IN THE SEYCHELLES COURT OF APPEAL

HAROLD AH-WAN **APPELLANT**

versus

THE REPUBLIC **RESPONDENT**

Criminal Appeal No: 1 of 2002

[**Before**: *Ayoola. P, De Silva & Matadeen JJ.A]*

.....

Mr. J. Hodoul for the Appellant
Mr. R. Govinden for the Respondent

JUDGMENT OF THE COURT

(Delivered by Matadeen, JA)

This is an appeal against a judgment of the Constitutional Court (Perera, Juddoo and Karunakaran JJ) which found that the appellant's right to a fair hearing "*within a reasonable time*" as guaranteed by Article 19(1) of the Constitution had not been contravened. The leading judgment of the Court was given by Juddoo J, to which Perera and Karunakaran JJ made some contributions.

The issue that was submitted to the Constitutional Court for determination under Article 46(7) of the Constitution arose from facts which were canvassed in a number of affidavits filed before the trial Court. In an affidavit sworn on 16 May 2001, the appellant had claimed that he had been charged on 24th July 1998 with two offences, that almost two years later he was required by a summons issued under Section 71 of the Criminal Procedure Code to appear before the Supreme Court on 4th July 2000 to answer the charges, that he appeared before Court and was arraigned on 1st March 2001 and the hearing was fixed for 18th May 2001, and that the lapse of time was unreasonable.

The affidavits filed on behalf of the respondent indicate that on 24th July 1998 the appellant was only "informally charged" by the police who then completed the enquiry and referred the matter to the Attorney General on 23rd November 1998 for advice. However, when it transpired that the appellant had already left the jurisdiction on 2nd August 1998 for the United Kingdom with the declared intention of emigrating, the file was on 6th January 1999 returned to the Police who on being informed that the appellant had returned to Seychelles on 29th May 1999 referred the matter to the Attorney General. An information was sworn and filed against the appellant on 7th April 2000 and the matter was fixed for 2nd May 2000. Attempts to serve the summons on the appellant were unsuccessful as the appellant had left for Reunion on 27th May 2000 and only returned on 9th January 2001. In the meantime the matter was fixed to 4th July 2000 when Counsel appeared for the appellant. The appellant's absence led to several postponements until finally his Counsel was allowed to withdraw and a warrant of arrest was issued against him. The appellant was arrested at the airport on 26th February 2001 when he was about to leave for Reunion after having returned on 9th January 2001.

Juddoo J, after reviewing a number of decisions from other jurisdictions, found that, in view of the fact that the appellant was on 24th July 1998 "*informally charged*" by a Deputy Inspector of Police with two distinct and serious offences under the Penal Code and which were particularised, it could not be said that the Deputy Inspector was merely enquiring into the matter and consequently held that the 24th July 1998 was the starting point from which time began to run.

The learned Judge further found that the delay which occurred in the progress of the case was due to the absence of the appellant from the jurisdiction, first, when he left for the United Kingdom on 2nd August 1998 for emigration only to come back in May 1999 and, secondly when he left for Reunion in May 2000 to come back in January 2001, although at the

time he left for Reunion he knew that a summons had been issued against him and had instructed Counsel to appear for him. The appellant was arrested in February 2001 and arraigned and his trial scheduled for May 2001 when he raised the issue that his constitutional right to a hearing within a reasonable time had been contravened.

Finally the learned Judge held that in view of the fact that the appellant had contributed significantly to the lapse of time, it could not be said that there was unreasonable delay.

Now, Article 19(1) of the Constitution provides as follows:-

> ""*Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court established by law.*"

Before we advert to the grounds of appeal, it is appropriate that we note that there are provisions similar to Article 19(1) of the Constitution in other instruments, constitutional or otherwise. Indeed, similar provisions are to be found in Section 10(1) of the Constitution of Mauritius, Section 20(1) of the Constitution of Jamaica and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Moreover, Article 48 of the Constitution enjoins this Court, when interpreting the Chapter on Fundamental Human Rights and Freedoms, to take judicial notice of the reports, decisions or opinions of international and regional institutions administering or enforcing conventions on human rights and freedoms as well as the Constitutions of other democratic States and decisions of the Courts of such States in respect of their Constitutions.

Our consideration of decisions handed down in other jurisdictions has led us to identify two schools of thought, which are equally valid.

The first one is exemplified by the decisions of the Judicial Committee of the Privy Council in the cases of **Bell v Director of Public Prosecutions** [1985] AC 937 and **Flowers v The Queen** [2000] 1 WLR 2396, both of which were appeals from Jamaica. In **Bell**, the appellant was tried and convicted in October 1977. His appeal was allowed and a retrial ordered in March 1979. After the case was mentioned on a couple of occasions, the Crown in November 1981 offered no evidence and the appellant was discharged. He was rearrested in February 1982 and a trial ordered for May 1982. He unsuccessfully complained of a breach of his constitutional right. On appeal to the Judicial Committee of the Privy Council, Lord Templeman, relying on American case law, held that the words "*a fair hearing within a reasonable time by an independent and impartial Court*" in Section 20(1) of the Jamaican Constitution formed:-

> *"part of one embracing form of protection afforded to the individual. The longer the delay in a particular case the less likely it is that the accused can still be afforded a fair trial. But the Court may nevertheless be satisfied that the rights of the accused provided by Section 20(1) have been infringed although he is unable to point to any specific prejudice."*

The Privy Council also recognized the need for balance between the right of the individual and the public interest in the attainment of justice and stated that the right to trial within a reasonable time is not a separate guarantee.

In **Flowers** the appellant was charged with murder in the course of robbery committed in February 1991. At his trial in December 1992 the jury disagreed and a retrial was ordered. At the retrial in October 1994

the jury again disagreed and a further retrial was ordered. In January 1997 he was convicted of capital murder and sentenced to death. On appeal to the Judicial Committee of the Privy Council he sought to impeach the summing-up and was partly successful. His conviction was quashed and a conviction for non-capital murder substituted. However for the first time an argument based on Section 20(1) of the Constitution was raised. **Bell** was followed, and Lord Hutton pointed out that, given the prevalence of such offences in Jamaica, public interest required that persons who committed such crimes and whose guilt could be proved should be convicted and punished. In deciding whether the appellant's conviction should be quashed because of the lengthy period of delay, Lord Hutton was of the view that account should be taken of the fact that the appellant had been proved on strong evidence to be guilty of murder in the course of an armed robbery, that such offence was prevalent in Jamaica and that it posed a serious threat to the lives of innocent persons.

The second school of thought is epitomized in the decisions of the Judicial Committee of the Privy Council in the cases of **Darmalingum v The State** [2000] 1 WLR 2303, an appeal from Mauritius, and **Procurator Fiscal, Linlithgow v Watson and Burrows,** a judgment delivered on 29th January 2002, on appeal from Scotland, and exemplified in a considerable body of case law from the European Court on Human Rights in Strasbourg. In **Dharmalingum** the appellant was arrested in December 1985 on provisional charges of forgery but it was not until January 1992 that he was served with an information. His application for a stay of the information was dismissed. He was convicted in May 1993 and appealed on grounds, among others, of delay. The delay issue first came before two appellate judges in March 1994 but they disagreed and the issue was not reargued before a bench of three judges until May 1997. Final judgment dismissing the appellant's appeal was only given in July 1998. The J.C.P.C. allowed his appeal. It was held that the pre-trial delay

or the delay in the appellate proceedings taken by itself amounted to a breach of the constitutional guarantee. Lord Steyn said:-

> "It will be observed that section 10(1) contains three separate guarantees, namely (1) a right to a fair hearing; (2) within a reasonable time; (3) by an independent and impartial court established by law. Hence, if a defendant is convicted after a fair hearing by a proper court, this is no answer to a complaint that there was a breach of the guarantee of a disposal within a reasonable time. And, even if his guilt is manifest, this factor cannot justify or excuse a breach of the guarantee of a disposal within a reasonable time. Moreover, the independence of the "reasonable time" guarantee is relevant to its reach. It may, of course, be applicable where by reason of inordinate delay a defendant is prejudiced in the deployment of his defence. But its reach is wider. It may be applicable in any case where the delay has been inordinate and oppressive. Furthermore, the position must be distinguished from cases where there is no such constitutional guarantee but the question arises whether under the ordinary law a prosecution should be stayed on the grounds of inordinate delay. It is a matter of fundamental importance that the rights contained in section 10(1) were considered important enough by the people of Mauritius, through their

> representatives, to be enshrined in their constitution. The stamp of constitutionality is an indication of the higher normative force which is attached to the relevant rights: see *Mohammed v The State* [1999] 2 WLR 52."

Unlike **Bell** and **Flowers,** the decision of the Judicial Committee of the Privy Council in **Procurator Fiscal Linlithgow** and the Strasbourg case law underscore the fact that Article 6(1) of the European Convention has fashioned four separate and distinct rights. They also support the proposition that the concept of reasonableness implies that a relatively high threshold must be crossed before it can be said in any particular case that a delay is unreasonable and before the onus passes on to the prosecutor to come forward with reasons for the delay. Their Lordships in the **Procurator Fiscal Linlithgow** case held the view that *"this will be so only if the period which has elapsed is one which, on its face and without more, gives grounds for real concern that the Convention right has been violated."* Their Lordships also endorsed the principle that was stated in **Komig v Federal Republic of** Germany [1978] 2 EHRR 170, where the European Court on Human Rights said at page 197:-

> "The reasonableness of the duration of proceedings covered by Article 6(1) of the Convention must be assessed in each case according to its circumstances. When enquiring into the reasonableness of the duration of criminal proceedings, the Court has had regard, *inter alia,* to the complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities."

We shall now turn to the grounds of appeal, which read as follows:-

1. The Constitutional Court was wrong in law to find that in Art. 19(1) of the Constitution, "A fair hearing envisages a fair hearing within a reasonable time" and "undue delay is one of many relevant factors in determining whether the fairness of a trial has been affected"; it wrongly considered that the article embodies only one guarantee, namely, that of a "fair hearing" and failed to appreciate that it includes, *inter alia*, a reasonable time guarantee, distinct therefrom. As a result, the Court came to the erroneous conclusion that there was "no infringement of the constitutional guarantee under Article 19(1) of the Charter."

2. The Constitutional Court wrongly interpreted the Appellant's travelling abroad and ignored his constitutional right of freedom of movement, in the absence of any restriction imposed by an order of a court. As a result, the Court came to the erroneous conclusion that "he had largely caused" and "significantly contributed to the lapse of time which it has taken to bring the charges against the defendant to be determined before a court of law."

3. The Constitutional Court made a wrong finding of fact that "The defendant was arrested on 26th February 2001 at the Seychelles International Airport whilst he was attempting to leave Seychelles for Reunion", which indicates bias against the Appellant.

4. Having rightly stated that "the reasonable time element may relate to both pre-trial, trial and post-trial (i.e. appellate) periods", the Constitutional Court came to the erroneous conclusions that (i) "mere delay, whatever may be the length of such delay, would be inadequate to establish a contravention or a likely contravention of the Fundamental Right

agreed with the leading judgment delivered by Juddoo J, which itself followed **Darmalingum** , and additionally made a "few observations in the light of the particular charges against the defendant." These observations do not nullify the tenor of the leading judgment of Juddoo J with which Perera J agreed. In any event, these excerpts from the judgment of Perera J are consonant with the test laid down in **Bell** and **Flowers** and which is equally valid. That disposes of the first ground of appeal.

We turn now to the second ground of appeal. True it is that the appellant was neither arrested nor bailed out on condition not to leave the jurisdiction and that his right of movement was not impeded. However, in assessing the "*reasonableness*" of the lapse of time, the Constitutional Court was entitled to look at the conduct of the appellant and his contribution to the delay. The evidence before the Constitutional Court, as highlighted above, shows that the appellant was "informally charged" on 24th July 1998 and less than ten days later left the jurisdiction with the avowed intention of emigrating only to return ten months later. He again left the jurisdiction on 27th May 2000 after he became aware that a summons had been issued under Section 71 of the Criminal Procedure Code requiring him to appear before the Supreme Court on 2nd May 2000, although no summons was actually served on him, but not before having briefed Counsel concerning the summons. Indeed Counsel did appear for him and, after several postponements occasioned by the appellant's absence, had to move to withdraw from the case as the appellant remained outside the jurisdiction until 9th January, 2001. He was arrested at the airport on 24th February 2001 when he was about to leave Seychelles again. There is no indication that he sought to find out about the outcome of the proceedings from his Counsel. In the result the Constitutional Court rightly concluded that, notwithstanding the appellant's undoubted right to freedom of movement, he had contributed to the delay in a substantial measure.

With regard to the third ground of appeal, the only error is a factual one and relates to the date. The respondent was arrested on 24th February 2001 and not 26th February as mentioned in the judgment. It is an admitted fact that he was arrested when he was trying to leave the jurisdiction for a third time. The words "attempting to leave" used by Juddoo J must be looked at in their proper context. The appellant did leave on two previous occasions without hindrance. He was about to leave for a third time when he was arrested. We take the view that the words used by the learned Judge are but an objective statement of facts without any value judgment. They are not indicative of any bias against the appellant and are nothing more than words used in the context of the consideration of the appellant's conduct when assessing the reasonableness of the delay. We hold therefore that the complaint against the judgment is without substance.

With regard to the fourth ground of appeal, learned Counsel for the appellant urged us to consider only the first conclusion quoted in the ground of appeal as being erroneous. We do not agree that the conclusion reached is erroneous. Delay in hearing a charge does not *per se* constitute a contravention of the right to be tried within a reasonable time. It is only where the period of the delay is, on the face of it, a source of real concern that the court is required to look into the detailed facts and circumstances of the particular case with the prosecution seeking to explain and justify the lapse of time which appears to be excessive. This has been done in the present case and the judgment of the Constitutional Court cannot be impeached.

The last ground of appeal finds fault with the judgment of the Constitutional Court in that when considering the reasonableness of the delay, it failed to give consideration to the "prevailing system of legal administration and prevailing economic, social and cultural condition to be found in the country." Once again we regret to say that the words quoted

are being taken out of their context. What the Constitutional Court was saying was that it had, following **Bell v Director of Public Prosecutions**, to balance the right of the appellant to a hearing within a reasonable time with the public interest in the attainment of justice in the context of the prevailing system of legal administration. The language of the judgment shows that the Court was alive to the fact that enquiries are conducted by the police who are also called upon to arrest defaulting persons whilst the decision to prosecute vests with the Attorney-General. The Constitutional Court was also alive to the fact that, once arrested on 26th February 2001, the appellant was bailed out and arraigned on 1st March 2001 and his trial set down for 18th May 2001. This no doubt was indicative of expediency on the part of the "legal administration" and constituted a serious attempt to treat the case with the urgency which by the beginning of 2001 it undoubtedly deserved. That ground of appeal equally fails.

Consequently we take the view that the Constitutional Court properly held that the delay, if any, had been adequately explained, and rightly found no appearance that the reasonable time requirement had been violated. All the grounds of appeal having failed, the appeal is dismissed with costs. We order that the trial be proceeded with due diligence.

E. O. AYOOLA	**G. P. S. DE SILVA**	**K. P. MATADEEN**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Delivered at Victoria, Mahe this 20th day of **December** 2002.