[2012] UKPC 32
Privy Council Appeal No 0042 of 2011

JUDGMENT

Joseph Stewart Celine (Appellant) *v* The State of Mauritius (Respondent)

From the Supreme Court of Mauritius

before

Lord Hope
Lord Kerr
Lord Dyson
Lord Reed
Sir Anthony Hooper

JUDGMENT DELIVERED BY LORD KERR ON

16 August 2012

Heard on 18 July 2012

Appellant	*Respondent*
Yanilla Moonshiram	Edward Risso-Gill Sulakshna Beekarry
(Instructed by S B Solicitors)	(Instructed by Royd Solicitors)

LORD KERR:

1. Mr Joseph Celine applies for an extension of time in order to prosecute an appeal against the decision of the Supreme Court of Mauritius which upheld his conviction for forgery and making use of forged documents. The Intermediate Court of Mauritius had found him guilty on four counts on 2 March 2006. The offences were alleged to have been committed in October 2005. Mr Celine was sentenced to three years' penal servitude. On 12 February 2008 the Supreme Court dismissed his appeal against conviction but reduced his sentence to eighteen months' imprisonment.

2. On 20 February 2008, Mr Celine applied to the Supreme Court for leave to appeal to the Judicial Committee of the Privy Council. Leave to appeal was finally granted on 10 August 2009. Mr Celine was given leave to appeal on a number of grounds. The deadline for filing his Notice of Appeal was 4 October 2009. As Mr Celine also sought permission to appeal on grounds other than those for which he had been granted leave, he was required to lodge a Notice of Appeal. In this connection rule 11(2) of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 ("the 2009 Rules") provides:

> "An application for permission to appeal must be filed within 56 days from the date of the order or decision of the court below or the date of the court below refusing permission to appeal (if later)."

3. Mr Celine was also required by rule 18(2) of the 2009 rules to lodge a Notice of Appeal within 56 days in respect of those grounds on which he had been granted leave. His Notice of Appeal was not filed in time. It was lodged on 29 June 2011. The Board directed that the application for extension of time should be listed for an oral hearing before five members of the Judicial Committee, with the appeal itself to follow if the Board was satisfied that it was in the interests of justice that it should proceed to a full hearing.

4. Having heard submissions from counsel on Mr Celine's behalf and on behalf of the State in relation to his application to have time extended, the Board announced its decision that it would extend time in relation to one ground only, namely, "whether, in view of the delay which has elapsed since the alleged commission of the offence, the Supreme Court was right to maintain a custodial sentence against the appellant in breach of section 10 of the Constitution". This was one of the grounds on which leave had been

granted by the Supreme Court and the Board heard further submissions from counsel and reserved its decision. This judgment gives the Board's decision on the appeal.

5. 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."

6. The respondent accepts that there has been a breach of the reasonable time requirement in this case. It is submitted, however, that the State was by no means responsible for all of the very considerable delay in the case and that the appellant must bear some blame in relation to a number of periods. Moreover, it is said, the appellant was complaisant about the State's inaction and did not oppose the frequent applications for adjournments.

7. The appellant does not accept that he should be penalised for what might be regarded as passivity on his part in relation to the State's recurrent applications for adjournments. He claims that such applications are almost always granted by the courts of Mauritius and that any opposition to adjournments would have been pointless.

8. The Board is not in a position to make any judgment on these claims. It observes, however, that an appellant 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.

9. The Board received extensive submissions from Miss Moonshiram on behalf of Mr Celine and from Mr Risso-Gill on behalf of the State about the various periods of delay and the reasons for them. It would not be profitable to rehearse those at great length. A chronology of events has been helpfully prepared by the respondent and it is annexed to this judgment. It is sufficient to say that between the time that the appellant was first cautioned about the offences (on 29 November 1996) and the final disposal of his appeal, there were substantial periods of delay which were either unexplained or inexcusable. The respondent accepts that, for the purposes of calculating the

period of delay, time began to run from the date on which the appellant was cautioned.

10. In fairness to the appellant it should be pointed out that in September 2000 an application was made on his behalf to stay the case on the ground that too great a period had elapsed from the date of his alleged offending and trial. As Mr Risso-Gill pointed out, that application was withdrawn on 7 December 2000, it having been conceded that the inquiry into the case had been completed within a reasonable time and that the Director of Public Prosecutions had advised timeously. But as counsel was quick to accept, whether that concession was correctly made or not, in light of the subsequent delay in the case, the period up to December 2000 must come again into the reckoning because it is the effect of the overall period of delay that must be considered in deciding whether this should have any impact on the sentence passed.

11. The respondent accepts responsibility for the following periods of post-2000 delay in proceedings before the Intermediate Court: from 21 January 2003 to 20 February 2004 due to the loss of prosecution papers (14 months); the adjournment from 20 January 2004 to 6 April 2004 (2 months); and a proportion of the periods of delay occasioned by subsequent adjournments before the Intermediate Court, although it claims that some of these would have been necessary in any event. The case was adjourned on successive occasions for the twelve months between July 2004 and July 2005.

12. During the appellate proceedings below the respondent accepts that it was responsible for a 12 month delay due to the late filing of the record and an additional 5 month delay from 26 June 2008 to 24 November 2008 caused again by the absence of the relevant record before the Supreme Court on the application for leave to appeal to the Judicial Committee.

13. It is suggested that the prosecution was therefore responsible for delay of more than three years in the overall period of 15 years. The Board does not accept that the State's responsibility for delay can be confined to so short a period. The appellant was cautioned and charged on 29 November 1996 but an information was not filed until 16 June 1999 and pleas were not taken nor was the trial date set until 26 July 1999. While some of this period would undoubtedly be required for the assembly of evidence, it does seem an inordinately long time to pass without any proceeding before a court.

14. When finally the trial before the Intermediate Court was completed on 2 August 2005, judgment was due to be delivered on 15 September 2005. It was

not delivered on that date because, apparently, the defence had failed to submit authorities on which it intended to rely. Judgment was fixed for 31 October 2005 but was again adjourned because the court then decided that it needed to hear submissions from the prosecution on matters of law. This legal argument did not take place until 8 February 2006. While some of the delay during this time was due to defence counsel being abroad, other reasons for postponements (such as the magistrate being on leave on a day which had been fixed for the resumed hearing) must be laid firmly at the door of the respondent. Moreover, much delay was occasioned in arranging the hearing of the application for leave to appeal to the Judicial Committee before the Supreme Court and the respondent must accept responsibility for that.

15. The Board has therefore concluded that the State has been responsible for delay well beyond the three years that counsel for the respondent suggested.

16. It is accepted that the Supreme Court did not take account of delay in reducing the sentence that had been imposed by the Intermediate Court. The section of the judgment dealing with sentence merely states:

> "Considering the sums involved, we consider that the sentence passed was in the circumstances of the case manifestly harsh and excessive and that the appropriate sentence would have been one of 18 months' imprisonment."

17. In light of the fact that delay played no part in the Supreme Court's decision on sentence, Mr Risso-Gill accepts that some adjustment to the period of eighteen months is warranted. Miss Moonshiram argues that the sentence should be quashed.

18. In *Darmalingum v The State* [2000] 1 WLR 2303, at 2310 D Lord Steyn, delivering the judgment of the Board, said that the normal remedy for failure of the reasonable time guarantee would be to quash the conviction. At 2310 E, however, he went on to say:

> "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, e.g. in a case where there had been a plea of guilty or where the inexcusable delay affected convictions on some counts but not others."

19. This issue has been considered more recently by the Board in *Boolell v The State* [2006] UKPC 46 where reference was made to the decision of the House of Lords in *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72 which had held that although through the lapse of time in itself there was a breach of article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, the appropriate remedy would not necessarily be a stay of proceedings but "would depend on all the circumstances of the case". In light of that decision, delivering the judgment of the Board in *Boolell*, Lord Carswell said at para 32:

> "Their Lordships accordingly consider that the following propositions should be regarded as correct in 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."

20. Miss Moonshiram submitted that the appellant's trial was rendered unfair because the delay which had occurred made it difficult for various prosecution witnesses to remember essential details that were necessary to sustain the charge and a number of witnesses had to inspect documents in order to refresh their memory. But it is not suggested that having their memory refreshed in this way was inadmissible or unfair, nor was it claimed that the evidence that they gave was not relevant. And the plain fact is that this evidence was considered to be sufficient to establish the appellant's guilt and all challenges to the safety of the conviction have failed. Unlike the case of *Dahall v The State* (1993) MR 220, where a conviction was quashed because the appellant had only a vague recollection of the events surrounding the offences with which he was charged, it was not suggested in this appeal that the appellant had suffered from any lapse of memory. The Board is therefore satisfied that no unfairness of the type described in *Boolell* has been established and that it would not be appropriate to quash the appellant's conviction.

21. Counsel referred the Board to a number of decisions where sentences of imprisonment were reduced or substituted by a fine. The Board intends no

discourtesy to counsel by its decision not to review those authorities. The choice of an appropriate sentence is highly dependent on the view that one takes of the particular circumstances of an individual case and the assistance to be derived from comparison with other cases where the facts may be very different from those under consideration is bound to be limited.

22. It is relevant, however, to refer to the observation of the Board in *Boolell* at para 39 to the effect that it was not acceptable to put into operation a prison sentence some 15 years after it had been imposed "unless the public interest affirmatively required a custodial sentence, even at this stage". Although the period of time between sentence and the hearing of the appellant's appeal is much less (6 years and 4 months), it is still appropriate to consider whether the public interest requires that a custodial sentence be imposed.

23. All the indications are that the appellant was content to postpone the day of judgment and while this cannot excuse the failure to adhere to the reasonable time guarantee (see *Boolell* at para 32 and *Elaheebocus v The State* [2009] UKPC 7 at para 20), it is relevant to the selection of the proper sentence. Moreover, the offences of which the appellant was convicted were serious. They involved the perpetration of a significant fraud on a government department. It is also relevant that the appellant has three previous convictions for offences of dishonesty, albeit of a much less serious character than those involved in this appeal. The Board is satisfied, in view of these circumstances, that the public interest does indeed require the imposition of a custodial sentence notwithstanding the delay that has occurred.

24. That delay was grossly excessive, however, and the appellant has had to confront the prospect of imprisonment when he is much older than he would have been if the trial had been conducted expeditiously. To reflect this and the serious failure of the State to fulfil the important constitutional guarantee of trial within a reasonable time, the Board has concluded that a sentence of nine months' imprisonment should be substituted for that imposed by the Supreme Court.

25. The parties should make written submissions on the question of costs within 28 days.

ANNEX

Interlocutory Proceedings

29 November 1996	Applicant first charged (see evidence of witness 21)
16 June 1999	Information filed
26 July 1999	Pleas taken & trial set for 17 January 2000
17 January 2000	Accused absent
15 June 2000	Defence adjournment application – they said they did not receive the "brief" requested 14.03.00. Trial re-fixed for 19 September 2000.
19 September 2000	The Defence applied to stay the case arguing that 5 years from offence to trial was too long – Argument adjourned to 7 December 2000.
7 December 2000	**The Defence withdrew their application to stay the case – they conceded both that the enquiry into this case was completed with a reasonable time and that the DPP gave advice within a reasonable time.** Trial re-fixed 12 July 2001 apparently to counsels' convenience.
12 July 2001	The Defence applied for an adjournment as his counsel had passed away and he needed to retain the services of another. Trial re-fixed for 22 January 2002.
23 January 2002	Cyclone Dina appears to have interrupted the proceedings. Pre Trial Hearing listed for 18 February 2002.
18 February 2002 & 5 March 2002 & 8 April 2002	Applicant absent and had to be traced by Police. 13 May 2002 trial fixed for 10 October 2002.
10 October 2002	Defence applicant for adjournment – counsel says he didn't get the brief until the day before (although it was available the previous week). He pleaded inability to obtain the brief from previous counsel. Case adjourned to 21 January 2003.

21 January 2003	Prosecution application for adjournment – Inspector Najeer says that one of the enquiring officers has passed away and as a result original documents which were in his possession have been mislaid – an adjournment is requested and no objection is made – adjourned to 30 June 2003.
30 June 2003	The Prosecution explained that the documents in relation to all but counts 1-2 & 5-6 had been lost and that the deceased PS Ramchurn never handed them to the clerk of CID South. The Prosecutor only obtained this information on the day before the trial listing. Adjourned for mention on 2 September 2003 for Prosecution to take a stand.
9 September 2003	Mention for the Prosecution to take a stand – the Prosecution said it would only proceed with counts 1-2 and 5-6.
16 September 2003	Mention to Fix – trial re-fixed for 20 February 2004.

Trial

20 February 2004	1st Day of Trial (Opening & Witnesses 21, 17, 16 and 11 called). Adjourned due to Court difficulties. Adjourned for Mention for Prosecution to take a stand on photocopied documents on which they sought to rely.
24 February	Trial re-fixed for 6 April 2004.
6 April 2004	The learned Magistrate was unwell. Case re-fixed for 27 July 2004.
27 July 2004	2nd Day of Trial (No Evidence Called). Prosecution application to adjourn – witnesses 1-7 were all absent and it appears that they had not been summonsed. **No objection from the Defence.** Case re-fixed for 1 October 2004.
1 October 2004	3rd Day of Trial (Witnesses 2&4 called) adjourned to 9 November 2004 lack of Prosecution Witnesses. **No Defence objection.**
9 November 2004	4th Day of Trial (Witnesses 1,3,6 & 7 called) adjourned to 8 March 2005 due to absence of additional Prosecution witnesses (witnesses 5 & 10). **Defence did not object** but warned that they would do on the next occasion. Adjourned to 8 March 2005.
9 March 2005	It was realised that the 8 March 2005 was a public holiday. Mention to fix arranged for 15 March 2005 and on that date the continuation was re-fixed for 4 May 2005.
1 May 2005	5th Day of Trial (Witness 5 called) but adjourned to 13 June 2005 due to the absence of witness 10 **no objection by the Defence.**
13 June 2005	6th Day of Trial (No evidence Called) Witness 10 was absent again – Prosecution application to adjourn **no Defence objection.** Adjourned to 13 July 2005.

13 July 2005	7th Day of Trial (No Evidence Called) Witness 10 was absent again despite having been waned personally – Prosecution application to adjourn **no Defence objection** adjourned to 2 August 2005.
2 August 2005	8th Day of Trial. (Witness 10, Prosecution Case Closed, No Evidence for the Defence, Closing Submissions) Judgment fixed for 15 September 2005.
13 October 2005	9th Day of Trial (No Judgment). Judgment postponed as Defence late with their authorities – Judgment now 31 October 2005.
31 October 2005	10th Day of Trial (No Judgment) Court requests submissions from the Prosecution on 3 matters of law to be argued on 15 November 2005.
15 November 2005	11th Day of Trial (No legal argument on the 3 Points of Law) Prosecution Application to adjourn – Legal Argument re-fixed for 30 November 2005.
30 November 2005	12th Day of Trial (No legal argument on the 3 Points of Law) Defence application to adjourn as Defence counsel was abroad. Legal Argument re-fixed for 16 January 2006.
16 January 2006	13th Day of Trial (No legal argument on the 3 Points of Law) learned Magistrate on leave submissions adjourned once more to 24 January 2006.
24 January 2006	14th Day of Trial (No legal argument on the 3 Points of Law) Defendant absent no message had been received – Submissions adjourned to 8 February 2006. Defendant attends in the afternoon.
8 February 2006	15th Day of Trial (Legal Argument on the 3 Points of Law). Judgment fixed for 2 March 2006.
2 March 2006	16th Day of Trial (Judgment, Amendment of Charges, Conviction and Appellant's notification of intention to appeal).

Appeal Proceedings

2 & 16 March 2006	Grounds of Appeal lodged.
11 May 2006	Mention to Fix before the Registrar of the Supreme Court, fixed for 20 February 2007.
13 February 2007	Record had not yet been received – Appeal to be mentioned for re-fixing on 22 February 2007.
22 February 2007	Mention to Fix before the Registrar of the Supreme Court, fixed for 14 January 2008.
14 January 2008	Supreme Court Appeal Hearing Cor:- Sik Yuen CJ, Matadeen J
12 February 2008	Judgment on Appeal filed.
20 February 2008	Motion for leave to appeal to the Judicial Committee filed.
10 March 2008	Supreme Court Mention Cor:-Sik Yuen CJ Prosecution indicates will oppose the motion case to be mentioned to fix.
25 March 2008	Case fixed for 26 June 2008.
26 June 2008	Supreme Court Hearing Application for Leave to Appeal to the Judicial Committee Cor: Sik Yuen CJ, Matadeen J. Adjourned because the record of the proceedings in the Court of Appeal was not available.
18 July 2008	The matter was listed for mention to fix for continuation.
18 July 2008	The matter was re-fixed for 24 November 2008.
19 November 2008	The matter was to be re-fixed as the Chief Justice was overseas on 24 November 2008.
13 January 2009	The matter was re-fixed for 8 May 2009.

8 May 2009	Supreme Court Cor:-Sik Yuen CJ, Matadeen J Order granting Conditional Leave to Appeal to the Judicial Committee (Grounds (a) – (h)).
10 August 2009	Supreme Court Order granting Final Leave to Appeal to the Judicial Committee (Grounds 8(a)-(h)).
29 June 2011	Notice of Appeal Filed.