IN THE HIGH COURT OF NIUE

Application No: CR26/09

IN THE MATTER THE CROWN

AND JOSEPH MCCOY

DECISION

The Application

[1] This is an application for a stay of proceedings filed in relation to an indictment containing a charge of murder or manslaughter laid against Joseph McCoy.

Background

[2] Joseph McCoy was originally indicted on a charge of murder. He stood trial and was convicted in June 2002 for a lesser charge of manslaughter, and in October 2002 was sentenced to 9½ years imprisonment.

[3] On 15 November 2006 following an application for rehearing the High Court quashed Mr McCoy's conviction and Mr McCoy was released on bail pending a retrial. Since that time the Crown has been in discussion with counsel for Mr McCoy regarding the most appropriate manner to deal with this case.

Position of the Parties

[4] On 12 June 2009 Mr Hirschfeld, counsel for Mr McCoy, filed an application for the stay of proceedings, upon the following grounds:

a) The Court may so order and for the reasons given has jurisdiction to do so;

b) Witness availability both for the prosecution and the defence is limited by death, incapacity or unavailability;

c) Were the rehearing to proceed, Mr McCoy would be denied a fair trial given the lapse of time, lack of availability of witnesses, loss of court records and inability to prepare an adequate defence;

d) The time which has elapsed since conviction is likely to compromise the ability of witnesses who could give evidence to recall the detail of what happened;

e) Mr McCoy has served a substantial period of the prison sentence imposed; and

f) The overall delay in this case is unconscionable and a breach of Article 11 of the Universal Declaration of Human Rights Act 1948.

[5] The Crown filed a submission on 17 July 2009 seeking that the Court make the orders it thinks appropriate as "most consistent with natural justice and convenience" under section 71 of the Niue Act 1966, and stating that the Crown would abide by the decision of the Court.

[6] On 19 November 2009 I held a conference with Toepenina Hekau (Crown Counsel), Maria Tongatule (Acting Chief of Police), Senior Constable Maka Ioane and Mr Hirschfeld, who attended by telephone. Darren Tohovaka, the Deputy Registrar, was also in attendance. At the conclusion of this conference I directed as follows:

a) Mr Hirschfeld was to file within one month a memorandum setting out details as to what witnesses are not available and the reasons why, as well as what documents he was to rely upon that are no longer available;

b) The Crown was to respond to Mr Hirschfeld's memorandum within two weeks of its deadline for filing. In their response they were to set out details responding to the initial application as well as detailing what witnesses are available and evidence they may call at trial; and

c) The Registrar was to provide, within one week, a brief summary of the documents available on the Court File.

[7] I informed partied that upon receipt of these submissions I would issue a written decision of the application for a stay of proceedings.

[8] On 7 December 2009 the Deputy Registrar circulated to parties a summary of the contents of the Court File from the 2002 trial. The record contained:

a) The original court order;

b) A criminal offence report;

c) Twelve exhibits from the original trial, including both physical evidence (the murder weapon, shotgun shells, a sketch plan of the crime scene, prison diary roster and copy of receipts) and statements;

d) Briefs of evidence from the original trial;

e) Transcripts of court sittings (with only a partial transcript of the sentencing hearing);

f) Documentation as to Crown disclosure;

g) The accused's previous conviction history; and

h) Audio cassette recordings of the original trial (potentially damaged in 2004 when they were submerged in water during Cyclone Heta).

[9] Also on 7 December 2009, Mr Hirschfeld filed a memorandum outlining the unavailability of witnesses and loss of evidence. He lists six classes of witnesses as "living overseas or dead or unavailable". These are:

a) Arresting police officer;

b) Crime scene officer;

c) Police armourer;

d) Interviewing police officer;

e) Pathologist; and

f) Civilian witnesses at the prison.

[10] Mr Hirschfeld also provided a list of unavailable documents, including police documentation, photographs, the weapon used in the alleged crime, clothing of the accused and deceased, witness statements, a pathologist's report and trial transcripts.

[11] In a memorandum dated 22 December 2009, Crown counsel responded to Mr Hirschfeld's list of unavailable witnesses and evidence. The Crown noted that all relevant members of the classes of witnesses listed in his memorandum were available, with the exception of one witness who was deceased and one who has been deported.

[12] The Crown noted that there was no pathologist available as no pathology report was ever commissioned in this matter. A visual examination was carried out by a registered medical doctor, who has since left Niue. The Crown do not state if this witness would still be available to give evidence, although his report from the first trial is still on record.

[13] The Crown also stated that the majority of the evidence noted as unavailable in Mr Hirschfeld's memorandum is in fact available to the Court. The only missing evidence is the clothing of the accused and the deceased, and spent cartridges from the weapon used in the alleged crime. I note that this last item may in fact be available, as the Deputy Registar's report lists two spent shotgun shells (as well as six, presumably unspent, shells) as available exhibits preserved on the Court File, along with the weapon in question. The Crown also notes that some evidence listed as 'no longer available' by Mr Hirschfeld was never presented to the Court, namely the pathology report (for the reasons outlined above) and evidence from civilian witnesses (as the events in question were not witnessed by any civilians).

[14] The Crown has also altered its position on the application from its 17 July 2009 memorandum. Rather than abiding by the decision of the Court, counsel now submits that as the majority of evidence and witnesses from the original trial are available, and given the serious nature of the original crime, the Court should dismiss the application for a stay of proceedings and allow the matter to proceed to trial.

The Law

[15] There are neither specific statutory provisions nor any common law precedents in Niue that deal with an application for a stay of proceedings.

[16] However, under Article 37(2) of the Niue Constitution, the High Court of Niue "shall have all such jurisdiction (both civil and criminal) as may be necessary to administer the law in force in Niue."

[17] As a result, the High Court has all the powers ancillary to its primary jurisdiction that are necessary to administer the law, whether or not those powers are conferred by statute or the rules of the Court.

[18] All Courts have inherent powers which flow from the Court's particular jurisdiction and are part of the common law of the Courts.[1] In my view this situation is no different for the Niuean High Court.

[19] One of these inherent powers, which is necessary for the Court to control its own processes and prevent an abuse of process, must be the ability to grant a stay of proceedings.

[20] As pointed out in paragraph [15] there are no precedents in Niue relating to stay of proceedings. Therefore my view is that overseas cases regarding circumstances in which a stay of proceedings should be granted should be considered. The most common sense position is that the High Court of Niue is free to draw on decisions of other common law jurisdictions to the extent that the Court considers such decisions have application in Niue. These cases would be seen as persuasive but not binding on the Court, and there is certainly no presumption that a rule of common law or equity developed in a foreign jurisdiction has application in Niue. It must be scrutinised on its own merits.

[21] It is reasonable however to expect that the Court will resort to existing common law rules from other jurisdictions. In particular, in developing Niue common law in a manner appropriate to local circumstances it can be seen that Niue's close relationship with New Zealand is a relevant factor, and that consistency with the common law of New Zealand is a relevant consideration. Many of Niue's statutes are based on New Zealand statutes, and while it would be contrary to section 4(e) of the Interpretation Act 2004 to automatically apply

[1] *R v Norwich Crown Court; Ex parte Belsham* [1992] 1 WLR 54 at 66

the common law rules of New Zealand to Niue, it is legitimate to find these laws persuasive and applicable where local circumstances do not necessitate a different result.

[22] The leading case on stay of proceedings in New Zealand is the Supreme Court judgment in *R v Williams*[2]. This decision was based on statutory rights, encoded in the New Zealand Bill Of Rights Act 1990, to a fair trial and trial without undue delay. Niue does not have a bill of rights, nor is it necessarily bound by the international human rights covenants and jurisprudence that inform the New Zealand Act. However, the right to a fair trial is such a fundamental precept of common law that it is obviously desirable for the common law of Niue to be developed in line with this concept. It is also desirable that those accused of crimes are tried without undue delay.

[23] The Court in *R v Williams* found that in general a stay of proceedings for any reason is a remedy of last resort, and that the right to a speedy trial should not lead to a wide criminal immunity. A stay should only be granted if it is no longer possible to proceed with a fair trial. If there are other remedies available to ensure that a fair trial can proceed, they should be preferred.

[24] It should be emphasised that where a stay of proceedings is sought due to delay, the accused must be able to show either particular or general prejudice arising from this delay.

[25] Particular prejudice occurs where the defendant can point to a particular disadvantage occurring as a result of the delay in bringing the charges, such as the unavailability of witnesses who might have been called or the loss or destruction of relevant and important documents or evidence.

[26] If particular prejudice is established, the Court must first consider remedies to cure that prejudice before granting a stay of proceedings. These remedies could include excluding evidence, adjournments, and any other steps at the disposal of the Court.

[27] If particular prejudice cannot be shown, the defendant may plead general prejudice as a result of the delay. To justify the granting of a stay as a result of general prejudice arising from delay, the delay must have been exceptional or there must have been some form of prosecutorial involvement.

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[2] [2009] 2 NZLR 750

[28] Where a stay is sought on the basis of delay, it may be appropriate to expedite the hearing to the greatest extent practicable and possibly, if the accused is not already on bail, to ensure bail is granted. However, a stay will never be an appropriate remedy if any lesser remedy will cure any potential unfairness.

[29] To summarise, when considering the legal principles relating to a stay of proceedings, the main issue for the Court is whether or not in light of the circumstances of the case a fair trial is possible. If there is found to be unjustified delay, but a fair trial is still possible, a remedy other than a stay should be granted.

Discussion

[30] Counsel for Mr McCoy submits that a fair trial is not possible as witness availability for both the prosecution and defence is limited by death, incapacity or unavailability; the time which has elapsed since conviction is likely to compromise the ability of witnesses who could give evidence to recall relevant events; Mr McCoy has served a substantial portion of his prison sentence; and that the overall delay in this case in unconscionable.

[31] The Crown submits that there is still sufficient evidence available for a fair trial to be held. They acknowledge that some physical evidence may have deteriorated and that one witness is now deceased, but submit that given the evidence that is available, the serious nature of the alleged crime and the interests of natural justice, the application for a stay should be dismissed and the trial allowed to proceed.

[32] The first question to be considered is the alleged unavailability of witnesses and loss of evidence. These allegations are the only evidence put before the Court of particular prejudice that could prevent a fair trial being held. However, there are conflicting accounts as to how many witnesses are unavailable, and how much evidence has been lost, between counsel for Mr McCoy and Crown counsel.

[33] Mr Hirschfeld submitted a list of six classes of witnesses, reproduced at paragraph [9] above, all of whom, he stated, are "living overseas or dead or unavailable". This was contradicted by Crown counsel who stated that the majority of the witnesses from the original trial are still available. Only one witness has died in the period since the original trial, and one is overseas as a result of deportation and, it is implied, would not be available to give evidence at a retrial. Given the specificity of Crown counsel's submissions, in contrast to the general statements made by Mr Hirschfeld, I accept that the majority of witnesses from the

original trial are available to give evidence in a retrial. Where they are not, the Court File shows that witness statements and briefs of evidence have been preserved from the original trial.

[34] There are also conflicting accounts as to the loss of the Court's records and physical evidence from the original trial. Mr Hirschfeld asserts that a large amount of documents that the accused wished to rely upon (described in paragraph [10] above) are no longer available. However the Crown, in its 22 December 2009 memorandum, noted that the majority of the evidence from the original trial is still available, albeit in some cases deteriorated by the passage of time. This is confirmed by the Deputy Registrar's summary of the Court File described at paragraph [8] above. The Crown states that the only pieces of physical evidence no longer available are the clothing of the accused and the deceased and spent cartridges from the weapon used in the alleged crime. As noted above, this seems to be partially contradicted by the Deputy Registrar's report, which lists two spent cartridges as preserved on the record. The Crown also states that audio recordings of the original trial on cassette were submerged in water during Cyclone Heta, and as a result may be damaged or permanently destroyed. Work to retrieve this audio has not yet been undertaken. This incident is also recorded in the Deputy Registrar's report, although in the same report several trial transcripts are listed as available on the record. The extent to which transcripts of the original trial are available is therefore unclear, although it appears at least some transcripts have been preserved.

[35] Looking at the evidence of the Crown and the report of the Deputy Registrar, it is clear that both the majority of witnesses and evidence from the original trial will still be available at a retrial. To the extent that evidence has been lost and witnesses are unavailable to give testimony, this appears to be much more prejudicial to the prosecution's case than that of the defendant, as the absence of the particular evidence and witness testimony noted will, if anything, hinder the prosecution's ability to make out the elements of the crime rather than deprive the accused of a valid defence.

[36] I am not persuaded that the unavailability of witnesses and evidence is such that it would render the trial unfair. It is clear that a large amount of evidence and witness testimony will be available to both the prosecution and the defence and, where such evidence or testimony is unavailable, or evidence has deteriorated due to the passage of time, Mr McCoy has not shown any reason why this would be prejudicial to his case rather than the prosecution's.

[37] Turning to general prejudice, counsel for Mr McCoy also submits that the overall delay in this case is unconscionable, and will have compromised the ability of available witnesses to give detailed evidence.

[38] Mr McCoy's original conviction was quashed by the Court on 15 November 2006, with a rehearing ordered on 21 November 2006. Between that date and April 2009, as stated by the Crown in its 22 December 2009 memorandum, there were several negotiations between the Crown and Mr McCoy regarding the rehearing, with the Crown prepared to file a Nolle Prosequi on certain conditions. These negotiations broke down, leading to the accused's filing of this application for a stay of proceedings on 12 June 2009.

[39] As stated above, where a stay is sought as a result of general prejudice arising from a delay, the delay must have been exceptional or there must have been some form of prosecutorial involvement to justify a stay being granted. There is no allegation of prosecutorial involvement in this instance. And while the delay in bring this matter to a rehearing was considerable, I do not find it to be exceptional. The delay was caused by the Crown and the accused taking steps to pursue a conclusion to this matter which, while unsuccessful, were reasonable in the circumstances. It should be noted that the High Court only sits in Niue at most twice per year, which may have been a contributing factor in the delay. I therefore do not find the delay in bringing this matter to a rehearing to be unreasonable such that it has rendered a fair trial impossible.

Decision

[40] For the reasons given above, the application for a stay of proceedings is dismissed. In order to ensure that there is no further delay in this matter, the rehearing of this case should be set down for hearing in the High Court of Niue for the November 2010 Court hearings. This Court sitting is to be confirmed as soon as possible by the Registrar so that both parties can commence preparation for the hearing.

Dated at Wellington this 17th day of February 2010.

JUSTICE WILSON W ISAAC