

**SOKOVETI TUIMOALA v PUBLIC SERVICE COMMISSION and 3 Ors**

HIGH COURT — CIVIL JURISDICTION

5 SINGH J

4 November 2003

[2003] FJHC 297

10 **Constitutional law — Constitution — declarations and permanent stay of proceedings — disciplinary charges against principal librarian of Ministry of Education — whether delay unreasonable — right to fair trial within reasonable time — Constitution ss 29(1), 29(3) — Public Service Commission (Constitution) Regulations 1990 reg 41(6).**

15 Plaintiff sought declarations that it is her constitutional right to have the three disciplinary charges against her determined within a reasonable time and that there was delay in the proceedings. She also sought an order for a permanent stay of proceedings. Respondents alleged that it was not an unreasonable delay.

20 **Held** — The delay in the proceedings was reasonable since an investigator had to be appointed, witnesses need to be located and summoned and the events which put the country in turmoil.

Declarations disallowed.

**Cases referred to**

25 *Apatia Seru v State* Crim App No AAU 41 and 42 of 1999; *Bell v Director of Public Prosecutions of Jamaica* [1985] 2 All ER 585; *Martin v Tauranga District Court* [1995] 2 NZLR 419; *R v Morin* [1992] 71 CCC (3d) 1; *Rahey v R* (1987) 33 CCC (3d) 289 (SCC), considered.

30 *T. Fa* for the Plaintiff.

*S. Naivoti* for the 1st Defendant.

*J. Raikadroka* for the 2nd–4th Defendants.

35 **Singh J.** By an originating summons filed on 25 July 2003 the Plaintiff is seeking inter-alia the following declaration or orders:

(1) *A declaration* that it is the constitutional right of the Plaintiff to have the three disciplinary charges against her determined within a reasonable time by virtue of Art 29(3) of the 1997 Constitution.

40 (2) *A declaration* that the delay of some 6 years to determine whether the Plaintiff herein had committed the three disciplinary offences which she was alleged to have committed in 1997 and the failure of the 1st and 2nd Defendants herein to have acted in accordance with the Fiji Court of Appeal decision of 12 May, 2000 a period of over 3 years is unreasonable, inexcusable delay and therefore a breach of the requirements of Art 29(3) of the 1997 Fiji Constitution.

45 (3) *An order* that the 1st and 2nd Defendants should now take steps to have the Plaintiff reinstated to her position as principal librarian of the Ministry of Education on full salary backdated to June 1997.

50 On the day of hearing counsel for Plaintiff sought to add without objections from a Respondents order for permanent stay of proceedings. The amendment was allowed.

## Facts

The Plaintiff in her affidavit says she was employed as a librarian with the Ministry of Education since 1975. On 24 June 1997 she was charged for three disciplinary offences by the 2nd Defendant. By a memorandum dated 21 August 1997 she was informed that her case had been considered and she was dismissed. She filed a judicial review which was dismissed by the High Court. Her appeal to the Court of Appeal was upheld and the Court of Appeal on 12 May 2000 ordered the 1st Defendant to determine the truth of the charges in accordance with reg 41(6) of the Public service Commission (Constitution) Regulations 1990. In early February 2002 she was informed that Captain John Rounds had been appointed to investigate her case but she has heard no more. She got her solicitors to write to the 1st Defendant but has not received any reply.

The position of the 1st Respondent is contained in the affidavit of Filimoni Kau. He says following the Court of Appeal judgment, the commission wrote to the 2nd Defendant requesting original statements and relevant papers to commence disciplinary proceedings. It wrote a series of letters to the second defendant for this information. On 6 September 2001 an investigator was appointed but on 18 September 2001 he wrote to say he could not act as investigator. Hence on 23 January 2002 another person was appointed to investigate the Plaintiff's case and one other case of one Joseph Nainima. Joseph Nainima's case was heard first and it took an extremely long time due to non-availability of witnesses and adjournments at request of counsels. That case was finalised on 9 April 2003. On 12 October 2003, the tribunal met to map out the tribunal hearing in Plaintiff's case.

All the parties have made useful written submissions. They are agreed on factors which a court ought to look at in considering the matter of stay.

## Relevant constitutional provision

The relevant provisions of the Constitution are s 29(1) and (3) which deal with right to a fair trial and trial within reasonable time. They read:

29. (1) Every person charged with an offence has the right to a fair trial before a court of law.

(3) Every person charged with an offence and every party to civil dispute has the right to have the case determined within a reasonable time.

These provisions show that a person has a constitutional right to have his criminal case tried within a reasonable time. If he is not so tried then he is entitled to ask that he not be tried at all.

## Case law

In *Rahey v R* (1987) 33 CCC(3d) 289 Larner J expressed the position as follows:

If an accused has the constitutional right to be tried within a reasonable time he has the right not to be tried beyond that point in time and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable time, no trial, not even the fairest possible trial is permissible.

It is impossible to say what constitutes or does not constitute a reasonable time. I do not consider that a court can lay down that a delay beyond certain months is unreasonable delay. The concept of reasonable time would vary according to the circumstances of each case and also vary from country to country depending on resources available to the judicial system.

The New Zealand Court of Appeal in *Martin v Tauranga District Court* [1995] 2 NZLR 419 said that delays beyond certain time may be regarded as presumptively prejudicial in the sense that the delay is so long that it is unreasonable.

5 In *Bell v Director of Public Prosecutions of Jamaica* [1985] 2 ALL ER 585 the Privy Council considered a provision in the Jamaican Constitution which afforded an accused “a fair hearing within a reasonable time”. The Privy Council laid certain guidelines for determining whether a delay would deprive an accused person of a fair trial.

10 The relevant factors were:

- (a) the length of delay;
- (b) the prosecution’s reason for the delay;
- (c) efforts of accused to assert his rights; and
- (d) prejudice caused to the accused.

15 Somewhat more detailed factors were given by New Zealand Court of Appeal in *Martin v Tauranga District Court* [1995] 2 NZLR 419 where Sir Robin Cooke J adopted the following passage from the judgment on the Supreme Court of Canada in *R v Morin* [1992] 71 CCC 3d 1 from 13. It gives the following factors in considering the issue whether the delay has become unreasonable.

- 20 (1) the length of delay
- (2) Waiver of time periods
- (3) the reasons for the delay including—
  - (a) inherent time requirements of the case
  - (b) actions of the accused
  - 25 (c) action of the Crown
  - (d) limits on institutional resources and,
  - (e) other reasons for the delay, and
- (4) prejudice of the accused.

The Court of Appeal in *Apaitia Seru & Anthony Frederick Stephens v State* —  
 30 Crim App 41 and 42 of 1999S on p 10 said:

We do not regard the list of considerations set out by Sopinka J. (pp 12–13 of his judgment, quoted above) as necessarily exhaustive but under one heading or another it encompasses all the factors that may be regarded as relevant in the present case.

### 35 Length of delay

The starting point from which time ought to run is the order for retrial by the Court of Appeal on 12 May 2000 and not when the Plaintiff was first charged — see *Bell v Director of Public Prosecutions of Jamaica* [1985] 2 ALL ER 585.

40 At the time of the application 3 years and 2 months had elapsed since the order of the Court of Appeal. It is conceded that there was no waiver of time periods by the Plaintiff. In fact the Plaintiff had been writing to express concern about the delay.

### Reasons for delay

45 Every case be it civil or criminal has certain inherent time requirements which must be considered when considering whether delay is unreasonable. In this case and investigator had to be appointed; the witnesses would need to be located and summoned.

50 Unlike the ordinary courts the investigators in situations such as the present are appointed on case by case basis and it also appears depending on availability of persons approached. Nor can any civil servant be appointed as an investigator.

The investigator must be some one who is appreciative of the serious nature of responsibility of such investigation and requirements of natural justice. This places the present case in a category different from those cases in ordinary courts where a duly constituted court convenes everyday and is more readily available to hear cases.

When an investigator was appointed, he commenced to deal with another case before him which for reasons beyond his control took longer than expected. This also led to the delay in these proceedings.

In considering the reasons for delay one cannot ignore the events of May 2000 which put the country in turmoil. Some delay was inevitable as a result of this. The defendants also say that one of the appointed investigators later withdrew. This was in September 2001. Between the appointment and the withdrawal there was only a space of 12 days. However, this would necessitate a search for another proper person to replace him which would take time. After the withdrawal by the first investigator, the next investigator was appointed over 4 months later on 23 January 2002.

Part of the delay immediately following the Court of Appeal judgment can squarely be laid at the doors of the 2nd Defendant which failed to provide original statements and documents to the 1st Defendant despite five letters being written to it by the 1st Defendant between 4 July 2000 to 18 April 2001.

The Plaintiff says she has suffered prejudice as she has lost her witnesses who have migrated. The affidavit does not say who her witnesses were and the nature of the evidence they were to give, and when they migrated. The date of migration is very material as they may well have migrated after the first hearing and before the Court of Appeal judgment. No blame can be laid on the defendants if the witnesses had left before the judgment of Court of Appeal or soon afterwards. The Plaintiff also does not state if she is in contact with her witnesses even if they are overseas.

In para 18 of her affidavit dated 23 July 2003 she stated certain consequences which flowed from her being interdicted. Again she gives no dates and whether these events occurred before or after the Court of Appeal judgment.

However, in considering an application of the type before the court prejudice is not the dominating factor. The Court of Appeal in *Apatia Seru* at 13 remarked:

If prejudice or its absence is regarded as the dominating factor, the purpose behind section 29(3) of ensuring the speedy disposal of charges is deflected.

The Plaintiff's affidavit fails to persuade me on balance of probability that the Plaintiff will suffer prejudice if the proceedings were to continue.

### **Application**

An imposition of a stay on basis of delay is an exceptional remedy. Consideration of delay involves the balancing of the interest of the individual against the wider interest of the community in due administration of justice. The community can fairly expect that civil servants holding responsible posts do not abuse their position for personal gain or other incidental profit. The Plaintiff was a librarian with the Ministry of Education. She was sole proprietor of an entity called Modern Book and Library Supplies. Without declaring her interest in the entity she is alleged to have got staff under her control to raise Local Purchase Orders in favour of the entity. The amount involved is \$74,439.44. These are serious allegations of a dishonest practice. The Auditor General frequently alludes to such practices in his annual reports and recommends action. His reports generate widespread public concern.

Opposed to this is the interest of the Plaintiff not to have serious allegations hanging over her head resulting in anxiety and uncertainty as to her future. One of the consequences if she is found guilty is she could lose her employment.

5 Looking at all the factors raised by various parties, I am of the view that the delay in the proceedings is not an unreasonable delay which warrants the interference of this court to stay proceedings permanently. The hearing in fact is scheduled for November. Accordingly I decline to grant the declarations sought.

*Declarations disallowed.*

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