Republic v Yuan Mei Investment (Prop) Ltd
(1999) SLR 14

Ronny GOVINDEN for the Republic
Pesi PARDIWALLA for the accused
Accused – Present

Ruling delivered on 2 July 1999 by:

PERERA J: This is an application for a stay of proceedings on the ground of "abuse of the process of court". There is no statutory provision for such an application in criminal proceedings, as in civil and admiralty proceedings. However, as Menzies J pointed out in *R v Forbes, ex parte Bevan* (1972) 127 CLR 1

> Inherent jurisdiction is the power which a court has simply because it is a court of particular description, it is not something derived by implication from statutory provisions conferring particular jurisdiction.

It is therefore under the inherent powers of this Court that this application falls to be considered.

The offence that is being prosecuted is an alleged violation of section 16(1)(a) read with section 19(4) of the Licenses Act (Cap 113). The particulars are that the company "Yuan Mei Investment (Proprietary) Limited" trading under the registered business name of "Oriental Services (Seychelles)", during the period 11 to 15 December 1996 engaged in or carried on trade as a hirer of three omnibuses to Mahe Shipping Company without being granted a licence as a hirer of vehicles by the Seychelles Licensing Authority. This offence is punishable by a fine of R20,000 andimprisonment for two years.

The prosecution commenced before the Magistrates' Court "B" in case no 406/97 on 4 June 1997 against Mr Patrick Liu-Chit Chon in his personal capacity. The charge contained only one count which included the alleged offence in respect of all three vehicles. The prosecutor himself later expressed doubts as to the validity of the charge as presented and stated that it needed amendment. He therefore on 19 January 1998, on the instructions of the Attorney-General, withdrew the charge in terms of section 65 of the Criminal Procedure Code.

Section 65 is as follows-

> In a trial before any court a prosecutor may, with the consent of the court or on instructions of the Attorney-General, at any time before judgment is pronounced, withdraw from the prosecution of any person; and upon such withdrawal –

(a) If it is made before the accused person is called upon to make his defence, he shall be discharged, but such discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.

(b) ……

Accordingly, Mr Patrick Liu-Chit Chon was prosecuted in his personal capacity once again in Magistrates' Court "A" in case no 245/98 on 27 March 1998. This time the charge contained six counts, which involved the same facts, but count 1, 3 and 5 charged a company called "Yuan Met Investment (Proprietary) Limited" trading under the business name of "Oriental Services (Seychelles)" while counts 2, 4 and 6 charged Mr Chit Chon as a director of that company. Mr Pardiwalla, counsel for the accused, submitted in that Court that the charge was bad in law as it offended the rule of double jeopardy in that Mr Chit Chon was being charged in his personal capacity as well as a director of his company. The prosecutor thereupon withdrew the charge under section 65 of the Criminal Procedure Code for the purpose of filing a proper charge. The accused was thus discharged for the second time.

The third prosecution was instituted in the Supreme Court on 20 May 1998. There were two accused on the charge, (1) Yuan Mei Investment (Proprietary) Limited represented by its director Patrick Liu-Chit Chon, and (2) Patrick Liu-Chit Chon. The charges were substantially the same as in Magistrates' Court case no 245/98 but in counts 1, 2, 3 and 4 the business name of the trading company was stated as "Oriental Services (Seychelles)" but in counts 5 and 6, it was stated as "Hong Kong Hotel".

Once again Mr Pardiwalla informed the Court that he would be raising preliminary objections to the charge, before the accused took the plea. But before those objections were raised, the prosecution filed the fourth amended charge against the said company represented by Mr Chit Chon as director. Counts 5 and 6 were also amended changing the business name from "Hong Kong Hotel" to "Oriental Services (Seychelles)". Mr Pardiwalla informed the Court that in view of the latest amendment he could not maintain his objection on the basis of double jeopardy, but restricted himself to the application for stay of proceedings on the ground of an abuse of the process of court.

Mr Pardiwalla relied on the general principles set out in paragraphs 4-40 to 4-42 in Archbold *Criminal Pleading, Evidence and Practice* (vol 1,1992) under the sub-heading "Limited discretionary power to prevent prosecution proceedings". He submitted that the accused was first summoned to court in Magistrates' Court case no 406 of 1997 on 20 June 1997 in respect of this alleged offence and that due to the fault of the prosecution he is still awaiting trial and being tossed from one court to another. He also referred the Court to article 19(1) of the Constitution under the Charter of Fundamental Rights, which provides that-

19(1) - 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.

The Supreme Court of India, in the case of *Hussainara Khatoon v Home Secretary, State of Bihar* (1979) AIR 1360, emphasising the importance of speedy trial of criminal offences stated -

> No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair or just; an expeditious trial is an integral and essential part of the fundamental right to life and liberty.

Ingrained in this view is the principle that, in the administration of justice, unnecessary delays must be avoided. In this respect it must be considered that prisoners on remand may be in incarceration when they may be acquitted, and that even those on bail are subject to anxieties and inconveniences pending trial.

Section 60 of the Criminal Procedure Code vests the Attorney-General with the right to prosecute all crimes and offences committed within the country. Section 65 empowers him to withdraw such prosecutions without a bar to subsequent prosecutions on the same facts.

In the instant matter, two prosecutions instituted and withdrawn, and the amendment of the indictment for the third time in this Court, were statutory permissible. As Lord Salmon stated in the case of *DPP v Humphreys* [1977] AC 1 at 46 -

> ..... A judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of court and is oppressive and vexatious that the judge has the power to intervene.

Lord Diplock further clarified this power of the court in the case of *Hunter v Chief Constable of the West Midlands* [1982] AC 529 at 536 when he stated –

> ..... this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right - thinking people."

The abuse alleged may arise in different forms. In the case of *Connelly v DPP* [1964] AC 1254, Lord Devlin, considering the duty of a judge to prevent an abuse of process, stated –

> The fact that the Crown has .... and that private prosecutors have ..... generally behaved with great propriety in the conduct of prosecutions, has up till now avoided the need for any consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment from those who come or are brought before them?

In the instant case, the delay has been occasioned by the negligence or incompetence of the prosecution to draft a proper charge in respect of a purely technical offence which presents no complexity. In *R v Oxford City Justices, ex parte Smith* (1982) 75 Crim App R 200, the prosecution was stopped because the summons had not been served on the accused until some two years after the offence had been committed, purely due to incompetence. Lord Lane CJ thought that the proceedings should be stayed because the delay was unconscionable and had caused the accused prejudice in so far as his recollection of events was diminished, and as he would have difficulty in tracing witnesses, who may not recall the incident.

Ormrod LJ in *Doyle v Leroux* [1981] RTR 438 expounded the principle that an abuse of process covered anything done "deliberately or by accident by the prosecution which has seriously prejudiced the possibility of the accused defending successfully". Similarly Donalson LJ in *R v Watford Justices, ex parte Outrim* [1983] RTR 26 held that where delay has been caused by inefficiency or even by a failure of the system, judges have a discretion to decline to hear the summons. The relevancy of inefficiency for a stay order was again emphasised in *R v. Ex parte Turner*, where the divisional court said that delay would normally need to be accompanied by mala fides or efficiency "or at its lowest .... the court must be able to draw an inference that something has gone wrong with the prosecution process."

An "abuse of process" was defined in *Hui Chi-Ming v R* [1992] 1 AC 34 by the Privy Council as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceedings".

The foregoing cases of abuse based on delay were summarized by Lord Lane CJ Sir Roger Ormrod in the case of *R v Derby Magistrates' Court, ex parte Brooks* [1985] 80 Cr App R 164 where two circumstances in which an abuse of process can occur. They stated thus-

> In our judgment, bearing in mind Viscount Dilhome's warning in *DPP v Humphreys* [1977] AC 1 at 26 that this power to stop a prosecution should only be used "in most exceptional circumstances," and Lord Lane CJ 's similar observation in *R v Oxford City Justices*, *ex parte Smith* (1982) 75 Cr App R 200 at 204, which was specifically directed to Magistrates' Courts, that the power of the justices to decline to hear a summons is "very strictly confined," the effect of these cases can be summarised in this way. The

> power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service. We doubt whether the other epithets which are sometimes used in relation to delay, such as "unconscionable," "inordinate," or "oppressive," do more than add an emotive tone to an already sufficiently difficult problem.
>
> The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, for, as Lord Diplock said in *R v Sang* [1980] AC 402 at 437: "... the fairness of a trial ... is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted." It is, as Lord Diplock also said in that case "no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them." Or, we would add, in regard to the preparation of the case, unless this has prejudiced the defendant in this way, lengthy inquiries into the reasons for the delay should not be necessary.

The staying of prosecution is a drastic encroachment on the prosecuting powers of the state, exercised through the Attorney-General. Prosecution is stayed in exceptional circumstances not merely because serious prejudice may be caused to the accused, but also because if the trial were to continue, it would subvert the judicial process. Therefore abuse of process would involve more than simple unfairness to the accused. In the Mauritian case of *The State v Hussain Sheik & Ors* 1993 SCJ 406, abuse of the process of court on the basis of delay, was considered in relation to section 10 of the Constitution. That section is the same as our article 19(1). In that case two accused were charged for the unlawful importation of heroin before the Intermediate Court. The case was called pro forma on 20 May 1993. No plea was recorded from the accused as there was no interpreter available. The case was then postponed and fixed for trial on 20 July 1993. On that day a nolle prosequi was filed by the Director of Public Prosecutions. A fresh charge was filed on 2 August 1993. The Court considered section 10 of the Constitution and held that "the time which elapsed between the date that the nolle prosequi was filed, and the date of the present indictment, (was) not such as to amount to an abuse of process."

In the present case the initial prosecution in case no 406/1997 before the Magistrates' Court was withdrawn on 19 January 1998. The second prosecution filed in that Court on

27 March 1998 was withdrawn on 15 May 1998. The third prosecution on the same facts was filed in this Court on 20 May 1998. Article 19(1) of the Constitution requires that a fair hearing be given within a reasonable time "unless the charge is withdrawn." Hence for purposes of a stay application based on an alleged abuse of process, the delay must be reckoned from the day the charge was withdrawn initially or when, for some reason attributable to the prosecution, a delay commences. The time which elapsed between the date the initial charge was withdrawn and the filing of the charge in this Court was four months. The case was called on 1 July 1998 for the taking of the plea, but was postponed as counsel for the accused informed the Court that he had preliminary objections to raised before the plea was taken. The delay thereafter has been consequential. In those circumstances I do not consider that there has been an abuse of the process of court as to amount to what was defined in the *Hui Chi-Ming* case (supra) as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding."

As Brennan J stated in the case of *Jago v District Court of New South Wales* (1989) 168 CLR 23 –

> Stays imposed on the ground of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust.

I would however add that the reluctance on the part of courts to grant a stay in criminal proceedings, except in exceptional circumstances, should not serve as a licence to the prosecution to adopt "trial and error" methods when prosecuting.

The application for stay of proceedings is accordingly dismissed.

Record: Criminal Side No 24 of 1998