
[2013] UKPC 6
**Privy Council Appeal No 0033 of 2012**

# JUDGMENT

# Hassen Eid-En Rummun (Appellant) *v* The State of Mauritius (Respondent)

## From the Supreme Court of Mauritius

**before**

**Lord Hope**
**Lord Kerr**
**Lord Reed**

## JUDGMENT DELIVERED BY LORD KERR ON

## 7 February 2013

**Heard on 12 December 2012**

| *Appellant* | *Respondent* |
| --- | --- |
| S Kailash Trilochun | Geoffrey Cox QC |
| (Instructed by Roshan Rajroop) | (Instructed by Royds Solicitors LLP) |

**LORD KERR:**

1. Following a trial before a magistrate of the Intermediate Court of Mauritius, Mrs V Phoolchund-Bhadain, Hassen Eid En Rummun was found guilty on 9 October 2009 of the offence of larceny while armed with an offensive weapon. On 5 November 2009 he and three co-accused who had pleaded guilty earlier received sentences of imprisonment. The three co-accused were Lall Sujore, Beny Lutchoomun and Deojit Vallacanna Beeharry. They had entered pleas of guilty on 27 November 2008. In the case of Beeharry the plea was to the offence of aiding and abetting the commission of larceny. All other accused, including the appellant, were either convicted or pleaded guilty to the offence of larceny with an offensive weapon.

2. In sentencing the accused, the magistrate said that they had each taken part in a "well planned plot" to commit the offence. On 30 December 1999, in a car hired for the purpose, they had followed the victim from his business premises. When he had brought his car to a halt, they approached it wearing masks. Some of the offenders were carrying sabres. The appellant, Rummun, was one of these. Threats were made to the victim, including that he would be killed if he did not hand over the takings from that day's business. The windscreen of his car was smashed by the defendant, Lutchoomun, wielding a piece of wood. Some 800,000 Mauritian rupees (approximately £17,000) were handed over. The proceeds of the crime were divided up between the defendants. Most of the proceeds were not recovered.

3. The appellant was arrested on 2 February 2000 and cautioned for the offence. He and his three co-accused confessed to the crime on that date. Rummun appeared before the Intermediate Court of Mauritius on 15 July 2002 and his trial was postponed on many occasions until, finally, it took place in September 2009. It appears that the basis of the defence was that Rummun had not participated in the offence as a principal but merely as a secondary participant. On the hearing of the appeal before the Board, Mr Trilochun, who appeared on his behalf but not in the proceedings below, wisely accepted that, in light of Rummun's confession and what was established about the manner of his participation in the offence, this defence was non-viable.

4. When she came to sentence the defendants in November 2009, the magistrate said that she took into account that the offence was committed in 1999. But her sentencing remarks then continued as follows:

> "However, the delay in disposing of this matter is largely attributable to the defence. True it is that since that time, the accused parties have not been convicted of any offence, this being an indication that they have stayed away from crime. Nevertheless, being given (*sic*) the gravity of the offence, the interests of justice will be served by a custodial sentence."

5. The three accused who had pleaded guilty were each sentenced to three years' penal servitude. The magistrate referred to that consideration in sentencing each of them. The appellant was sentenced to four years' penal servitude. All four appealed their sentences to the Supreme Court.

6. On 21 September 2011 the Supreme Court (Judges S B Domah and S Bhaukaurally) substituted a sentence of two years' imprisonment for the sentence of three years' penal servitude in the case of Sujore because his clear record had not been given sufficient weight as a mitigating factor. In the case of Lutchoomun, the court reduced the sentence of three years' penal servitude to one of two years and nine months, reflecting the fact that, after pleading guilty on 28 November 2008, he had moved for a separate trial in order to have the matter disposed of. That application had been refused but the Supreme Court considered that Lutchoomun deserved credit for this attempt to have the case dealt with at an earlier stage. The sentences imposed on Beeharry and Rummun were affirmed. The court rejected the argument that Rummun had received a heavier sentence because he had pleaded not guilty. It found that the discrepancy between his sentence and those imposed on the others was the consequence of their having earned a discount by pleading guilty.

7. On the hearing of the appeal before the Supreme Court counsel for Rummun had raised the issue of delay in bringing his case to trial. It does not appear from the record of the proceedings with which the Board has been provided that any submission was made about the impact which the delay had on the appellant's rights under section 10(1) of the Constitution which, among other things, guarantees a fair trial within a reasonable time to all those charged with criminal offences. The Supreme Court, perhaps understandably in light of the absence of any submission to the effect, did not address the question of the possible breach of the appellant's constitutional rights. In the Board's view, this is unfortunate. In cases such as the present involving substantial delay, the Board considers that it is the duty of the sentencing court, whether or not the matter has been raised on behalf of a defendant or appellant, to examine the possibility of a breach of that person's constitutional rights in order to decide whether any such breach should have an effect on the disposal of the case.

8. Section 10(1) of the Constitution 1968 provides:

> "(1) Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

9. This is a fundamentally important constitutional guarantee. The Board has had to consider, in a series of cases of which *Celine v State of Mauritius* [2012] UKPC 32, [2012] 1 WLR 3707 is but the most recent, the effect of failure to adhere to this provision. The Board notes with approval the reference in the judgment of the Supreme Court to reforms that the legal profession are advocating to deal with delay in the conduct of trials. But the duty of the courts is also clear. Magistrates and judges should be astute to detect delay in the conduct of criminal trials and should be pro-active in seeking to eliminate it.

10. It appears from the Supreme Court judgment that much of the delay in this appeal was attributable to the conduct of Beeharry's case. Apart from the fact that Rummun advanced a defence that proved in the event to be unmeritorious, there is no suggestion that he was *actively* responsible for any significant delay. He was absent from court hearings twice on medical grounds. On the first of these occasions, 7 April 2009, three of the total of five prosecution witnesses were also absent, so that the trial could not have proceeded in any event. He was again absent on 19 October 2009, having been admitted to hospital. This caused sentencing to be postponed for 15 days until 5 November 2009. In the overall period of delay in bringing this case to trial, such a short period is not of significance.

11. The Board considers that the magistrate ought to have addressed the question of delay in the context of the constitutional guarantee to a fair trial within a reasonable time. She should also have examined the individual responsibility of each of the defendants for that delay. Instead she summarily dismissed the relevance of this factor on the basis that the delay was "largely attributable to the defence".

12. Likewise, the matter should have been directly addressed by the Supreme Court. It should have been considered whether a declaration ought to be made that the appellant's section 10(1) rights had been breached. Instead the Supreme Court also dismissed this factor, saying:

> "As rightly pointed out by learned counsel for the respondent, public interest demanded that the delay in disposal of the case should not be a factor for the reduction of sentence on account of the nature and gravity of the case."

13. In the event, the respondent has now accepted that the delay in this case constitutes a breach of the appellant's constitutional right. A breach of that right will always be a factor to be considered in deciding upon the appropriate disposal. In some instances it may not be a factor of great weight and there may even be some cases in which, because of the strength of countervailing factors such as the gravity of the offence, it will be accorded no weight at all. But it will always be a factor to be considered.

14. In *Dyer v Watson* [2004] 1 AC 379, paras 52-55, Lord Bingham of Cornhill set out a number of propositions by which the reasonableness of the period taken to complete the hearing of a criminal case was to be judged. These propositions were endorsed by the Board in *Boolell v State of Mauritius* [2006] UKPC 46, [2012] 1 WLR 3718. It is not necessary to refer to all of the passages from *Dyer v Watson* which were cited in *Boolell*. It is sufficient for present purposes to quote from paras 53-55:

> "53. The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.
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> 54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.

> 55. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured …"

15. Three matters fall to be considered, therefore, in deciding whether the delay constitutes a breach of the right to a trial within a reasonable time: (i) the complexity of the case; (ii) the conduct of the appellant; and (iii) the conduct of the administrative and judicial authorities. The Board considers that these factors are also relevant to the question whether, when a breach of the constitutional right has been established, there should be any effect on the sentence that would have been passed if there had been no delay.

16. It has not been suggested that this case was unduly complex. Most of the witnesses were police officers and the defendants had all confessed to the crime. This is therefore not a factor which can excuse or explain the delay. The conduct of the appellant is criticised in two respects. First because he advanced a spurious defence and secondly because he acquiesced in the delay that had been engineered by one of his co-accused and was complacent about the delays for which the prosecuting authorities were responsible. On the latter aspect the Board has recently said in the *Celine* case [2012] 1 WLR 3707 that this may affect the choice of appropriate sentence. At para 8 of that case the Board said this:

> "[The Board] observes, however, that a defendant who seeks to challenge the propriety of a sentence passed on the ground that there has been delay in the prosecution of offences must expect to have his attitude to the postponement of proceedings closely examined. Even if success in opposing applications for adjournment is unlikely, one would expect to see evidence of representations on a defendant's behalf protesting about delay before accepting that he was truly anxious for the case to be completed."

and at para 23:

> "All the indications are that the defendant was content to postpone the day of judgment and while this cannot excuse the failure to adhere to the reasonable time guarantee (see *Boolell's case* [2012] 1 WLR 3718, para 32 and *Elaheebocus v The State* [2009] MR 323, para 20), it is relevant to the selection of the proper sentence."

17. In this case the appellant does not appear to have pressed to have his case tried expeditiously. This must therefore be taken into account in deciding whether any reduction in his sentence is appropriate. The Board observes, however, that while he may have been passively acquiescent in the continued postponement of the case there is no evidence that he was actively complicit in the manoeuvrings of others in delaying the trial of the case.

18. On the question of the appellant's decision to contest the case on grounds that proved to be unfeasible, the Board considers that this factor should be treated with some caution. A defendant to any criminal charge is entitled to put the prosecuting authorities to proof of his guilt. The Board considers that the circumstances in which, by reason of a not guilty plea, a trial is delayed call for anxious scrutiny before he is penalised for such delay.

19. In relation to the third factor identified by Lord Bingham in *Dyer v Watson* it seems clear that much of the responsibility for the delay in this case lies with the prosecuting authorities. A crucial witness for the prosecution, the officer who had recorded many of the defendants' statements, was absent on no fewer than 13 occasions, although his absence seems only to have been solely responsible for postponements twice, presumably because other witnesses were also absent. An officer who had recorded the appellant's statement was absent on 11 occasions but it is not, at present, clear how often his absence was alone responsible for the trial being adjourned.

20. The Board has decided that the necessary close examination of the reasons for the plainly inordinate delay in this case is best conducted by the Supreme Court of Mauritius. That court is also better placed to evaluate how the seriousness of the offence of which the appellant has been convicted should rank as a factor against the now admitted breach of the appellant's section 10(1) right. It will also be familiar with such sentencing guidelines as exist to point to the range of sentence that would have appropriate if there had not been delay and how much, if at all, that range should be adjusted to reflect the violation of the appellant's constitutional right to a trial within a reasonable time.

21. The Board will therefore remit this case to the Supreme Court of Mauritius to consider the sentence to be passed on the appellant in light of the guidance provided by this judgment and its examination of the factors which the Board has outlined should now be considered. It is to be hoped that this reconsideration of the appellant's case can be conducted with all due expedition.

22. The parties will have 21 days within which to make submissions on costs.