.

[18] I do not therefore think this is an appropriate case in which to grant a stay. I think the Claimant will obtain adequate and appropriate redress and have his rights under section 8(1) properly enforced if I make a declaration to the effect that his rights have been infringed, order a speedy trial and order compensation to be assessed after the trial. Obviously the question whether he is found guilty or not guilty will be an overwhelming consideration in the assessment of any compensation.

Result

[19] I therefore make the following declarations, orders and directions:

(1) Section 8(1) of the Constitution of St Lucia has been contravened in relation to the Claimant in that he has not been afforded a hearing of the criminal charges brought against him in February 1998 for causing grievous bodily harm to Frank Augustin within a reasonable time;

(2) There shall be a trial of the criminal proceedings at the earliest opportunity;

(3) After the trial of the criminal proceedings the Claimant may apply for an assessment of what compensation (if any) should be ordered to be paid in respect of the contravention of section 8(1) mention in paragraph (1) above.

Post script

[20] It is unfortunate that the trial of this matter will have been held up for at least a further five months as a consequence of this constitutional motion. It seems to me that in future it would be preferable if the trial judge dealt with such a motion at the outset of the criminal trial along with any application under the common law for a stay on the grounds of abuse of process. If there had been evidence of specific prejudice the trial judge would have been in a much better position than me to assess its significance; he or she would also have had a far better idea of whether any delay by the prosecution was such as to raise real concerns and (if so) whether the explanations given by the prosecution were satisfactory.

Murray Shanks

High Court Judge (Ag)