[2001–02 Gib LR 214]

ATTORNEY-GENERAL v. CHAPPORY

COURT OF APPEAL (Neill, P., Glidewell and Stuart-Smith, JJ.A.): March 4th, 2002

Criminal Procedure—stay of proceedings—delay—no fixed period beyond which fair hearing impossible—factors to consider under Constitution, s.8(1) and common law are (a) length of delay; (b) prosecution's justifications for delay; (c) respondent's willingness to assert right; (d) prejudice to respondent, which need not be specific but must be serious—stay of criminal proceedings only in exceptional circumstances

The respondent was charged in the Supreme Court with offences relating to the importation of drugs.

A package originating in Venezuela and containing cocaine was seized in Germany addressed to a former employee of the respondent at the respondent's business address. A similar package was found in Venezuela which was dispatched by courier and addressed to the same person. The German package, with the cocaine removed and a listening device inserted, was put into the Gibraltar postal system and collected by the respondent. Having left the package at his business premises, he left in the company of a group of men but was stopped by the police. Other officers had in the meantime broken into his premises and found the package. The respondent was denied his right to see a lawyer when he was interviewed and cautioned, but not told that the interview was being taped. He said that a third party had given him the courier slip for the package he had collected and gave it to the police. He was later arrested.

On November 15th, 1997, the respondent was charged, further charges were added later that month and in March 1998; there were delays in the committal proceedings for administrative reasons and the respondent was finally committed for trial on June 11th, 1999. The trial was adjourned at the request of the Crown because of the unavailability of witnesses from Venezuela and began on June 13th, 2000. The jury returned a verdict of not guilty on Count 1 (which related to the Venezuelan package) but was unable to reach a majority verdict on Counts 2 and 3 (relating to the German package) and a re-trial was ordered. Owing to the illness of the judge, the re-trial was adjourned to April 17th, 2001. Counsel for the respondent was then injured and the preliminary arguments concerning the re-trial were further adjourned at the request of the defence until September 3rd, 2001.

The respondent submitted that the re-trial should be stayed *inter alia* because (a) of the delay, which was so long that there could be no "fair hearing within a reasonable time" as required by s.8(1) of the Constitution, and also amounted to an abuse of process at common law; (b) the investigating police officers, by failing to order the fingerprinting of the courier slip, had undermined his statement that the slip had been given to him by a third party, with consequent impairment of his credibility; and (c) the denial of access to a solicitor before he was interviewed resulted in the making of incriminatory statements which might not be excluded at the trial and were liable to cause him serious prejudice. The Supreme Court (Pizzarello, A.J.) ruled that the re-trial should be stayed.

On appeal, the Crown submitted that only exceptional circumstances justified the granting of a stay in criminal proceedings and that the Supreme Court had erred in doing so once it had found the delays reasonable though "disturbing." None of the factors it had relied on, singly or taken together, justified the stay.

In reply, the respondent repeated his submissions before the Supreme Court but argued that (a) the conclusion that the delay was "disturbing" was tantamount to a finding that his constitutional right had been infringed; and (b) if the court concluded that the Supreme Court had misdirected itself, it should grant a stay of its own motion.

Held, refusing to uphold the stay of the proceedings:

(1) None of the factors the Supreme Court could properly have taken into account justified the granting of a stay. It would only be ordered in criminal proceedings in exceptional circumstances, when the accused's right to a fair trial was prejudiced in a way that could not otherwise be remedied. The stay would accordingly be lifted (para. 48; para. 76; para. 78).

(2) There was no fixed period beyond which it could be said that it was impossible for there to be no "fair hearing within a reasonable time" as required by s.8(1) of the Constitution. Everything depended on the circumstances of the individual case, but the factors to which special regard had to be paid were (a) the length of the delay (in this case some $3\frac{1}{2}$ years, which the Supreme Court justifiably treated as giving rise to a presumption of prejudice and at the very least demonstrated the need for enquiry); (b) the justifications for the delay offered by the prosecution, which in this case suggested that the Crown might well have been blameless and the administrative delays reasonable, though the Supreme Court found them "disturbing"; (c) the willingness of the respondent to assert his right to a speedy trial, which he had done consistently by complaining of delay as early as his first trial; and (d) the prejudice the respondent could be shown to have suffered or be likely to suffer in seeking to obtain a fair trial (para. 38; paras. 41–42; paras. 60–61; para. 64).

(3) The respondent did not need to point to any specific prejudice in order to rely on his allegation that he had suffered prejudice in consequence of the breach of his Constitutional and common law rights, though he might well have been able to show that the delay had created excessive anxiety and concern, or, more importantly, that his defence had been impaired. Nonetheless, the Supreme Court gave no indication that it had found serious prejudice resulting from a breach of his rights (para. 43; para. 45).

(4) Similarly, the common law used similar criteria in affording protection to accused persons against abuse of process in order to ensure a fair trial. Unacceptable delay between the offence and the trial was one such criterion and the courts had then to examine the causes of the delay and the degree of prejudice occasioned to the accused, using standards similar to those set out in considering the constitutional position. The granting of stays of proceedings by reason of delay should, however, only be contemplated in exceptional circumstances. The Supreme Court had correctly concluded that the delays in this case were "properly accounted for," that the presumption of prejudice had been rebutted and that the respondent had been unable to show that his right to a fair trial had been impaired (para. 48; para. 61).

(5) The remaining grounds of appeal also supported the conclusion that the respondent's right to receive a fair trial had not been impaired. The Supreme Court was correct in concluding that the failure to order the fingerprinting of the courier slip was of little consequence and the extent to which the investigation might have supported the respondent's credibility was minimal. Similarly, the giving or exclusion of evidence from the interview conducted without legal representation did clearly not give rise to prejudice, since the interview contained both incriminating and exculpatory statements and the Supreme Court's view of the significance of this evidence was both tentative and fell far short of finding a risk of serious prejudice (paras. 71–72; para. 74).

(6) In the circumstances, the Supreme Court had been wrong to stay the proceedings and the stay would be lifted. Even if the Supreme Court had misdirected itself, the court would not grant a stay of its own motion, both for the reasons already given and because the central issue in the case against the respondent was a short one which should easily be disposed of (paras. 76–78).

Cases cited:

(1) *Att.-Gen.'s Ref. (No. 1 of 1990)*, [1992] Q.B. 630; (1992) 95 Cr. App. R. 296, followed.
(2) *Att.-Gen.'s Ref. (No. 2 of 2001)*, [2001] 1 W.L.R. 1869; [2004] 1 All E.R. 1049, followed.
(3) *Barker* v. *Wingo* (1972), 407 U.S. 514; 33 L.Ed.2d 101, applied.
(4) *Bell* v. *D.P.P.*, [1985] 1 A.C. 937; [1985] 2 All E.R. 585, followed.
(5) *Grant* v. *D.P.P.*, [1982] A.C. 190, not followed.

(6) *Martin* v. *Tauranga Dist. Ct.*, [1995] 2 N.Z.L.R. 419, referred to.
(7) *R.* v. *Saunders* (1973), 58 Cr. App. R. 248, not followed.
(8) *Tan* v. *Cameron*, [1992] 2 A.C. 205; [1993] 2 All E.R. 493, followed.

Legislation construed:

Court of Appeal Ordinance (1984 Edition), s.9(2): The relevant terms of this sub-section are set out at para. 2.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p. 3602), s.8(1): The relevant terms of this sub-section are set out at para. 33.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953), Cmnd. 8969), art. 6(1): The relevant terms of this paragraph are set out at para. 34.

Jamaica (Constitution) Order in Council 1962 (S.I. 1962/1550), s.20(1): The relevant terms of this sub-section are set out at para. 35.

Constitution of the United States, Sixth Amendment: The relevant terms of this Amendment are set out at para. 36.

New Zealand Bill of Rights Act 1990 (c.190), s.25(b): The relevant terms of this sub-section are set out at para. 44.

R.R. Rhoda, *Q.C.*, *Attorney-General*, for the Crown;
G. Licudi for the respondent.

1 **NEILL, P.:**

Introduction

This is an appeal by Her Majesty's Attorney-General for Gibraltar from the decision of Pizzarello, A.J. dated September 25th, 2001, whereby it was decided that the re-trial of John Chappory, the respondent, on two charges of offences against the Imports and Exports Ordinance ought to be stayed.

2 The appeal is brought pursuant to s.9(2) of the Court of Appeal Ordinance that, so far as is material, provides as follows:

> "(a) [W]here an accused person tried on indictment is discharged or acquitted or is convicted of an offence other than the one with which he was charged;
>
> . . .
>
> the Attorney-General . . . may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone."

3 Following the grant of the stay of the re-trial by Pizzarello, A.J. on September 25th, 2001, Mr. Chappory was discharged.

4 The primary facts in this matter are not in dispute. The question for consideration by this court is whether, in applying the law to the facts, Pizzarello, A.J. was in error as a matter of law.

The background facts

5 On November 2nd, 1997, Mr. John Ballantine, a senior Customs officer in Gibraltar, was informed that a package had been seized in Frankfurt by the German authorities. Mr. Ballantine was subsequently informed that the package came from Venezuela and was addressed to Alexander Povedano, Medmarine Ltd., Units 20/21 Queensway Quay, Queensway, Gibraltar. Mr. Povedano is a former employee of Mr. Chappory at Medmarine. Mr. Chappory is the manager of Medmarine. The package, that came to be known as "the German package," was subsequently after examination found to contain 1.96 kg. of cocaine.

6 On November 6th, 1997, Mr. Ballantine was informed that another package similar to the one seized in Frankfurt had been discovered in Venezuela by the National Guard. This package, known as "the Venezuelan package," had been dispatched by DHL and was addressed to Medmarine for the attention of Alexander Povedano.

7 A joint operation was then mounted by the Customs authorities in Gibraltar and the Royal Gibraltar Police. It was the opinion of the Gibraltar authorities that the amount of cocaine involved was such that it could not be absorbed in the market in Gibraltar and was therefore destined to go abroad. The purpose of the operation was to discover those who were taking part in the reception and transmission of the German package and to discover the extent of their knowledge.

8 On November 11th, 1997, an officer of the German Customs arrived in Gibraltar with the German package. The package was opened by the Gibraltar authorities, the suspected drugs were removed and were replaced with white powder. A listening device, which had been obtained from the United Kingdom, was inserted in the package. On examination the suspected drugs were found to consist of approximately 1.96 kg. of cocaine of high purity.

9 Following the removal of the cocaine and the insertion of the listening device, the German package was delivered to the Parcel Post Stores and introduced into the postal system. A collection slip was then delivered to the premises at Medmarine. Observations were kept by the Police and the Customs authorities both at the premises of Medmarine and at the Parcel Post Stores at Landport.

10 Shortly after 10.00 a.m. on November 14th, 1997, Mr. Chappory arrived at the Parcel Post Stores at Landport with the collection slip. The German package was handed to Mr. Chappory by Mr. Jacques, a Customs

officer, who had previously arranged for the tape recorder forming part of the listening device inside the German package to be switched on. A short conversation took place between Mr. Chappory and Mr. Jacques, but this was before the handing over of the German package and therefore before any recording of the conversation could take place. It is common ground that Mr. Jacques did not administer a caution to Mr. Chappory before the conversation.

11 Meanwhile two police officers and a Customs officer were keeping watch on the premises of Medmarine. They were in a car about 20–25m. away from the premises. They saw Mr. Chappory close his shop at 10.04 a.m. and then leave on a motor cycle taking a white slip of paper with him. Shortly after that they saw a blue truck from the Electricity Department arrive and stop just opposite Medmarine's premises. Three men got out and waited outside the premises. Mr. Chappory returned at about 10.34 a.m. carrying the German package. He spoke to the three men, opened the office and all four men went inside. Within a minute or two they all came out. Mr. Chappory locked the door and they left in the blue truck. The German package was left inside Medmarine's premises.

12 While the four men were inside Medmarine's premises, some conversation took place between them. This conversation was monitored and (in the words of the judge when he gave his ruling) "all the indications from these conversations were that those persons knew the contents of the package were cocaine."

13 Owing to a failure of communications, however, the fact that the four men including Mr. Chappory had left the premises of Medmarine was not transmitted to Insp. Alcantara who was in the field command vehicle to which the signals from the tape recorder in the German package were being sent.

14 At 10.38 a.m. Insp. Alcantara gave the order to two officers to enter the premises. A door of the premises was broken down, the officers obtained entry and found the German package there. The four men, however, had already left.

15 After leaving the premises at Queensway Quay, Mr. Chappory and the other three men drove in the blue truck towards Medmarine's other premises at New Harbours. On the way, the blue truck was stopped by police cars.

16 It will be convenient if I now refer to the recital of the facts as given by the judge with admirable clarity in his ruling. I can start at the second sentence of para. (q):

> "(q) . . . Sgt. Ullger alighted and got into the blue van with another officer. He says he immediately cautioned the four men and informed

them of his suspicion that they were in possession of a controlled drug and that it was his intention to search the vehicle at New Mole House.

(r) P.C. Tilbury had stopped recording once the blue truck had been stopped . . . The operation was then aborted as a result of the breaking in by the officers, since the operation could no longer be kept secret.

(s) At New Mole House the vehicle was searched and the four persons were taken inside. Mr. Chappory was shown his rights from a board and was specifically told that these rights were denied to him. One of these rights was his entitlement to see a lawyer and the reason, which was not conveyed to the defendant for the refusal, was that the investigation could be jeopardized by the suspect calling a lawyer."

17 In the following para. (t), the judge considered the question of whether Mr. Chappory had been arrested at that stage. After referring to the evidence, he continued:

"The overall impression I have, not just of the evidence of Sgt. Ullger but generally, is that Mr. Chappory had not been formally arrested, but the nature of his detention was such that in fact that is what had happened and everyone was happy at the trial to refer to his detention at Rosia Road as a detention/arrest and for the reasons which I refer to later, an arrest is what should have happened at that stage . . .

(u) Mr. Chappory was then taken down to Medmarine's premises by Insp. Alcantara and his team in the control car, but before that D.C. Tilbury had placed a virgin tape into the tape recorder on the instructions of Insp. Alcantara, so that an interview with Mr. Chappory could be taped. They were at New Mole House at approximately 10.45 a.m. and arrived at the premises of Medmarine at approximately 10.52 a.m. D.C. Tilbury switched on the tape recorder. Mr. Chappory was interviewed. Mr. Chappory was cautioned but not told that the interview was being taped. The transcript of the taped interview bears out that the defendant was prepared to answer questions despite the lack of a lawyer. He could be said to be co-operating with the police. He said that Gloria had given him a DHL slip for the package that he had picked up. He handed over the DHL slip to the investigators, he explained the presence of the three men, denying having any conversation with those persons about the package and said they have nothing to do with it. He was then told that it was suspected the package contained drugs and he replied that he could not tell and he was then told that

he was free to talk with his lawyer and this was followed with his arrest by Mr. Macias [a Customs officer who was, together with Insp. Alcantara, in control of the operation]. He continued to aver that the owner of the package was coming to the premises later in the day for it and described Gloria. Mr. Macias reiterated that he was under arrest and the defendant said 'Then I have to call a lawyer' and was told that he would have the opportunity to do so when they got back to the station. In fact the DHL slip related to the Venezuelan parcel, but it was not fingerprinted in any way and as a matter of fact the defendant was not taken straight to New Mole House but taken to his home for further investigation at which place his lawyer attended.

(v) That same afternoon at about 12.30 p.m., Alfonso, Gloria and a juvenile arrived at the premises and were arrested. Here they were interviewed separately by various officers including Mr. Ballantine and Insp. Acris. Not a single note, contemporaneous or otherwise, was kept by the investigating officers of these interviews, notwithstanding that the officers knew because they had been told that these two persons were those to whom the defendant had referred to as the recipients of the parcel. They were subsequently released without charge. No effort was made to link the DHL slip with Gloria via fingerprints and so to test the accuracy of that part of the defendant's account."

18 I can now turn to the history of the subsequent proceedings.

The history of the proceedings

19 On November 15th, 1997, Mr. Chappory was charged with importation of a controlled drug. This charge was later replaced on July 14th, 1998, with a charge of being knowingly concerned in the importation of a controlled drug. On November 26th, 1997, a further charge of attempted possession of a controlled drug was put to Mr. Chappory. On March 20th, 1998, two further charges were added. One of these further charges related to the Venezuelan package. The Crown prepared two separate dockets of evidence, one relating to the German package and the other relating to the Venezuelan package. The docket relating to the Venezuelan package was served on the defence on March 20th, 1998.

20 On July 14th, 1998, the committal proceedings began. These proceedings continued on various dates in August and December 1998 and in January, February and May 1999. The protracted nature of the proceedings was caused primarily by difficulties concerning the diary in the magistrates' court. On several occasions, only half a day was available. On June 11th, 1999, Mr. Chappory was committed for trial on all charges to the Supreme Court.

21 The indictment was lodged on June 30th, 1999 and Mr. Chappory was arraigned on October 4th, 1999, when he pleaded not guilty to all four counts on the indictment. The trial was then fixed for February 1st, 2000. However, the Crown sought an adjournment of the trial on the grounds that they had not sufficient time to arrange for several witnesses relating to the Venezuelan package to come to Gibraltar. The trial was therefore adjourned to June 13th, 2000.

22 The trial began before the Chief Justice on June 13th, 2000, almost exactly a year after the committal for trial. Before the trial began, the defence informed the Crown that the witness statements of the South American witnesses could be read.

23 At the outset of the trial, counsel for Mr. Chappory made an application to stay the proceedings on the grounds of abuse of process. This application was rejected. The first count in the indictment related to the Venezuelan package. Counts 2 and 3 related to the German package. The Attorney-General agreed at the outset of the trial not to proceed with the fourth count which was a count of conspiracy.

24 On July 10th, 2000, the jury returned a verdict of not guilty on Count 1. The jury was unable to reach a majority verdict, however, on Counts 2 and 3 and was discharged. The Chief Justice ordered a re-trial on those two counts.

25 The matter came back before the court on October 2nd, 2000. On that occasion it was not thought that a date for the re-trial could be fixed during the autumn sittings, but a date was set for preliminary arguments before Pizzarello, A.J. on December 5th, 2000. The main hearing was adjourned to January 5th, 2001.

26 Due to the unforeseen illness of Pizzarello, A.J., neither the preliminary hearing on December 5th, 2000, nor the hearing on January 9th, 2001, could take place. On January 9th, 2001, all criminal cases were adjourned to January 31st, 2001.

27 On January 31st, 2001, the matter came before the Chief Justice. On that occasion counsel for Mr. Chappory invited the Chief Justice to consider an application himself for the stay of the re-trial on the ground of abuse of process and a denial to Mr. Chappory of his constitutional rights. The Chief Justice adjourned the application for further argument to February 13th.

28 On February 13th, Mr. Licudi, counsel for Mr. Chappory, renewed his application but the Chief Justice declined to consider the application on the basis that it would be inappropriate, as he had been the judge at the original trial. A date was fixed for the hearing before Pizzarello, A.J. on April 17th.

29 Shortly after the hearing on February 13th, 2001, however, Mr. Licudi suffered an injury. As a result, the re-trial could not take place on April 17th, 2001 and at the request of the defence it was adjourned to June 27th, 2001, for preliminary arguments, with the main trial being adjourned to October 15th, 2001. On June 27th, 2001 and again at the request of the defence, the preliminary arguments were adjourned until September 3rd, 2001. The application for a stay finally came on for hearing before Pizzarello, A.J. on September 3rd, 2001. This court has a transcript of the proceedings before Pizzarello, A.J., which included not only legal argument but the hearing of evidence.

30 At the outset of the hearing, Mr. Chappory entered pleas of not guilty to the two counts on the indictment prepared for the re-trial. Both these counts related to the German package. Following Mr. Chappory's re-arraignment and the entry of his plea, Mr. Licudi then developed his application for a stay. He said that the proposed re-trial would infringe s.8(1) of the Constitution and that in any event it amounted to an abuse of process. He said that the defence was seeking a declaration that a fair trial within a reasonable time as required by the Constitution could not be held and sought a stay of the proceedings. During the course of the hearing, counsel for Mr. Chappory also referred to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The hearing before Pizzarello, A.J.

31 In support of the application for a stay on the re-trial, counsel for Mr. Chappory developed his submissions, both orally and in writing, under five main headings:

(1) delay;

(2) the denial by the investigating officers of material relevant to the defence;

(3) denial of access to a lawyer before the interview that took place on November 14th, 1997, at the premises of Medmarine;

(4) publicity;

(5) the fact that prosecution witnesses had remained in court after they had given their evidence at the first trial.

32 Both the Attorney-General and Mr. Licudi addressed the court on the relevant principles of law and referred to a number of authorities. This court has had the advantage of being referred not only to the same authorities, but also to some additional ones. At the conclusion of the oral submissions at the beginning of September, the judge reserved his judgment. On September 25th, 2001, he gave his ruling. I shall have to refer in detail to this ruling and the conclusions that the judge reached as

to the various grounds that had been put before him and in particular to his ruling on the question of delay. Before I do so, however, it will be convenient to make some reference to the relevant principles of law.

The law

33 Section 8(1) of the Gibraltar Constitution Order 1969 provides as follows:

> "If 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."

34 It will be seen that this provision in the Gibraltar Constitution is in very similar terms to art. 6(1) of the European Convention which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

35 Furthermore, the Constitutions of other member states of the Commonwealth contain provisions to the same effect. For example, s.20(1) of the Constitution of Jamaica provides:

> "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."

36 In addition, one can see a reflection of the same concept in the Sixth Amendment to the Constitution of the United States that provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

37 Counsel for Mr. Chappory placed great reliance on the constitutional right given to a fair trial within a reasonable time. In support of his submissions, he referred us to a number of authorities, particularly decisions of the Privy Council, which show that in certain cases a breach of this constitutional right will lead to the stay of the criminal proceedings.

38 In the leading case of *Bell* v. *D.P.P.* (4) the Privy Council referred to the guidance given by the Supreme Court of the United States in *Barker* v. *Wingo* (3). In *Barker* v. *Wingo*, Powell, J. identified four factors which, in his view, a court should assess in determining whether a particular defendant had been deprived of his right under the Sixth Amendment to a speedy and public trial by an impartial jury. He stated these factors to be:

(1) The length of the delay.

(2) The reasons given by the prosecution to justify the delay.

(3) The responsibility of the accused for asserting his right.

(4) Prejudice to the accused.

The Privy Council accepted the desirability of applying the same or similar criteria to any Constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. It added: "The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case."

39 Counsel for Mr. Chappory drew our attention to two cases in which it has been said that it was indicated that a delay of $3\frac{1}{2}$ years between the date of the original offence and the trial would infringe the provision that the hearing should take place within a reasonable time: see *R.* v. *Saunders* (7) and *Grant* v. *D.P.P.* (5). *R.* v. *Saunders* was not a case involving any constitutional provisions, but Lord Widgery, C.J. said (58 Cr. App. R. at 255): "[I]t is not in the Court's knowledge that it has ever before been contemplated that a retrial should take place some three and a half years after the original offence was committed."

40 In *Grant* v. *D.P.P.*, a case on appeal from the Court of Appeal in Jamaica, Lord Diplock expressed the opinion that a trial $3\frac{1}{2}$ years after the event would not in the ordinary way constitute a fair hearing within a reasonable time.

41 I am not satisfied, however, that it is correct to attempt to lay down any fixed period as amounting to a period beyond which a fair hearing cannot take place. So much depends upon the circumstances of the particular case. In this context, it is most important to bear in mind a passage in the opinion of the Privy Council delivered by Lord Templeman in *Bell* v. *D.P.P.* (4), where he said in relation to the appeal from Jamaica then before the Board ([1985] 1 A.C. at 953):

> "[T]he courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica. The administration of justice in Jamaica is faced with a problem, not unknown in other countries, of disparity between the demand for legal services and the supply of legal services. Delays are inevitable. The solution is not necessarily to be found in an increase in the supply of legal services by the appointment of additional judges, the creating of new courts and the qualification of additional lawyers. Expansion of legal services necessarily depends on the financial resources available for that purpose."

42 If one follows the guidance given by Powell, J. in *Barker* v. *Wingo* (3), as endorsed by the Privy Council not only in *Bell* v. *D.P.P.* but in other more recent decisions, one has to consider the four factors in relation to the facts of the particular case. Clearly a deliberate attempt to delay the trial by the prosecution would be a powerful factor in favour of the defence. In relation to the third factor referred to by Powell, J., it is important to bear in mind in the present case that Mr. Chappory complained of delay even at the time of the first trial, though this complaint was not then persisted in.

43 The question of prejudice to an accused person is of great importance. Powell, J. identified the interests which a speedy trial is designed to protect. These are—

(a) to prevent oppressive pre-trial incarceration;

(b) to minimize anxiety and concern of the accused;

(c) to limit the possibility that the defence will be impaired.

Of these interests the last is the most important.

44 We were also referred to a decision of the Court of Appeal in New Zealand in *Martin* v. *Tauranga Dist. Ct.* (6). Section 25(b) of the New Zealand Bill of Rights Act 1990 contains a specific provision conferring "the right to be tried without undue delay." The New Zealand Court of Appeal in *Martin's case* examined the degree of prejudice to an accused person that had to be shown to see whether the delay was "undue."

45 A common theme runs through all the cases decided in jurisdictions which confer a constitutional right to a trial "without undue delay," or "within a reasonable time" or some similar provision. Any substantial period of delay will occasion the need for an enquiry. Indeed, it may give rise to a presumption of prejudice. Furthermore, as counsel for Mr. Chappory rightly pointed out, there is high authority for the proposition that prejudice may be relied upon even though an accused person cannot point to any specific prejudice: see *Bell* v. *D.P.P.* (4) ([1985] 1 A.C. at 951).

46 But whether an accused person's right has been infringed in any particular case depends on all the circumstances. Moreover, the breach of a constitutional right will not necessarily lead to a stay or the quashing of a conviction. In each case the court's primary concern is to see whether the accused's right to a fair trial will be or has been infringed. Thus, in *Att.-Gen.'s Ref. (No. 2 of 2001)* (2) Lord Woolf, in giving the opinion of the court, said ([2001] 1 W.L.R. at 1877):

> ". . . If there has been prejudice caused to a defendant which interferes with his right to a fair trial in a way which cannot

> otherwise be remedied, then of course a stay is the appropriate remedy. But in the absence of prejudice of that sort, there is normally no justification for granting a stay."

47 I now turn to the law relating to abuse of process. In addition to the protection given by a specific right conferred by a written Constitution or under art. 6(1) of the European Convention, an accused person can also rely upon the fundamental and inescapable duty of the courts to secure fair treatment for those who come or are brought before them. This is a protection given by the common law. It arises where the court concludes that the defendant cannot receive a fair trial or concludes that it will be unfair for the defendant to be tried. These two separate elements of the common law protection may sometimes overlap. In the present case we are concerned primarily with the question of whether Mr. Chappory can receive a fair trial, or, to be more specific, whether his re-trial can be fair.

48 The common law jurisdiction may be exercised in many different circumstances. There may have been some unfairness in the process whereby the accused was brought before the court. Or, owing to some action (whether negligent or otherwise) of the prosecuting authorities, the defendant's ability to prepare his defence may have been adversely affected. Many cases in this branch of the law, however, involve the question of delay. The common law recognizes, just as do the written Constitutions, that a fair trial may become impossible if there is an unacceptable delay between the event which gave rise to the charge and the trial of the accused. Accordingly, in considering the exercise of the common law jurisdiction, the court will examine the causes of the delay and the degree of prejudice occasioned to the accused. But the courts have underlined that stays imposed on the grounds of delay should only be employed in exceptional circumstances: see *Att.-Gen.'s Ref. (No. 1 of 1990)* (1) ([1992] Q.B. at 643). The Privy Council in *Tan* v. *Cameron* (8) ([1992] 2 A.C. at 224) endorsed the statement that the jurisdiction to halt criminal proceedings was exceptional.

49 As I mentioned earlier, counsel for Mr. Chappory also referred to the European Convention. However, he did not develop an argument under this heading and I am satisfied that it is sufficient to approach the questions which arise for determination in this case by reference to Mr. Chappory's constitutional right as enshrined in s.8(1) and by reference to the common law principles that guard against abuse of process.

The judge's ruling

50 It will be remembered that I stated earlier that counsel for Mr. Chappory advanced his submissions under five main headings: (1) delay; (2) the denial by the investigating officers of material relevant to the defence; (3) denial of access to a lawyer before the interview that took

place at the premises of Medmarine; (4) publicity; and (5) the fact that prosecution witnesses had remained in court after they had given their evidence at the first trial.

51 The judge in giving his ruling referred to these five matters in turn. I shall have to examine what he said in relation to each of them, but it will be convenient to refer first to the concluding paragraph of the ruling, as follows:

> "I stand back and look at this matter as a whole. I look at Kneller, C.J.'s judgment in the case of *R.* v. *Gerada* 1995–96 Gib LR 1. I consider the *Att.-Gen.'s Ref. (No. 1 of 1990)*, [1992] Q.B. 630. I look at the Attorney-General's submission that it is only in the rarest of occasions that the court orders a stay. I consider his suggestion that a scatter-gun approach is not sufficient to justify the court in stopping a case when it is generally the province of the prosecuting authorities to institute and progress a trial and for the court to try it. I am of the opinion that an accumulation of factors can be taken to add weight to the consideration of this application. I have considered the factors in the round and find on balance that the defendant has proved he would suffer serious prejudice. I consider this trial should be stayed and the defendant discharged."

52 In support of the appeal on behalf of the Crown, the Attorney-General has invited the court to look at this paragraph with care and to consider the nature and weight of the factors that the judge was entitled to take into account in reaching his conclusion. A consideration of these factors necessarily requires an examination of the conclusions that the judge reached in relation to each of Mr. Licudi's five headings.

53 I propose to start with the fourth and fifth headings—publicity and the fact that the witnesses remained in court.

54 In para. 8 of the ruling, the judge summarized the submissions that had been made to him about publicity and took into account the fact that Mr. Chappory is a well-known man. It is clear, however, that the judge attached no weight to this argument. He said that proper directions from the judge at the re-trial would instruct the jurors to put out of their minds all that they had heard outside the court room. He further said: "I do not see why the trial should be stopped just because of this dimension."

55 The judge was referred, as we were, to the fact that the two main witnesses for the prosecution had been present in court at various stages of the proceedings after they had given their evidence. In addition, two prosecution witnesses, including Mr. Ballantine, were present in the public gallery. It seems clear, however, that the judge was wholly unimpressed by the submission that the fact that some witnesses had been in court after giving evidence—it is indeed a common practice—might

affect the re-trial. He said: "That they have heard the evidence of the first trial does not seem to me to impinge on their giving the evidence at a new trial."

56 I shall turn next to the first of the matters relied upon by counsel for Mr. Chappory—delay. In view of the importance of this matter, I shall deal with it under a separate heading.

The judge's treatment of the question of delay

57 At the time when the application for a stay came before Pizzarello, A.J. on September 3rd, 2001, the trial had been fixed to begin on October 15th, 2001, nearly four years after Mr. Chappory had first been charged. Counsel made it clear, however, that for the purpose of his submissions he would focus his attention on April 17th, 2001, the date when the hearing would have begun before Pizzarello, A.J., had counsel himself not become indisposed.

58 Counsel relied primarily on his submission that Mr. Chappory's constitutional right to a fair trial would be infringed by the fact that the re-trial would take place $3\frac{1}{2}$ years after Mr. Chappory had been first charged. Counsel also submitted that the delay before the re-trial constituted an abuse of process, whereby serious prejudice to Mr. Chappory would be caused.

59 The judge dealt with counsels' submissions in his ruling. It seems clear that he dealt first with the position at common law and a submission that the delay amounted to an abuse of process. I should set out a substantial passage from the judge's ruling:

> "Turning to delay, it is now four years since Mr. Chappory was arrested. I am concerned by that delay and I go along with Mr. Licudi's submission that the court should view that length of time as giving rise to a presumption of itself that there is prejudice. It is only a presumption but one which Mr. Licudi submits requires no particularization of damage (*Bell* v. *D.P.P.*) and he also refers to *R.* v. *Saunders* as authority to this effect. I accept that principle, but the presumption does not hold in my view if it is shown that the delay can be properly accounted for and if it can, then it seems to me it is for the defendant to show why it is unjust. Mr. Licudi took me meticulously over every aspect of the delay. I find it hard on the face of the history of this case to conclude that these delays are not reasonable. I am prepared to accept that the defendant is wholly blameless and none of the $3\frac{1}{2}$ years that passed before his counsel was incapacitated can be attributed to him. But then so is the prosecution. One consideration that has to be looked at is that the prosecution has a duty to discharge to ensure that those who are

> alleged to have committed a crime should be brought to book and the instant case, I observe, is one of a very serious nature. Mr. Licudi asks me in effect to dig a little into the prosecution's role in delay because one facet of the delay is that a great deal of the time lost was due to the charge in relation to the Venezuelan package. That, he submits, should never have been proceeded with by the prosecution, as there was a break in the continuity of the exhibit and so it was a non-starter. He balked at the suggestion, quite rightly, that I should look afresh to decide the point myself, but nevertheless he pursued the point to the extent that I should at least get the flavour of those proceedings. I have indeed done so. Nevertheless, I do not agree with him, firstly, the prosecution marshalled its facts sufficiently well to persuade the trial judge not to accede to his submission. Secondly, it should have been taken at the committal stage, where it was not for what I understood from Mr. Licudi were in effect tactical reasons."

60 I have referred earlier to the decision of the Court of Appeal in England in *Att.-Gen.'s Ref. (No. 1 of 1990)* (1) and to the passage in that judgment that was approved by the Privy Council in *Tan* v. *Cameron* (8). It seems that at this stage of his judgment, the judge had in mind the principles enunciated by the Court of Appeal. Thus, though he was satisfied that there was a presumption of prejudice, he went on to consider the reasons for the delay and the question of prejudice to the defendant. He looked to see whether the delay could be "properly accounted for." In two important sentences, he expressed an unequivocal conclusion: "Mr. Licudi took me meticulously over every aspect of the delay. I find it hard on the face of the history of this case to conclude that these delays are not reasonable."

61 Pausing there, I am satisfied that in the passage that I have set out, the judge was reaching a conclusion on the common law aspect of delay by holding that though there was a presumption of prejudice, this presumption had been rebutted once the delay had been explained and because Mr. Chappory had been unable to show that his right to a fair trial had been violated. It also seems clear that at this stage of his ruling, the judge had in mind the duty imposed on the prosecution to show that those who are alleged to have committed a crime should be brought to trial.

62 I must turn, therefore, to the second part of the judge's ruling. It was at this point that he considered the constitutional position. Once again, I must set out his precise words:

> "All that said on blameworthiness, I have to say that in my view the constitutional requirement of a reasonable time is there for the protection of the defendant, that he should not be unduly pressured by the event of a trial over his head, by the stress induced by these

> pressures in terms of his life, his business, *etc.*, by the worry to his family, by the impairment of witnesses' recollections. The constitutional requirement for reasonable time is for a defendant's protection rather than that the prosecution should show that it has acted reasonably in time. That is to say, even if the prosecution is blameless still a defendant has to be protected. And that is an aspect which arises in my view in this case in this way. The committal proceedings were overlong, there is no fault in anyone, but it is in my view the State's duty to ensure that the constitutional rights of its citizens be protected. It is no use having constitutional rights if the State does not provide the infrastructure to ensure that those rights are acknowledged and kept. I can well understand the busy Stipendiary Magistrate not having room in his diary to run a long case, and, equally I can understand that the treasury of a State may require some constraints. But that is no comfort to a defendant and this aspect in this case is disturbing."

63 It was submitted by counsel for Mr. Chappory in the course of his admirable argument, that the words used by the judge in that passage amounted to a conclusion by him that Mr. Chappory's constitutional rights had been infringed.

64 It seems clear that the judge had in mind the considerations which were examined by the Privy Council in *Bell* v. *D.P.P.* (4). But, though I have read this passage a number of times, I am quite unable to equate the comment that this aspect of the case was disturbing with a positive finding that Mr. Chappory's constitutional rights had been infringed. Furthermore, it seems to me that the matter is put beyond doubt by the earlier passage in the same judgment where the judge said in terms: "I find it hard on the face of the history of this case to conclude that these delays are not reasonable."

65 The constitutional right enshrined in s.8(1) is to be afforded a fair hearing within a reasonable time. I accept that it might be possible to conclude that a person was not being afforded a fair hearing "within a reasonable time" even though the delays which led to the lapse of time were excusable. But the judge did not state his conclusion in those terms. He went no further than to say that this aspect of the case was "disturbing." The word "reasonable" is a crucial word in s.8(1). The judge had this word in mind when he mentioned "the constitutional requirement for reasonable time."

66 I do not think it is open to this court to insert into the judge's ruling a finding that he did not make explicitly.

67 In *Bell* v. *D.P.P.* (4) the Privy Council ([1985] 1 A.C. at 953) referred to the fact that in some countries delays are inevitable and that

there is a disparity between the demand for and the supply of legal services. It would seem that the judge had this passage in mind when he referred to the "infrastructure" provided by the state. But in the context of a case such as the present, where the delays at the committal stage were caused by the pressure on the Stipendiary Magistrate's Court, a finding that a constitutional right had been infringed and indeed to an extent that caused serious prejudice would require a full and explicit appraisal of the various factors taken into account.

68 On this analysis of the judge's treatment of the question of delay, it becomes apparent that he did not regard the delay as amounting to an abuse of process at common law and, though "disturbed" by the delay in the context of Mr. Chappory's constitutional right, made no finding that there had been a breach of that right. I must, therefore, look next at Mr. Licudi's second heading—the denial by the investigating officers of material relevant to the defence.

Paragraphs 6 and 7 of the ruling

69 It was submitted to the judge that the investigating officers had been negligent and incompetent in a number of respects. The judge examined these criticisms and concluded, save in respect of one matter, that there had been no negligence shown at all. However, at one point in the ruling the judge said this:

> "There is one aspect of this submission that merits some consideration and that is the failure to fingerprint the DHL slip. That could be said to fall under the authority of *R.* v. *Gargee*. The case is not wholly in point, but it is correct to say that a fingerprint examination of the DHL slip might have provided material evidence. Would Gloria's fingerprints appear? That would substantiate what the defendant says in part. But in truth even if it had, that would not decide the matter either way. Yes, that would add to the credibility of the defendant, no small matter of course, but in the context in my view of little consequence."

70 The evidence of Mr. Chappory was to the effect that he had been visited on the day before his arrest by a woman called Gloria who had given him a DHL slip relating to the expected package that he was to collect. In fact, it is now clear that the DHL slip related to the Venezuelan package and not the German package. The argument on behalf of Mr. Chappory was that had the DHL slip been fingerprinted and had Gloria's fingerprints been found on it, this would have lent credence to the evidence given not only by him, but also by a witness called on his behalf that Gloria had indeed visited his premises the day before the package was collected and he was arrested.

71 It is right to bear in mind, however, that the prosecution recognized throughout that Mr. Chappory was not the ultimate receiver of the package. The quantity of drugs was too large for the Gibraltar market. An investigation of any fingerprints on the package was not, therefore, a matter of central importance.

72 It is apparent that the judge took some account of the failure by the investigating officers to fingerprint the DHL slip but, as he said, he thought the failure was "of little consequence."

73 The remaining matter relied upon by counsel for Mr. Chappory was the denial of a lawyer. A transcript was taken of the interview with Mr. Chappory at the premises of Medmarine. It was the judge's view, as he explained in his ruling, that by that stage Mr. Chappory should have been arrested and cautioned and should have been allowed to see his lawyer. The question the judge posed was: does that denial of a lawyer lead to an unfair trial? He answered that question as follows:

> "This court may deal with the problem by excluding the interview evidence and I understand the Attorney-General to say that he would make some submissions on that at the trial. But I may say at this stage, peremptorily, that the least I should do is not allow the transcript in. Is this sufficient to ensure a fair trial? It probably is. Nevertheless, there is a residual problem and that is that the transcript does have exculpatory aspects to it. Inculpatory as well. And taking that away might give rise to a prejudice to the defendant."

74 It will be seen that it was the judge's view that if this evidence of the interview was excluded, as he thought it would be, there was a risk of prejudice to the defendant because the transcript of the interview would reveal both exculpatory matters as well as inculpatory matters. His conclusion, however, is expressed in tentative terms and falls a very long way short of a finding of a risk of serious prejudice.

75 Having examined the earlier paragraphs of the ruling I now return to para. 10. The first question to decide is: what "factors" did the judge consider and take into account when he was making his final assessment? It seems to me that in view of his earlier conclusions, he must have excluded from his mind the questions of publicity and the fact that witnesses had remained in court after they had given evidence at the trial. Only three other matters remain—delay, the DHL slip and the denial of a lawyer.

76 I have studied the last five pages of the judge's ruling with care. I have come to the clear conclusion that on the judge's own findings there was no adequate material on which he could exercise this exceptional jurisdiction to grant a stay. The judge was entitled to look at matters of

substance and accumulate factors which might create a serious risk to a fair trial. But I am satisfied that none of the factors that the judge could have properly taken into account in the light of his findings could either individually or taken together with all the other factors have justified the stay of these proceedings.

77 Counsel for Mr. Chappory invited the court, if it concluded that the judge had misdirected himself, to grant a stay of its own motion. He said that in the light of the authorities, the delay in this case was unacceptable and that the "reasonable time" guaranteed by s.8(1) of the Constitution had been seriously exceeded. Mr. Chappory's constitutional right under s.8(1) would be infringed if a re-trial took place this year and serious prejudice would be caused to Mr. Chappory. Furthermore, no fair trial could take place in accordance with the principles recognized by the common law.

78 I am unable to accede to this alternative submission. This is a serious case. I recognize that it is not necessary for Mr. Chappory to point to any specific prejudice, but the central issue in this case is a short one, the nature and extent of Mr. Chappory's knowledge of the contents of the German package. Accordingly, for the reasons that I have endeavoured to outline, I would allow the appeal and remove the stay. The court will invite argument on any directions that the court should now give.

GLIDEWELL and **STUART-SMITH, JJ.A.** concurred.

Appeal allowed.
