IN THE SUPREME COURT OF NEW ZEALAND

SC 61/2008
[2009] NZSC 41

SHANE EDWARD WILLIAMS

v

THE QUEEN

Hearing:	26 February 2009
Court:	Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ
Counsel:	L Cordwell for Appellant B J Horsley and C J Curran for Crown
Judgment:	15 May 2009

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by Wilson J)

Introduction

[1] Mr Williams appeals against his conviction on a charge of conspiracy to manufacture methamphetamine. He contends that there was undue delay in bringing

him to trial, that his trial should have been stayed and that his conviction should therefore be set aside.

[2] Nearly five years elapsed between the arrest of Mr Williams in November 2002 and his conviction, following a fourth trial, in October 2007. Much of this delay was clearly unavoidable. The first trial could not proceed, initially because a co-accused did not appear and, when he was located, insufficient jurors were available. The second trial was aborted, after seven weeks, when a co-accused was approached by jurors. The third trial was aborted, after two weeks, when the admissibility of crucial Crown evidence was successfully challenged.

[3] Mr Cordwell, for the appellant, submits however that there were three periods of undue delay. First, ten months elapsed while five pre-deposition hearings were adjourned because tapes of telephone discussions had not been transcribed. Secondly, the Crown appealed on 4 October 2005 against the ruling excluding evidence in the third trial. The appeal was heard on 18 May 2006. On 29 November 2006 the Court of Appeal announced that the appeal would be allowed, with reasons to follow. These reasons followed on 7 March 2007, some 17 months after the appeal was filed. Thirdly, there was a further delay of more than five months after the reasons of the Court of Appeal became available before the fourth trial started on 27 August 2007.

[4] The appellant does not allege prosecutorial delay. Conversely, the Crown does not claim that the appellant contributed to the delay.

The application for a stay

[5] The appellant and a number of his co-accused applied to Asher J, prior to the fourth trial, for a stay of the proceedings against them because of what they claimed was the undue delay in bringing them to trial. The Judge found that there had been undue delay.[1] He refused however the applications of the appellant and two others, all of whom were charged with the manufacture of and conspiracy to manufacture

---

[1] High Court, Auckland, CRI 2007-404-0006 and CRI 2007-404-0007, 10 August 2007.

methamphetamine, because of the seriousness of the alleged offending.[2] Asher J did grant a stay to seven other accused who were charged with less serious offending in that they were said to have assisted to some degree. Having been found guilty at trial on the conspiracy count, the appellant was sentenced by Asher J to four years six months' imprisonment. The term reflected a discount of 18 months (or 25 per cent) from the sentence of six years' imprisonment which would otherwise have been imposed, to reflect the undue delay in bringing the appellant to trial.

[6] While finding that the five year delay was "extraordinary"[3] and "unacceptably long",[4] Asher J concluded that neither prosecution nor defence was to blame. Rather there was largely "inherent systemic delay".[5] Because there was undue delay, a stay of proceedings was "clearly available".[6] A stay was a "primary remedy"[7] for a breach, although "the remedy of a stay is regarded as something of a last resort where there has been no prejudice"[8] and "a stay of criminal proceedings is an extreme remedy, to be granted rarely".[9] The Court should undertake a balancing exercise to assess whether remedies other than a stay might properly vindicate the breach. Some of the accused (the appellant not among them) would have completed their sentences if the first trial had proceeded and resulted in guilty verdicts. This weighed in favour of a stay, as did the detrimental effects of delay on the accused and the need to ensure the efficiency of the Courts. The public interest in the prosecution of alleged offenders, the serious nature of the charges and the lack of fault on the part of the prosecution weighed against a stay. On balance, a stay would be an inappropriate remedy for the appellant and the other alleged principal offenders but should be granted to the other accused because of the less serious charges they faced and the consequent lower sentencing range.

[7] On appeal by the appellant following his conviction and sentence, the Court

---

2 At para [112].
3 At para [41].
4 At para [74].
5 At para [54].
6 At para [80].
7 At para [85].
8 At para [101].
9 At para [111].

of Appeal[10] observed that, sitting as a Divisional Court, it did not propose to give a "leading judgment"[11] on the general question of undue delay. There was no challenge to the methodology of Asher J, he had appropriately balanced the relevant interests and had done so consistently with his role before the trial, which did not require him to predict the outcome of it. There was no allegation of specific trial prejudice. The Judge had made "no error of principle".[12] The appeal was therefore dismissed.

The nature of the right

[8] Section 25(b) of the New Zealand Bill of Rights Act 1990 guarantees to everyone who is charged with an offence "the right to be tried without undue delay". As Blanchard J said, when delivering the judgment of the Court of Appeal in *R v Harmer*[13]

> [130] The Bill of Rights guarantee of a trial without undue delay often overlaps with and supports the guarantee of a fair trial (s 25(a)) but it is a distinct right whose purpose is also to minimise pre-trial restraints (imprisonment or restrictive bail conditions) and to minimise other personal disadvantage as well as anxiety for someone who is entitled to be presumed innocent until guilt is established by verdict at a trial. Consequently, delay which has no appearance of prejudicing the fairness of a trial can become undue because of the elapsing of too long a period of time after the laying of a charge.
>
> …
>
> [131] Whether delay can said to be undue despite not affecting the fairness of a trial therefore falls to be determined on a case by case assessment of particular circumstances. The length and causes of delay must be considered.

[9] The right to be tried without delay supports the separate and independent right to a fair trial because the longer the delay in getting to trial the greater the

---

10 [2008] NZCA 296 (CA 664/07; CA686/07, 12 August 2008, Arnold, Panckhurst and Fogarty JJ).
11 At para [12].
12 At para [30].
13 CA 324/02 and 352/02, 26 June 2003.

possibility that there cannot be a fair trial. But, as the passage from *Harmer* recognises, the Court may be satisfied that the right to be tried without undue delay has been infringed although the accused has been unable to demonstrate any particular prejudice in defending the charges.[14] That was the position in the present case.

[10] There are thus two distinct rights, the right to a fair trial and the right to trial without undue delay. The right to trial without undue delay is directed to the time that elapses between arrest and final disposition, including any appeal,[15] whereas the right to a fair trial comes into play at the time of trial. The two rights overlap however where the consequence of undue delay in bringing an accused to trial is that a fair trial cannot be held. Both rights are then breached.

[11] In an earlier decision of the Court of Appeal, *Martin v Tauranga District Court,*[16] Cooke P and McKay J had adopted the approach of the Supreme Court of Canada in *R v Morin.*[17] That approach is to look at a range of factors, including the length of the overall delay, any waiver of time periods, the reasons for the delay (including time requirements, actions of the accused and the Crown, limits on institutional resources and any other reasons) and prejudice to the accused.[18] It is important, however, to emphasise that there can be undue delay and a breach of that right without there being any prejudice to a fair trial. That is one of the reasons why, as we will mention again when considering the question of remedy, a stay is neither a mandatory nor a usual remedy for undue delay.

[12] Whether there has been undue delay in a particular case is a function of time, cause and circumstance. *Undue* in this context is synonymous with *unjustifiable*. An accused may acquiesce in the delay, whether in the expectation that it will make the

---

14 See the judgment of Lord Hope in *Dyer v Watson (K v HM Advocate)* [2004] 1 AC 379 at paras [78] – [79] and that of Lord Templeman in *Bell v DPP of Jamaica* [1985] AC 937 (PC).

15 See the judgment of the Privy Council in *Darmalingum v The State* [2000] 1 WLR 2303 (PC) at p 2309 and the dictum of Cooke P in *Martin* at p 420.

16 [1995] 2 NZLR 419.

17 [1992] 1 SCR 771.

18 *Morin* at p 787-788 per Sopinka J.

task of the prosecution more difficult or because it defers the day of reckoning. Notwithstanding the suggestions to the contrary of Hardie Boys and McKay JJ in *Martin*,[19] there is no obligation on any accused to progress matters towards trial, or to protest about delay; the obligation is on the prosecution to ensure trial without undue delay. Whether delay is attributable to the Courts or to the prosecution is irrelevant to the determination of the question of excessive delay, but may be relevant in assessing the validity of any explanation for the delay and (if necessary) what remedy should be granted.

Undue delay – this case

[13] The delay in this case was plainly excessive. Almost five years between arrest and conviction is far too long. Whether there is sufficient explanation for the delay is, however, a more difficult question.

[14] On the information before us, we cannot say whether the delay of ten months before the pre-depositions hearing was justified. The number of tapes requiring transcription and the need to have a single transcriber who was familiar with the voices may explain the delay, at least in part. The delay is however of concern, particularly as Mr Cordwell told us that it was not unusual. It also colours the subsequent delays.

[15] By the time the Crown filed its appeal to the Court of Appeal after the third trial was aborted, nearly three years had elapsed since the arrest of the appellant. Against the background of that delay, the appeal should have been heard and decided as quickly as possible. Unfortunately, another seven months went by after the notice of appeal was filed before the appeal was heard, a further six months before the result was announced and then four months more before the reasons for that result were given. The significance of the issues raised by the appeal[20] and the heavy

---

[19] At pp 432 and 433 respectively.

[20] The judgment, *R v Williams* [2007] 3 NZLR 207 (CA), discusses comprehensively the admissibility of evidence obtained through the illegal execution of a search warrant.

workload of the Court[21] together provide a partial, but not a complete, explanation for the delay.

[16] After examining the Auckland High Court file, Asher J concluded that "it is therefore quite clear that the wait for the reasons for the decision of the Court of Appeal did not delay the setting down of the fixture [for the fourth trial]".[22] But that conclusion does not avail the Crown on the question of whether the delays were justifiable. The delay of five months between the giving of the reasons and the fourth trial might be acceptable, if that were the only delay. The much longer delay of fifteen months between the hearing of the appeal and the trial is not however justifiable when the previous delays are also taken into account.

[17] We conclude that the delay in its totality cannot be justified and was therefore undue. Mr Williams was entitled to a remedy for this undue delay in bringing him to trial.

Remedy

[18] The remedy for undue delay in an accused coming to trial must provide a reasonable and proportionate response to that delay. A stay is not a mandatory, or even a usual remedy.[23] Staying the proceedings is likely to be the correct remedy only if the delay has been egregious, or there has been prosecutorial misconduct or a sanction is required against a prosecutor who does not proceed promptly to trial after being directed by a Court to do so. If an accused is convicted after being on bail pending trial, a reduction in the term of imprisonment is likely to be the appropriate remedy. If the accused has been in custody, that time will count towards service of the term of imprisonment. In an extreme case,[24] the conviction may be set aside. Upon acquittal, monetary compensation may be justified. The seriousness of the

---

21 The Court is a very busy Court; it delivered 602 judgments in 2005, 686 in 2006 and 620 in 2007.

22 At para [51].

23 The Court of Appeal in *Martin* divided on the question of whether a stay is an automatic remedy for a breach of s 25(b): Cooke P thought at p 425 that it was; Hardie Boys J at p 432, Casey J at p 430 and McKay J at p 434 considered that a range of remedies were available; and Richardson J at p 427 declined to express a concluded view on the point.

24 As for example in *Darmalingum*.

offending will usually not be relevant to the nature of the remedy. If however the offending is well towards the lower end of the scale, that may be sufficient to tip the balance in favour of a stay.

[19] Article 6 of the European Convention for the Protection of Fundamental Rights and Freedoms is headed "Right to a fair trial". Part of Article 6(1) in effect combines the s 25(a) guarantee of a fair trial and the s 25(b) right to trial without undue delay by providing that "everyone is entitled to a fair trial and public hearing within a reasonable time". The observations of Lord Bingham of Cornhill in *Attorney-General's Reference (No 2 of 2001)*[25] as to the appropriate remedy for a breach of the entitlement to a hearing within a reasonable time are equally applicable to the right in this country to trial without undue delay:[26]

> The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.

[20] Earlier in his speech, Lord Bingham had pointed out that experience had shown that the practical effect of treating a stay as the necessary consequence of a

---

25 [2004] 2 AC 71.

26 At para [24].

breach of the reasonable time requirement is to subvert the right which the guarantee is designed to protect:[27]

> Judges should not be vexed with applications based on lapses of time which, even if they should not have occurred, arouse no serious concern. There is, however, a very real risk that if proof of a breach is held to require automatic termination of the proceedings the judicial response will be to set the threshold unacceptably high since, as La Forest J put it in *Rahey v The Queen*,[28] "Few judges relish the prospect of unleashing dangerous criminals on the public". La Forest J drew attention to the compelling observation of Professor Amsterdam, written with reference to American experience following the Supreme Court's decisions interpreting the sixth amendment to the United States Constitution in *Barker v Wingo*[29] and *Strunk v United States*:[30]
>
> > the spectre of immunizing, of 'turning loose', persons proved guilty of serious criminal offences has been thoroughly repugnant to judges, and they have accordingly held that shockingly long delays do not 'violate' the sixth amendment. The amendment has thereby been twisted totally out of shape – distorted from a guarantee that all accuseds will receive a speedy trial into a windfall benefit of criminal immunity for a very few accuseds in whose cases the pandemic failure of our courts to provide speedy trials has attained peculiarly outrageous proportions.[31]

[21] The recent judgment of the Privy Council in *Elaheebocus v The State of Mauritius*[32] is also instructive. More than four years elapsed between the arrest of the appellant and his conviction on a charge of counterfeiting banknotes, and more than three years between his filing an appeal against that conviction and the hearing of the appeal. A further 18 months then passed before judgment was given even though the appeal was, in the Privy Council's words, "quite frankly, hopeless".[33] Unsurprisingly, the Board had no difficult in finding that there had been a breach of the constitutional guarantee of trial "within a reasonable time". In addressing the question of redress, their Lordships concluded:[34]

> Frankly, the very fact that the Board is prepared to entertain this appeal and find a breach of the reasonable time guarantee could well be thought redress enough: anything beyond this from the appellant's standpoint may be regarded as essentially fortuitous. All that said, however, their Lordships on

---

27 At para [22].
28 39 DLR 481, 516.
29 (1972) 407 US 514.
30 (1973) 412 US 434.
31 Amsterdam, "Speedy Criminal Trial: Rights and Remedies" (1975) 27 Stan L Rev 525, 539.
32 [2009] UKPC 7.
33 At para [13].
34 At para [23].

> balance think it right to mark the undoubted constitutional breach in this case by making a modest reduction in the sentence to be served. In the result they quash the four-year term and substitute for it a term of three and a half years' penal servitude, such sentence now to be served without further delay.

[22] In the light of these authorities, Mr Williams should regard himself as fortunate. There was no justification for a stay of the proceedings against him, and the reduction of 18 months (or 25 percent) from the sentence which would otherwise have been imposed was a generous one. Mr Williams' alleged co-offenders who were granted a stay, particularly those who were said to have provided the greatest assistance to the principal offenders, should also regard themselves as fortunate in avoiding trial and the consequent risk of conviction and sentence.

Result

[23] There was undue delay in bringing the appellant to trial, but that delay did not justify a stay and was more than adequately recognised in the reduction in sentence. The appeal is therefore dismissed.

Solicitors:
Crown Law, Wellington