

SANDAPIN v GOVERNMENT OF SEYCHELLES

(2012) SLR 315

F Elizabeth for the petitioner

J Chinnasamy Principal State Counsel for the first and second respondents

Judgment delivered on 13 November 2012

Before Egonda-Ntende CJ, Burhan J

BURHAN J:

This is an application under article 46(1) of the Constitution of the Republic of Seychelles where the petitioner seeks the following relief from court -

- (a) A declaration that the petitioner's constitutional rights under article 18(1), 18(6) and 19(1) have been contravened.
- (b) An order that the respondent pays the petitioner compensation in a sum of R500,000 pursuant to article 18(10) of the Constitution.

The background facts on which the petitioner has based his application areas follows.

The petitioner was arrested on 23 October 2009 by the officers of the NDEA (National Drug Enforcement Agency) and charged in the Supreme Court of Seychelles with two counts of trafficking in controlled drugs namely heroin and cannabis resin in case number SCCS 49 of 2009. It is admitted that the petitioner was remanded to custody on an order of court and after a period of 11 months in remand custody by a ruling dated 28 September 2012, the petitioner was acquitted on all counts at the close of the prosecution case, after a submission of no case to answer had been made.

The petitioner contends that his constitutional right under article 18(6) of the Constitution was contravened in that he was tried 11 months after his arrest and thus denied his constitutional right to have a fair trial within a reasonable time pursuant to article 19(1) and article 18(6) of the Constitution.

Counsel for the petitioner in his submissions further contends that serious charges had been framed against his client at the whim of the Attorney-General who had also moved and convinced court that his client be detained. This he stated had resulted in his client being deprived of his freedom for a period of 11 months and therefore was entitled to the compensation claimed. He further submitted that the Attorney-General as a guardian of justice should be able to distinguish between a person against whom they had plenty of evidence as opposed to a person they did not have any evidence at all and further contended that the Attorney-General had therefore acted maliciously against his client.

The petitioner further contends that his arrest and subsequent detention was unlawful and contravened his constitutional rights under article 18(1) of the Constitution in that the said arrest and detention was orchestrated by NDEA agents using an “agent provocateur” to entrap him.

This court will first deal with counsel for the petitioner’s claim that the petitioner was denied his constitutional right to have a fair trial within a reasonable time pursuant to article 19(1) of the Constitution.

Article 19(1) of the Constitution reads -

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.

Article 6 of the European Convention on Human Rights (ECHR effective 3 September 1953) reads -

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

In *Golder v United Kingdom* (1975) 1 EHRR 524 it was stated that -

Article 6 ... enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right”: thus the right to a court is coupled with a string of “guarantees laid down ... as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.

One of these guarantees concerns compliance with the reasonable time requirement, intended by the Convention to counter excessively long judicial proceedings and highlight the importance of administering justice without delays which would jeopardize its effectiveness and credibility - refer *Vernillo v France* (1991) 13 EHRR 880. By making “reasonable time” an element of a fair trial it is often stated that the Convention has enshrined a favourite maxim of British jurists, namely that “justice delayed is justice denied”.

Frédéric Edél in *The Length of Civil and Criminal Proceedings in the Case Law of the European Court of Human Rights* at 103 states -

.....it is important to note that the right to judicial proceedings within a reasonable time is an original and fundamental achievement of the European Convention of Human Rights and its control system. By creating a genuine right to a trial within a reasonable time, with legal penalties for a state’s non-compliance, the European system for safeguarding human rights has played a decisive part in combating the sometimes excessive slowness of judicial systems in Europe and

has been at the root of many reforms of judicial institutions and procedure in Convention member states.

In reviewing compliance with the reasonable time requirement, the court always begins by determining the starting-point (*dies a quo*) and the end (*dies ad quem*) of the period to be considered. Basically the court assesses whether the length of proceedings from the starting-point to the end in the case before it has been reasonable or not. This is done in two stages. The first deals with the factual position and consists in adding up the relevant length of the proceedings. The second, although relying on a series of objective criteria, is more of a value judgment, assessing whether the length was excessive (Frédéric Edél (*supra*) at 16 and 39). Although usually complaints are made in respect of the total length of judicial proceedings which may entail more than one tier of jurisdiction, there could also be complaints made in respect of judicial delay only at a certain stage of the proceedings. In *Portington v Greece* (109/1997/893/1105) ECHR 23 September 1998 the complaint was in respect of appeal proceedings before the Court of Appeal.

In determining the period to be taken into account in a criminal case it was held in the case of *Neumeister v Austria* (1936/63) ECHR 27 June 1968 - "the period to be taken into consideration...necessarily begins with the day on which a person is charged".

Charge for the purpose of article 6 paragraph 4 of the Convention being "the official notification given to an individual by the Competent Authority of an allegation that he has committed a criminal offence." The end period would be the date of the final judgment marking the definitive end of the proceeding and which has become final and been executed.

In the case of *Frydlender v France* (30979/96) ECHR 27 June 2000 it was held by the European Court of Human Rights that -

the "reasonableness" of the length of proceedings must be assessed in the light of the *circumstances of the case* and with reference to the following criteria: *the complexity of the case, the conduct of the applicant* and of *relevant authorities* and what was at stake for the applicant in the dispute. (emphasis mine).

It further stated that reasonableness is to be assessed primarily with the reference to "the circumstances of the case" and emphasized that such assessment is highly relative and specific to each case *Konig v Federal Republic of Germany* (1983) 5 EHRR 1.

This court too is of the view that the test for reasonableness requires an objective assessment of a number of criteria namely -

- a) the nature of the case which would include as set out in the *Frydlender* case (*supra*) the complexity of the case and what is at stake for the applicant, and
- b) the conduct of the applicant and of relevant authorities.

In regard to paragraph (a) ie the nature of the case, the complexity of the case would be in regard to complexity in facts, complexity in legal issues and complexity in proceedings. Complexity in facts would be, to name a few, the number and particular nature of the charges, the number of defendants and witnesses (*Dobbertin v France* (1993) 16 EHRR 558). Complexity in legal issues would include respect for the principle of equality of arms and include questions of jurisdiction and constitutionality or interpretation of international treaty, while complexity of the proceedings would include the number of interlocutory applications, the number of parties and witnesses, obtaining files and documents of foreign proceedings and transfer of cases from one division to another on grounds of public safety.

In regard to paragraph (b) ie the conduct of the applicant (the person seeking redress and alleging failure to comply with the reasonable time requirement) would include requests for adjournments, repeated changes of lawyers, fresh allegations of fact which prove to be incorrect, failure to appear at hearings, creating a procedural maze ie applications for release, challenges against judges, request for transfer of proceedings to other courts, uncooperative attitudes etc (*Frédéric Edél* (supra) at 53 and 54). The conduct of the applicant should be examined to determine whether the applicant delayed the procedure with his acts or with his omissions. Such delays cannot be considered as contributing towards a failure to comply with the requirements of a reasonable time.

Conduct of the relevant authorities would include delays on the part of Judiciary authorities including the registry, administrative authorities and other national authorities including the government and legislature. In *Moreira de Azevedo v Portugal* (1991) 13 EHRR 721 it was held “the court notes that the State is responsible for all its authorities and not merely its judicial organs”. According to established case law *Buchholz v Federal Republic of Germany* (A-42, 7759/77) ECHR 6 May 1981, “only delays attributable to the State may justify [the Court’s] finding ... a failure to comply with the requirements of ‘reasonable time’”.

It is to be noted that in a number of resolutions, the Council of Europe’s Committee of Ministers has stated that “excessive delays in the administration of justice constitute an important danger, in particular for respect for the rule of law”.

Counsel for the petitioner in the instant case moved court that a finding be made by this court to determine what timeframe would constitute a “reasonable time” for a case to be concluded in order to come within the ambit of this article. This court is of the view having considered in detail the aforementioned decisions of the European Court of Human Rights that it would not be possible to broadly set down a general timeframe for cases be they criminal or civil to be concluded as computing reasonable time is both a complex and sensitive issue. It is the view of this court that reasonable time for a case to be concluded should be decided on a case by case basis taking into consideration the aforementioned circumstances peculiar to each case.

In the case before this court, considering the circumstance in the light of article 19(1) of our Constitution it is common ground that the trial against the petitioner was concluded in a period of 11 months from the day of his arrest and the petitioner acquitted of all charges by the Supreme Court of Seychelles which, admitted by all parties, is a competent court established by law. The petitioner has not sought to contest the independence or the impartiality of the said court. Considering the salient facts of this case, I find no evidence to even suggest that the petitioner who was eventually acquitted in a period of 11 months had been deprived of his right to a fair hearing and therefore this ground must quite obviously fail.

Counsel for the petitioner further contended that the petitioner's right under article 18(6) had been contravened.

Article 18(6) reads – "A person charged with an offence has a right to be tried within a reasonable time".

The petitioner in this case had been arrested on 23 October 2009 and the charges framed against him in the Supreme Court on 5 November 2009. Judgment acquitting the petitioner has been delivered on 28 September 2010. Thus in a period of 11 months the case has been concluded. Counsel in his submissions has not alleged any State attributed delays as discussed earlier. It therefore cannot be said that there was a failure to comply with the requirements of reasonable time in the hearing of this instant case. This court is of the view the time limit within which this instant case was concluded was reasonable.

Counsel for the petitioner further contended that the petitioner had been charged at the whim of the Attorney-General who had also moved and convinced court that his client be detained. It would be pertinent at this stage to draw attention to section 179 of the Criminal Procedure Code Cap 54.

Section 179 of the Criminal Procedure Code reads -

Before or during the hearing of any case, it shall be lawful for the court in its discretion to adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may suffer the accused person to go at large or may commit him to prison, or may release him upon him entering into a recognisance with or without sureties, at the discretion of the court, conditioned for his appearance at the time and place to which such hearing or further hearing shall be adjourned:

Provided that, if the accused person has been committed to prison, no such adjournment shall be for more than fifteen clear days, the day following that on which the adjournment is made being counted as the first day.

It is therefore apparent from a reading of this section that an order committing an accused person to prison before or during the hearing of a case or remanding an

accused to custody could only be done by a competent court. The Attorney-General has no power or discretion to remand to custody an accused as it falls strictly within the purview of a competent court and in this instant case the remand order was made by a competent court.

Further article 18(7) of the Constitution reads -

A person who is produced before a court shall be released, either unconditionally or upon reasonable conditions, for appearance at a later date for trial or for proceedings preliminary to a trial except where the court, having regard to the following circumstances, determines otherwise –

- (a) Where the court is a magistrates' court, the offence is one of treason or murder;
- (b) The seriousness of the offence;
- (c) There are substantial grounds for believing that the suspect will fail to appear for the trial or will interfere with the witnesses or will otherwise obstruct the course of justice or will commit an offence while on release;
- (d) There is a necessity to keep the subject in custody for the suspect's protection or where the suspect is a minor, for the minor's own welfare;
- (e) The suspect is serving a custodial sentence;
- (f) The suspect has been arrested pursuant to a previous breach of the conditions of release for the same offence.

The derogations contained in article 18(7) (a) to (f) of the Constitution grants court the power not to release a person brought before court. The Attorney-General is not precluded by law from making an application for remanding a person to custody under section 179 of the Criminal Procedure Code but it is the court which finally decides whether a person is to be remanded to custody or not. Further in the case of a remand to custody order being made by a trial court a right of appeal lies from such an order to the Seychelles Court of Appeal as held in the case of *Roy Beehary v R* SCA 11 of 2009. This court is therefore satisfied that sufficient safeguards exist in the Constitution and in the law to ensure that persons are not detained unfairly. The order remanding the petitioner in this case has been made by a competent court and the petitioner has not sought to appeal against the remand order made by the trial Judge. In fact even in this instant application counsel for the petitioner does not seek to complain against the said remand order made by court but in his submission merely states that as the "wheels of justice" turn slowly his client should be compensated for being in remand for such a long time.

Counsel next contended that there was a certain amount of maliciousness on the part of the Attorney-General in filing the said case against the petitioner and this could be determined by the fact that there was no evidence against the petitioner and the fact that he had chosen to rely on the statement of a person who was an agent provocateur

and who in his statement had stated that - "I was detained at the office of NDEA that night. And I have made my mind on how to help myself in his problem."

It is counsel for the petitioner's contention that the second respondent the Attorney-General should not have relied on the said statement as when the said Marcus Victorin was in the custody of the NDEA, it had been impressed on the said Marcus Victorin by the agents of the NDEA that he had others involved with him and the said Marcus Victorin in order to help himself had conveniently given the name of the petitioner as he was employed in the hotel owned by the petitioner.

At this stage it is pertinent to draw our attention to article 76(4) of the Constitution which reads –

The Attorney-General shall be the principal legal adviser to the Government and, subject to clause (11), shall have power, in any case in which the Attorney-General considers it desirable so to do –

- (a) To institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person;
- (b) To take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
- (c) To discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken under subclause (a) or by any other person or authority.

Therefore it is apparent that the Attorney-General has the power to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person. It would also be relevant to at this stage to refer to section 61A of the Criminal Procedure Code which reads -

- (1) The Attorney-General may, at any time with the view of obtaining the evidence of any person believed to have been directly or indirectly concerned in or privy to an offence, notify an offer to the person to the effect that the person –
 - (a) Would be tried for any other offence of which the person appears to have been guilty; or
 - (b) Would not be tried in connection with the same matter,
 - (c) On condition of the person making a full and true disclosure of the whole of the circumstances within the person's knowledge relative to such offence and to every other person concerned whether as principal or abettor in the commission of the offence.
- (2) Every person accepting an offer notified under this section shall be examined as a witness in the case.

It should be borne in mind while the Constitution guarantees the right of the Attorney-General to institute and undertake criminal proceedings against any person, such persons are not precluded from challenging such decisions made by the Attorney-General in a competent court *at any stage* (emphasis added) even at the stage of the

very institution of the case. In this instant case I note, as pointed out by counsel for the respondents, that no such prior challenge was made. Counsel for the petitioner was provided with all the statements soon after the case was filed in the Supreme Court and would have been aware of the contents of the statement of Marcus Victorin and therefore could have challenged even the institution of proceedings before court. Having not done so counsel for the petitioner cannot now seek to complain that he was in remand custody for a period of 11 months as the “wheels of justice” turn slow.

Further on a reading of the entire statement of Marcus Victorin produced by the petitioner, it is clear that the said statement contains sufficient material for the Attorney-General to act as empowered under article 76(4) of the Constitution and section 61A of the Criminal Procedure Code and therefore this court totally rejects the contention of counsel for the petitioner that the Attorney-General had acted maliciously in indicting the petitioner or that his arrest and subsequent detention was unlawful and contravened the petitioner’s constitutional rights under article 18(1) of the Constitution.

For the aforementioned reasons I find no merit in the application of the petitioner and would proceed to dismiss the petition and make further order that each party bear their own costs.