THE EASTERN CARIBBEAN SUPREME COURT

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2011/1151

BETWEEN:

Sandra Ludovic

Claimant

and

Magistrate Velon John
The Attorney General of Saint Lucia

Defendants

Appearances:

Andie George for Claimant
Jan Drysdale for Defendant

2012 April 30
2013 April 17

JUDGMENT

[1] **Belle J:** In Saint Lucia Criminal proceedings are regulated by a number of written laws including the Criminal Code Cap 3.01 of the Laws of Saint Lucia, the Criminal Procedure Rules 2008, and the District Courts Act Cap 2.02 of the Laws of Saint Lucia.

[2] The Claimant filed a claim for judicial review in which she prayed for the following relief:

(i) An order quashing the decision of the First Respondent not to dismiss the case due to delay under section 7.4 of the Criminal Procedure Rules 2008.

(ii) An order declaring that the Learned Magistrate acted unreasonably in exercising his powers as Magistrate in allowing the matter to continue despite the fact that the 180 days time limit to commence proceedings had elapsed due to no fault of the Defendant.

(iii) That the learned Magistrate acted in excess of his powers in allowing the matter to commence despite the fact that the 180 days time limit to commence proceedings had elapsed due to no fault of the Defendant.

[3] Having referred to the Claimant's claim, I sum up the case by saying that in my view it will be determined based on the construction of Section 7.4 of the Criminal Procedure Rules 2008 which states:

"Failure to Prosecute:

7.4 The court shall dismiss any summary case if the charge has been pending for more than 180 days, the trial has not commenced and the delay is not attributable to the defendant, unless the court concludes that there are exceptional reasons for not dismissing a case and so records."

[4] The affidavit in support of the Fixed Date Claim provides the evidence that the Claimant made a number of appearances at the District Court when the matter was adjourned because of the absence of the Magistrate. Suffice it to say that these assertions are contradicted by Magistrate Michelle Louis who claims to have been present on a number of occasions when the Claimant was absent and indeed that a summons had to be issued for the attendance of the Claimant.

[5] An explanation of the discrepancy comes from the affidavit of the Claimant who states that Magistrate Michelle Louis, the Magistrate in the case management court in her affidavit is speaking of absences of his client from court on occasions when the Claimant had not been served with the necessary summons to appear, even though she had been served with the charge.

[6] On the other hand the Claimant claims that the trial did not commence within 180 days from the date the matter was lodged on or about 10th March 2010.

[7] The Claimant also claims that disclosure was not made until 273 days after the matter was lodged on 10th March, 2010.

[8] There is no denial of the Claimant's factual assertions in relation to the time taken to set the charge against the claimant down for trial.

[9] Section 7.4 calls upon the court to dismiss a summary case that has been pending for more than 180 days, were the trial has not commenced and where the delay not being attributable to the defendant, unless the court concludes that there are exceptional reasons for not dismissing a case and so records.

[10] The legal context of the facts of this case must require that the court examine the general tenor of the relevant Criminal Procedure Rules. Those rules provide elaborate and detailed procedural steps on the road to a criminal trial.

[11] Among the possible case management steps is a referral to mediation. The referral to mediation in this case must have been made at a case management hearing. It is presumed that both parties agreed to this step. Obviously this step implies the likelihood of delay in setting the matter down for trial but all in the interest of saving judicial time.

[12] Pursuant to the Criminal Procedure Rules there are several opportunities for monitoring the process of the case such as sections 7.1 and 7.2. The latter states:

"The court through a designated person shall actively monitor and follow up on scheduling orders in order to keep matters moving on a timely basis and it shall cause to be reviewed on a regular basis all pending cases, to ensure that proper notices have been given, and other necessary action taken."

[13] Section 7.3 of the Rules details the kind of matters that can or should be addressed in preparation for trial. The only logical conclusion on these rules is that the elaborate structure referred to is designed to ensure that trials of summary matters are not delayed beyond 180 days. The process calls for cooperation by all of the parties involved and is also designed to ensure that the Claimant receives a fair trial.

[14] The record from the District Court Proceedings which is before the court speaks to a number of relevant circumstances. For example there was delay in issuing disclosure; secondly the matter was referred to mediation. Thirdly there was a suspension of court hearings for a period of time because of the unfortunate attack on a magistrate in the month of April 2010. These relevant incidents did not occur in that order.

[15] Indeed the scenario taken as a whole shows that the process provides many opportunities to explain any delay and address the possibility of taking steps to compensate.

[16] It is my view that when the 180 day deadline was approaching the prosecution would have been well placed to make an application to speed things up.

[17] **Arguments**

In support of her reply to the Claim counsel for the respondents submitted that:

(a) That the Applicant has not met the threshold for the Court to determine that the First Respondent acted unreasonably in rendering his decision to dismiss the applicant's application.

(b) That the Magistrate is empowered by section 7.4 of the Criminal Procedure Rules to make such a decision.

(c) That an appeal of the decision of the First Respondent is a more apt and suitable remedy in the circumstances.

(d) That the applicant has unreasonably delayed and is not entitled to any of the remedies claimed.

[18] In relation to point (a) counsel argues that the concept of unreasonableness or irrationality applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it: **Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374 at 410.**

[19] Counsel also cites in support of her position that the Claimant had not met the established threshold for impugning the Magistrate's decision, the case of Associated **Provincial Pictures Houses Ltd v Wednesbury Corporation [1948] 1 K.B**. Counsel was of the view that to establish unreasonableness that an Applicant is required to prove a case with something overwhelming. Counsel quoted from the Wednesbury case in the following terms:

'It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think is quite right; but to prove a case of that kind would require something over-whelming, and, in this case the facts do not come anywhere near anything of that kind..."

[20] Counsel was of the view that the First Respondent examined a multiplicity of issues including inter alia the reasons for the delay of the matter as well as the justice of the case. She concluded that in this case it cannot be deemed that the First Respondent's decision was lacking in rational justification or so outrageous that no other right thinking arbiter could have concluded the same.

[21] On the third point whether the First Respondent acted ultra vires section 7.4 of the Criminal Procedure Rules 2008 counsel submitted that the court's power of review

is to ensure that the powers of the public decision making bodies are exercised lawfully and cited **R v Hull University Visitor ex p Page (1993) 1 WLR 1112**

[22] Counsel argues that Section 7.4 does not provide for automatic dismissal of a matter after expiration of 180 days, but gives the First Respondent discretion in determining whether there are any circumstances which when considered should not result in the dismissal of the matter. She was of the view that the First Respondent exercised his discretion in accordance with the section and allowed the matter to proceed.

[23] Counsel argued that judicial review is concerned with the manner in which decisions are taken and should not be converted into appellate powers where the court substitutes its view for that of the decision making body below. The court should not arrogate to itself the task entrusted to that authority. See: **Peerless General Finance Investment C. Ltd. v Reserve Bank of India AIR 1992 SC 1033.**

[24] Counsel also argued that the failure of the Applicant to exhaust all alternative remedies precludes the applicant from obtaining the relief sought.

[25] Counsel submitted that it was trite law that before commencing an application for judicial review the Applicant is expected to exhaust all other adequate alternative remedies. In support of this submission counsel cited the case **R (Bancourt) v Secretary of State for the Foreign Commonwealth Office [2001] QB 1076.** She quoted the dicta in that case in the following terms:

"judicial review is a legal recourse of last resort and an applicant must exhaust any proper alternative remedy open to him before the judicial review court will consider his case,"

[26] Counsel argued that section 720 of the Criminal Code provided that an appeal is available from any decision or order from a Magistrate exercising a summary jurisdiction.

Section 720 states:

"(1) Where a district Court acting in the exercise of its jurisdiction-

(a) Refuses to make an order, or dismisses a complaint, the complainant may appeal to the Court of Appeal against such decision;

(b) Makes an order, the person against whom the order is made, whether complainant, or defendant, may appeal to the Court of Appeal against such decision."

[27] Counsel also cited section 11 of the District Court Act Cap 2.02 of the Revised Laws of Saint Lucia to the effect that:

"subject to the conditions and limitations set out in the Code of Civil Procedure and the Criminal Code an appeal shall lie to the High Court from any judgment, decision, or order of a District Court in the exercise of its criminal or civil jurisdiction, except from any order-

(a) For the adjournment of any cause or matter;

(b) In respect of any indictable offence;

(c) For the remand of any person to prison; or for the bail of any person in custody."

[28] Counsel's consequential submission applying **R v Secretary of State for the Home Department ex parte Swatt (1986) 1 WLR 477** was that the Claimant should have appealed to the next tribunal available and that failure to do so is an abuse of the process of the court. Counsel did not specify whether the appeal should be lodged after the order was made or at the end of the trial.

[29] Counsel also took the point of unreasonable delay by the Claimant. Counsel quoted from **R v Institute of Chartered Accounts in England and Wales ex p Andreou (1998) 1 All E .R. 14** as follows:

"The purpose of the procedure governing applications for judicial review is to provide a simplified and expeditious means of resolving disputes in the field of public law."

[30] Counsel was of the view that the Claimant should have acted without delay and where the applicant unreasonably delays the court is empowered pursuant to part 56.5(1) to refuse to grant relief.

[31] Counsel submitted that the court should have regard to the time which was allowed to elapse before filing any proceedings as well as any explanations proffered. It is accepted that notice of one month to the Crown was required. But the four months following before filing are not acceptable counsel submitted. Counsel therefore submitted that the Claimant's case was not sustainable.

[32] **Claimant's submissions**

The court has not received any submissions from the Claimant's counsel in relation to the last two issues addressed by the Respondents' Counsel. The First is the availability of other forms of redress.

[33] Without receiving submissions from the Claimant it is evident from the language of Section 720 of the Criminal Code that section 720 (1) (a) is restricted to the right of appeal of a complainant and does not provide that such a right is available to a defendant.

[34] Subsection (b) is less specific and confers the right to appeal when an order is made against either a Claimant or Defendant. It is fair to say that this subsection is ambiguous and while it may be construed to refer to procedural decisions of the kind being dealt with in this case it could also be construed to be restricted to decisions during trial which may have affected the outcome of the case before the magistrate. I therefore do not think that this section would preclude the possibility of a Claim in judicial review being made and prompt a decision not to hear the Claim.

[35] With regard to section 11 of the District Court Act it is subject to the conditions laid down in the Criminal Code which as I have pointed out refer to 1. the right of the

Complainant to appeal and 2. the right of a person against whom an order has been made.

[36] I have already said that the right of appeal addressed in subparagraph (b) seems to refer to a matter arising during a trial. But taken at its highest, that it also refers to procedural matters; the question is whether the decision of the Magistrate is one against any particular party or for any party in this matter. Indeed the learned Magistrate was being asked to construe section 7.4 of the Criminal Procedure Rules. This was not a no case submission made in favour of the defendant. The Claimant's counsel submission asked for a declaration that the case itself was either dead or that it was alive. If it was alive the case would continue to trial. If it was dead then there would be no trial. The matter was one about the proper administration of justice based on the Act and called for both sides to act as ministers of justice. The decision would not be for or against either side.

[37] In any event the Claimant did say as a ground in favour of the Claim for judicial review that:

"the matter has not yet been finally determined and as such there was not yet a decision to appeal against."

[38] This supports the view taken by the court that subparagraph (b) of Section 720 of the Criminal Code is construed as referring to a decision in the trial to be appealed against at the end of the trial.

[39] In the circumstances I am of the view that to make it clear that the matter went beyond the issue of benefit to either party and that the Learned Magistrate's decision affected the proper administration of justice pursuant to section 7.4 of the Criminal Procedure Rules the Claim for Judicial Review was more appropriate than an appeal.

[40] **Delay**

Counsel raises the issue of the delay in filing an Application for Judicial Review. It is evident that the applicant applied and was granted leave to file a Claim for judicial review on 2nd November 2011.

[41] The Learned Magistrate's response to the point in Limine made by Counsel Andie George in Case #232/10 which is the matter under consideration was apparently filed on 7th June 2011. It is not stated when the reasons were actually delivered to the Claimant's counsel.

[42] I find that there was a four month delay. But I do not find that the granting of leave in this case or the granting of relief would be detrimental to good administration pursuant to Part 56 of the CPR 2000. Indeed the point being taken by the Claimant is of great importance, and prior delay by the District court does not lead to the conclusion that filing the case was of great detriment to administration of justice. It is not the filing of the Claim for judicial review that caused the summary matter to be delayed beyond 180 days. I therefore do not agree with this ground for denying judicial review to the Claimant.

[43] **Outrageous and illogical**

In replying to the first ground for opposing the claim, counsel stated in conclusion of his arguments, that the Learned Magistrate in arriving at his decision took factors into consideration which he ought not to and as such the Decision was unreasonable under the principles of Wednesbury's Unreasonableness.

[44] I agree with this submission. In **Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1947) 1 KB 223 at page 229,** among other things Lord Green stated:

"For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider"

[45] My understanding of this dictum is that the learned Magistrate's view of the facts cannot be substituted by the reviewing court's view as long as the Magistrate considers the factors that he is bound to consider. However, the discretion in this case to determine whether to dismiss the case could only arise if there were exceptional reasons for not dismissing the case. If the Learned Magistrate found that there were no exceptional reasons, as he seems to have done, which reasons would have caused the matter to have lingered in the system for more than 180 days, before the commencement of the trial, and which would require that a trial be held, the Learned Magistrate would be compelled to dismiss the case.

[46] In giving the reasons for his decision the Learned Magistrate did not at any time address the matter of the existence of exceptional reasons to permit the matter to go to trial. This is what he said:

"Under the strict interpretation of Section 7.4 this matter should be dismissed. But then would Justice have been served. The defendant would be elated; what about the Virtual Complainant. From his perspective there would be a miscarriage of Justice since through no fault of his and prosecutor; this matter was not being determined on its merits.

In criminal litigation there has been what is known as "technicalities" and a case may go one way or the other way because of their judicial application.

But when a situation is created that is offensive to one's judicial sensibilities, when a situation is created that is tantamount to rape of Themis, when a situation is created that is so outrageous that even the blind goddess blinks, when a situation is created that it undermines even one man's confidence in the judicial system, when a situation is created that the reasonable man in the mini-bus questions the integrity and fairness of the system and where a situation is created that Justice begins to deny its own sublime existence and raison d'etre, then intelligence and morality must consummate the dissolution of what essentially is a travesty, since intelligence and morals are ethical, and an ethical being can make choices but among the choices are the things he will not do and must not do."

Finally the learned Magistrate concluded:

"*And so having so positioned ourselves we inexorably followed the path of dismissal in relation to counsel's point in limine and brought to the fore our inherent powers of fairness. What needs to be done must be done in the interest*

of Justice which ubiquitously must be proclaimed to the patricians and the plebians."

[47] With respect I do not see anything in the Learned Magistrate's decision which addresses the issue of exceptional reasons which caused the delay or require that a trial be held. Merely stating the facts and the saying that fairness dictates that on those facts the matter should not be dismissed does not satisfy the statutory framework which is that it must be explained why these circumstances caused the matter to be delayed beyond 180 days and why the matter should be tried, and if this cannot be explained with reference of exceptional reasons then the learned Magistrate is compelled to dismiss the charge as the Learned Magistrate himself admitted.

[48] I therefore have to conclude that this is an outrageous and illogical decision in the terms described in the **Council of Civil Service Unions** decision. The learned Magistrate conceded that on a strict construction of the law the matter should be dismissed and then purported to be exercising a discretion not to dismiss the case. In my view the law does not permit this.

[49] I agree with counsel for the Claimant that the section in some way codifies the common law. By setting the standard of 180 days for a summary matter to go to trial, the legislation puts pressure on the system through various case management measures to follow a strict regime of time keeping and fairness in order to safeguard the right to a fair trial in a reasonable time.

[50] What section 7.4 does is to remove the necessity to use discretion which can be an unruly horse in any determination as to what kind of a delay is too long. The legislation provides the necessary balance between delay caused by the prosecution, by the defence or institutional inefficiencies.

[51] In this case there is no allegation that the defendant caused the delay. Neither does the Claimant argue that the Virtual Complainant or prosecution caused the delay. It cannot be said that the Claimant did not assert his rights and it cannot be said that the delays were not institutional.

[52] It is my view however that section 7.4 modifies the common law to the extent that it does not call upon the judicial officer to embark upon any balancing exercise such as that outlined in **Sookermany v The DPP (1996) 48 WIR where de La Bastide CJ** stated:

> *"In performing this balancing exercise, the court is entitled to take into account the prevailing system of legal administration and the prevailing economic, social and cultural conditions that are found in the particular country. This point was made by Lord Templeman in **Bell** and reiterated by him in **Mungroo v R** [1991] 1 WLR 1351. The Board also recognised that the problem of institutional delays is a complex one to which there may be no simple or ready-made solution, and that scarcity of financial resources is clearly a factor to be taken into account in countries like Jamaica."*

[53] I also hold that counsel for the Claimant is correct that the Four Factors identified in **Barker v Wingo [1972] 407 U.S. 514** which determine whether a defendant has been deprived of a fair trial are addressed in the circumstances of the case. These factors are:

(1) The Length of the delay

(2) The reasons given by the Prosecution to justify the delay;

(3) The responsibility of the accused (defendant) for asserting his rights;

(4) Prejudice to the accused.

[54] In this case it is accepted that neither the prosecution nor the defence was the cause of the delay. Such delays as may have been caused by the defendant's absence have been adequately explained. The cause of the delay was institutional.

[55] Justice requires that the case has to be looked at subject to the proportionality of the circumstances. The charge in this case was a summary matter of assault. Clearly the idea behind the law is that such a matter should be commenced in 180 days. There is ample opportunity for recording any exceptional circumstances and permitting the trial to proceed after the 180 days deadline.

[56] Counsel for the Respondent argues that the Claimant had alternative means of redress by lodging an appeal. This approach in my view misses the point of these elaborate rules for managing cases. The reason for going beyond the 180 days must be addressed as part of the case management procedure. It is not good enough to say that it would be just to go to trial. The language of the section provides for the case management to address reasons for failing to start the trial within 180 days. In my view to permit the matter to go to trial at that point without the required explanation defeats the purpose of the rules which is intended not just to deem a matter which is delayed to be unfair but to bring proceedings to an end if the delay cannot be explained by the court with reference to exceptional reasons. If exercised in accordance with the letter of the law the process would be applied consistently in all similar cases.

[57] Although there is some attempt in the affidavits of the respondent to address the exceptional reasons for the delay of the trial in my view this is too late because the rules require that these circumstances be addressed in the decision making process. Furthermore there is nothing to suggest that they were exceptional reasons for delay nor that they were exceptional reasons for proceeding to trial.

[58] The Learned Magistrate has not provided any analysis of the time lost because of the attack on the Magistrate or for any other reason and the attempts made to address the effect this would have on the case against the Claimant. No analysis of the additional time taken in mediation is spoken to. There is nothing in the Magistrate's decision which states that the court's failure to sit for four months was an exceptional circumstance or was caused by an exceptional circumstance which gave rise to an exceptional reason why the trial should proceed.

[59] The legislation is not silent on these matters. Whereas at common law the court may be able to argue that a reasonable time for starting a summary matter may be more than 180 days because of the lack resources of the District Court or the

prosecution office, the Criminal Procedure rules provide that 180 days is the time at which the court must site exceptional circumstances if the case is to continue.

[60] I conclude that the legislature in Saint Lucia has deemed it fit to impose the solution of outlawing delays in summary matter beyond 180 days unless it can be shown that the defendant is responsible for the delay or the delay is caused by exceptional circumstances and the court can state that there are exceptional reasons for proceeding to trial.

[61] In the premises I hold that the Claimant's claim succeeds. The Learned Magistrate's decision not to dismiss the case on the basis of counsel for the defendant's submission is quashed because it does not address the issues which must be considered in deciding to allow the matter to proceed to trial, it considers irrelevant issues and is unreasonable.

[62] The matter is therefore remitted to the learned Magistrate for him to consider counsel's submission on the consequences for the summary charge against the Claimant based on the fact that there has been a delay of more than 180 days since the charge was laid before the court and before the commencement of a trial.

[63] I award costs to the Claimant in accordance with Part 65 of the CPR 2000.

Francis H V Belle
High Court Judge