[2012] UKPC 26
Privy Council Appeal No 0015 of 2011

JUDGMENT

Melanie Tapper (Appellant) *v* Director of Public Prosecutions (Respondent)

From the Court of Appeal of Jamaica

before

Lord Phillips
Lady Hale
Lord Mance
Lord Sumption
Lord Carnwath

JUDGMENT DELIVERED BY LORD CARNWATH ON

17 JULY 2012

Heard on 10 May 2012

Appellant	*Respondent*
Edward Fitzgerald QC Thalia Maragy	Howard Stevens QC Gayle Nelson Ms Sharon Millwood-Moore
(Instructed by Simons Muirhead & Burton)	(Instructed by Charles Russell LLP)

LORD CARNWATH

1. This is an appeal from a judgment given by the Court of Appeal of Jamaica (Smith and Harrison JJA and Dukharan JA (Ag)) on 27 February 2009. They dismissed the appellant's appeal against conviction, but allowed her appeal against sentence on the grounds of "inordinate delay", in breach of her constitutional right to a fair hearing within a reasonable time. They reduced the sentence of 18 months imprisonment with hard labour, to 12 months imprisonment suspended for 12 months. In the present appeal there is no challenge to the substantive basis of the conviction. It relates solely to the appropriate remedy for the breach of constitutional right.

Background facts

2. On 7 July 1997 the appellant was arrested and charged with a number of offences arising out of events in 1994 to 1995. She was granted bail pending trial. She was tried jointly with Winston McKenzie ("McKenzie") on a number of counts of fraud. The counts against them both included two charges of conspiracy, on which they were acquitted. She was charged alone on a separate count of fraudulently causing money to be paid out. It is her conviction and sentence on that charge, as varied by the Court of Appeal, which gives rise to the present appeal. (McKenzie was convicted on ten counts, but only three were upheld by the Court of Appeal. There was no further appeal in his case.)

3. The trial before the Resident Magistrate was due to open on 28 January 1998. However, following a number of adjournments, on 6 July 1998 prosecuting counsel on behalf of the Director of Public Prosecutions entered a nolle prosequi. The stated purpose was to enable the proceedings to be recommenced in the Home Circuit Court on a voluntary bill of indictment. This action was challenged in the Constitutional Court (Panton, Smith, and Marsh JJ), who gave judgment on 8 February 1999. They held that the prosecutor's action was an abuse of the process of the court, and a contravention of the constitution. They stayed the voluntary bill, and remitted the criminal proceedings to the Resident Magistrate's Court.

4. The trial commenced on 25 January 2000, and continued intermittently for more than three years. The case for the prosecution itself lasted until December 2002. Following an unsuccessful submission of no case to answer, the appellant offered no evidence. On 29 May 2003 she was found guilty on count 11 and sentenced. Bail was granted pending appeal.

5. Notices of appeal against conviction and sentence were lodged by both defendants. The grounds filed by the appellant stated in respect of sentence: "that the sentence is manifestly excessive having regard to all the circumstances". The record of the case, with the magistrate's notes of evidence, should have been transmitted by the clerk within 14 days (section 299 of the Judicature (Resident Magistrates) Act). In the event it was not received by the Court of Appeal until 9 August 2007, over four years late. Supplemental grounds submitted by McKenzie (but not the appellant) added a ground that –

> "an immediate sentence of imprisonment… to take effect after the passage of nearly five years from the date of conviction is not required in the interests of justice."

The Judgment of the Court of Appeal

6. The appeals were heard over eight days in March to April 2008 by Smith and Harrison JJA and Dukharan JA (Ag). Judgment was given almost a year later, on 27 February 2009. The reasons for dismissing the appeals against conviction are set out in the judgment of Smith JA. As regards sentence, Smith JA noted the submissions on behalf of both appellants that "the inordinate delay between conviction and appeal" constituted a breach of their rights, and that "it would not be in the interests of justice for the appellants . . . to be required to serve a term of imprisonment". After referring to section 20(1) of the Constitution, and a number of authorities, he concluded that the post-conviction delay of over five years was inordinate, and that "such delay without more, constitutes a breach of the appellants' constitutional right to a hearing within reasonable time."

7. On the question of the remedy, in the light of the Privy Council authorities, he considered that "only in exceptional circumstances, if at all" would it be justified and necessary to set aside a conviction, on the ground of unreasonable delay between the date of conviction and the hearing of the appeal. He concluded:

> "The appropriate remedies which of course will depend on the circumstances of each case will include a reduction in sentence, monetary compensation or merely a declaration. In this case the appellants were granted bail by the trial judge after they had given verbal notice of appeal. Thus in my view monetary compensation would not be appropriate. A mere declaration would not in my view, be a sufficient remedy as, this would mean that after waiting for over five years the appellants would now have to serve the full sentence.

> In my judgment, in the circumstances of this case a reduction in the sentence . . . from 18 months to 12 months would be sufficient to compensate the appellants for the effects of the delay.
>
> Another relevant factor which was brought to our attention at the end of the hearing is that a sum of about $1.7M was paid to the complainant towards restitution. This we think is a mitigating factor which we shall take into account by suspending the sentence for one year."

It is now common ground that, contrary to the apparent understanding of the Court of Appeal, the payment referred to in the last paragraph was made by McKenzie alone, and no part of it by the appellant. To that extent the Court erred in her favour. It is not suggested that this mistake should affect our consideration of the appeal.

The issues in the appeal

8. The issues, on which leave to appeal to Her Majesty was sought and granted, were expressed as follows in the Notice of Motion:

> "(a) Are the provisions of Section 20 of the Constitution of Jamaica, insofar as they relate to a remedy for any breach of the said section against a person charged with a criminal offence, confined only to a delay in the trial of a criminal offence?
>
> (b) Do the provisions of that Section of the Constitution, properly interpreted, require a conviction to be quashed, if there are breaches of Section 20 of the Constitution, between the date of arrest and the date of handing down of its judgment by the Court of Appeal?"

Section 20 of the Constitution provides:

> "20 (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

9. Leave was granted under section 110(1)(c) of the Constitution, which gives a right of appeal in respect of final decisions "on questions as to the interpretation of this Constitution". Although no point was taken by the Crown, the Board doubts respectfully whether either point justified leave to appeal under that sub-section. The

first issue did not arise, since the Court of Appeal accepted, and there is no dispute, that section 20 extends to post-conviction delay. On the second issue, it is not now contended that, in the event of a breach arising from such delay, section 20 "requires" a conviction to be quashed. The submission is that the Court erred in the exercise of its discretion. On this basis, the issue seems properly characterised as one of *application* of the constitutional provision, rather than *interpretation*.

10. On behalf of the appellant, Mr Fitzgerald QC submits that the Court of Appeal erred by confining themselves to the delay since trial, rather than having regard to the nature and gravity of the breaches of the appellant's rights, extending over the whole course of the proceedings from 1997. Those breaches started with the initial breach of her constitutional rights in 1998, as found by the Constitutional Court, leading to a delay of some two years before the commencement of the trial; followed by the unreasonably protracted course of the trial itself (in which the evidence of the chief prosecution witness alone stretched over two years); and leading to the delay of almost six years between the lodging of the appeal and the judgment.

11. For the correct legal approach, he relies principally on the judgment of the Board in *Darmalingum v The State* [2000] 1WLR 2303. This, he submits, established that the right to trial within a reasonable time was independent of the right to a fair trial, and that a breach in itself might in certain circumstances justify setting aside a conviction. He accepts that the statement at p 2310 that this was the "normal remedy" must be qualified in the light of subsequent authority (notably *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72, [2003] UKHL 68; *Boolell v The State* [2006] UKPC 46). However, the actual decision still stands, and the facts of the present case, he submits, are no less extreme.

12. For the respondent, Mr Stevens QC supports the reasoning of the Court of Appeal. They concentrated on the delay since conviction, because that was how the case was argued. There is no indication in the papers before the court, nor in their judgment, that they were asked to look at the issue more widely. In any event, *Darmalingum* must now be taken as an exceptional case turning on its own facts. The law is as stated by Lord Bingham of Cornhill in the *Attorney General's Reference* case. On the present facts, where it is not now argued either that the hearing itself was unfair or that it was unfair to try the defendant at all, there was no proper basis for quashing the conviction.

Discussion

13. Before considering the authorities, it is necessary to resolve a difference between the parties as to the extent to which the pre-conviction history was relied on in argument before the Court of Appeal.

14. As already noted, neither the appellant's own grounds of appeal nor the other written materials submitted to the court, made any specific reference at all to delay (whether before or after conviction) as a reason for reducing sentence. The issue of post-conviction delay was raised by the other appellant, McKenzie, by way of a supplemental notice. The court addressed it on the basis that it was an issue in both appeals.

15. The only other relevant evidence is an affidavit of Miss Carolyn Reid, one of the appellant's attorneys at trial and in the Court of Appeal. It was sworn on 9 May 2012 (the day before the hearing before the Board). The principal purpose of her evidence was to confirm (after consultation with the then leading counsel Mr Dennis Morrison QC) that the Court of Appeal were invited to quash the conviction, not merely to reduce the sentence. She adds: "furthermore the Court was asked to look at the total period of delay from 1997 to 2009 in the course of oral arguments that were presented". She gives no detail of the content of those submissions, nor does she explain why, if it was part of the case, it was not mentioned in any of the written materials submitted to the court.

16. Mr Fitzgerald points to two additional matters as suggesting wider consideration by the court. The first is the affidavit evidence submitted by the appellant in support of the application for leave to appeal against the Court of Appeal's decision. This evidence gave a detailed account of the proceedings since 1997, as seen by the appellant, and of her concerns about them. Secondly, he reminds us that Smith JA would have been very familiar with the previous history, having sat on the Constitutional Court, and therefore would have been expected to have it mind. As a last resort, he suggests that, since this was a matter of constitutional right, the court should have considered the whole course of the proceedings, whether or not relied on in argument.

17. Mr Stevens (supported by Mr Nelson, who appeared for the respondents in the Jamaica courts) does not dispute Miss Reid's evidence that the appellant sought the quashing of the conviction, rather than a mere reduction of sentence. However, he does not accept her assertion that the pre-conviction history constituted a significant part of the case. Had this been part of the case, he would have wished for an opportunity to challenge the factual basis of any assertions made.

18. In this state of the evidence, the Board sees no sufficient grounds to question the Court of Appeal's account of the argument before it. The two matters relied on by Mr Fitzgerald are, if anything, against him. The evidence submitted by the appellant after the judgment is an indication of the kind of written material one would have expected to have seen at the earlier stage if this had been a material part of the case. Smith JA's familiarity with the previous history makes it all the more unlikely that he would have overlooked it, if it had been any part of the appellants' case before him.

Nor was there any obligation on the court, of its own motion, to extend the argument beyond that advanced by the experienced advocates representing the appellant.

19. For these reasons, the Board is unable to accept Mr Fitzgerald's primary argument that the Court of Appeal erred in principle in this respect. On their exercise of discretion it would require something exceptional to justify the Board substituting its opinion for that of the domestic court. In particular, the domestic court is much better placed to judge the significance of delay having regard to local conditions and pressures on the courts (see *Bell v Director of Public Prosecutions* [1985] AC 937, 953E-G). In the circumstances, the Board finds no grounds to question either their decision to reduce the sentence, rather than to adopt some other remedy, or the amount of the reduction.

20. That would be enough to decide the case. However, in view of the importance attached by Mr Fitzgerald to the parallel with *Darmalingum*, it may be helpful to add a few words about its status, in the light of subsequent authority.

Darmalingum and after

21. The case itself was an appeal from the Supreme Court of Mauritius. The appellant had been arrested in 1985 on provisional charges of forgery. After being interviewed in custody at that time, the appellant heard nothing further about the matter until he was charged in 1992 and then convicted at a trial held in 1993, which lasted one day. He appealed to the Supreme Court, which did not reach a final decision rejecting his appeal until July 1998. The Board held that the overall delay, much of which was unexplained, was a flagrant breach of section 10(1) of the Constitution of Mauritius, and that the only disposal which would properly vindicate the constitutional rights of the appellant would be the quashing of the convictions.

22. Lord Steyn, giving the judgment of the Board, emphasised the "independence of the 'reasonable time' guarantee", which extended to cases not only where inordinate delay causes prejudice to the defence, but also where the delay has been "inordinate and oppressive" (pp 2307-2308). The delay before trial, caused by the inaction of the Police and the DPP's office was itself inordinately long –

> "taking into account the nature of the charges, the documentary records available, what the prosecution described as comprehensive confessions on all counts, and the duration of the eventual trial".

Although there was a strong argument that the pre-trial delay by itself amounted to a breach of the constitutional guarantee, the Board found it unnecessary to rule on this

matter as an independent ground of appeal (p 2309). However, this had to be taken with the delay of more than five years in disposing of the appeal:

> "In the result the defendant has had the shadow of the proceedings hanging over him for about 15 years. There has manifestly been a flagrant breach of section 10(1)." (p 2310)

23. As to remedy Lord Steyn said:

> "The normal remedy for a failure of this particular guarantee, viz the reasonable time guarantee, would be to quash the conviction. …
>
> Their Lordships do not wish to be overly prescriptive on this point. They do not suggest that there may not be circumstances in which it might arguably be appropriate to affirm the conviction but substitute a non-custodial sentence, eg in a case where there had been a plea of guilty or where the inexcusable delay affected convictions on some counts but not others. But their Lordships are quite satisfied that the only disposal which will properly vindicate the constitutional rights of the defendant in the present case would be the quashing of the convictions." (p 2310)

24. The proposition that quashing the conviction was the "normal remedy" was not accepted in later cases. In *Taito v The Queen* [2002] UKPC 15 the Privy Council described the appellant's reliance on *Darmalingum* as misplaced:

> "Delay for which the state is not responsible, present in varying degrees in all the relevant cases, cannot be prayed in aid by the appellants. Moreover, *Darmalingum* was a case where the defendant 'had the shadow of the proceedings hanging over him for about 15 years'…. It was a wholly exceptional case…." (para 23)

25. In *Mills v HM Advocate* [2004] 1 AC 441 Lord Steyn himself accepted (in the light of discussion by Lord Hutton in *Dyer v Watson* [2004] 1 AC 379, para 121) that he had been wrong to say that the "normal remedy" in such a case would be to quash the conviction. Commenting on para 23 of *Taito v The Queen*, he said:

> "It is clear from this passage that the Privy Council took the view that quashing of a conviction is not the only remedy for a breach of the particular guarantee. On the contrary, it is clear that *Darmalingum*, and its disposal, was regarded as an exceptional case. The holding in *Taito* is

inconsistent with the proposition that the normal remedy for such a breach is the quashing of the conviction." (para 19)

26. The same issues had been considered in 2003 in the *Attorney General's Reference* case [2004] 2 AC 72, in the context of the equivalent provision of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Lord Bingham, with whom the majority agreed, summarised the relevant principles:

"24. If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. 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. [emphasis added]

25. The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive

> manipulation of the kind classically illustrated by *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which *Darmalingum v The State* [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (*Martin v Tauranga District Court* [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right."

27. This statement of principle was followed by the Privy Council in *Boolell v The State* [2006] UKPC 46. Lord Carswell, giving the opinion of the Board, derived from it the following propositions, as correctly representing the law of Mauritius:

> "(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.
>
> (ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all." (para 32)

28. In the light of these cases the significance of *Darmalingum* as authority has been reduced almost to vanishing-point. At most it is a case on its own facts, explicable, as Lord Bingham suggested, on the basis that, in a straightforward case, the unexplained passage of seven years without any contact with the defendant, made it unfair even to embark on trial. The Board would affirm that the law as stated in the *Attorney General's Reference* case, [2004] 2 AC 72 and as summarised in *Boolell*, represents also the law of Jamaica. Although those judgments were not directed specifically at the effect of delay pending appeal, the same approach applies. It follows that even extreme delay between conviction and appeal, in itself, will not justify the quashing of a conviction which is otherwise sound. Such a remedy should only be considered in a case where the delay might cause substantive prejudice, for example in an appeal involving fresh evidence whose probative value might be affected by the passage of time.

29. For these reasons, the Board will humbly advise Her Majesty that the appeal should be dismissed.