SC Case 1/2017

IN THE SUPREME COURT OF SIERRA LEONE

IN THE MATTER OF SECTIONS 18(1), 20(1), 23(1), 124 AND 127 OF THE CONSTITUTION OF SIERRA LEONE 1991; OF SECTION 74 OF THE COURTS ACT 1965

AND

THE CRIMINAL PROCEDURE ACT 1965

AND

IN THE MATTER OF AN APPLICATION FOR THE UNCONDITIONAL RELEASE OF 10 ACCUSED PERSONS AWAITING JUDGMENT IN THE CASE OF:

THE STATE

vs

1. ABRAHAM LAVALY
2. INAH JAMES
3. ADETUNJI DESMOND COLE
4. BAKIE MINAH
5. EVERTON FAULKNER
6. ABU BAKARR KAMARA
7. ISMAIL DAINKEH
8. ISATA OSAIO KAMARA
9. SHARKA KPANABUM
10. ABDUL MUTALID KAMARA

AND

IN THE MATTER OF:

1. ABRAHAM LAVALY - PLAINTIFFS
2. INAH JAMES
3. ADETUNJI DESMOND COLE
4. BAKIE MINAH
5. EVERTON FAULKNER
6. ABU BAKARR KAMARA
7. ISMAIL DAINKEH
8. ISATA OSAIO KAMARA
9. SHARKA KPANABUM
10. ABDUL MUTALID KAMARA

AND

THE STATE - RESPONDENT

CORAM:
THE HON MR JUSTICE N. C. BROWNE-MARKE, JUSTICE OF THE SUPREME COURT
THE HON MR JUSTICE E. E. ROBERTS, JUSTICE OF THE SUPREME COURT
THE HON MS JUSTICE V. M. SOLOMON, JUSTICE OF THE SUPREME COURT
THE HON MS JUSTICE G. THOMPSON, JUSTICE OF THE SUPREME COURT
THE HON MR JUSTICE A. S. SESAY, JUSTICE OF THE SUPREME COURT

COUNSEL:
MS TUMA JABBIE for the Plaintiffs
MR CALVIN MANTSEBO for the Respondent

JUDGMENT DELIVERED THE DAY OF AUGUST, 2020

THOMPSON, JSC

1. My Lords, I have had the advantage of reading the speech of my Learned Brother Browne-Marke JSC with whom I agree. I gratefully adopt the facts as set out by him. I agree with my brother that the essence of the submissions advanced by the Plaintiffs in this matter is that the inordinate delay and circumstances that have prevented a judgment from being delivered in this case, through no fault of the Plaintiffs, (accused persons), are such that the proceedings should now be stayed as an abuse of process. Before I address this issue, let me say that for my part I find submissions referring to the learned trial judge as a foreign judge to be unhelpful and inappropriate. This can easily be demonstrated by posing the question whether the current circumstances would have been acceptable if he was a Sierra Leonean judge who decided to retire abroad before delivering the judgment. It would be a rare case indeed in which the nationality of a judge qualified to practice in Sierra Leone would be a relevant matter to be raised as it has been in this appeal. The only relevance of the fact that he is a foreigner is to give context to the background facts that precipitated this matter.

2. It is expected that those appearing before this court will ensure that they are able to assist the court by drawing it's attention to relevant jurisprudence and authorities on all grounds relied on. Abuse of process is briefly mentioned in paragraph C(vi) of the Plaintiffs' Statement of Case, but was not specifically argued. This is unfortunate, since that is what lies at the heart of this case. It is clear that the circumstances which give rise to the Plaintiffs' application for relief are wholly exceptional. There is no reasonable prospect of the trial judge delivering his judgment and it is wholly unrealistic for a re-trial before a different judge to take place. The question for this court therefore is

whether in those circumstances the proceedings should be stayed. As my Learned Brother states in paragraph 42 of his judgment, "*the Plaintiffs' contention here is that they have been subjected to an abuse of process, in that judgment is outstanding in their matter, and that there is no likelihood that it would be delivered. The challenge is not, in my view, to a fair hearing, but rather, to unreasonable delay in having the matter resolved one way or the other.*"

3. Although a stay for abuse of process is an exceptional remedy, it is neither new nor unusual in many common law jurisdictions. The fact that it was not satisfactorily argued before us illustrates that that there is a need for this court to provide some guidance for judges and practitioners alike. In doing so I stress that it is an exceptional remedy and it will only be granted when the trial process itself is not capable of curing any potential unfairness. Abuse of process arguments should not be put forward unless justified. If the application to stay for abuse of process is on the grounds of delay, it will not succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice to the defendants (or accused persons) occasioned by the delay which cannot fairly be addressed in the normal trial process. The nationality of the judge, the presence or absence of an explanation or justification for the delay is only relevant insofar as it bears on that question.

4. The genesis of Abuse of Process is in fact the common law, which empowers the court to use its discretionary power to ensure a fair trial. The courts have a duty to ensure that all who appear before it, are treated fairly and suffer no injustice (See Donnelly v DPP [1964] AC 1254). Similarly, the courts must protect the law and its processes and procedures from abuse. I say at the outset that there cannot be a single definition of Abuse of Process nor a single example that covers all instances of abuse. (see Rhett Allen Fuller (Appellant) *v* The Attorney General of Belize (Respondent) [2011] UKPC 23 per Lord Phillips). I adopt the words of Lord Clyde in *R v Martin (Alan) [1998] AC 917*, when he stated that: "*No single formulation will readily cover all cases, but there must be something so gravely wrong as to make it unconscionable that a trial should go forward, such as some fundamental disregard for basic human rights or some gross neglect of the elementary principles of fairness.*" In the instant case we are concerned with abuse of process in criminal proceedings. Different considerations may arise when dealing with other areas of law.

The Legal Framework

5. The doctrine of abuse of process was comprehensively considered by the UK Supreme Court and the Judicial Committee of the Privy Council in *R v Maxwell* [2010] UKSC 48, [2011] 4 All ER 941, [2011] 1 WLR 1837 and *Warren v Her Majesty's Attorney General of the Bailiwick of Jersey* [2011] UKPC 10, [2012] 1 AC 22, [2011] 2 All ER 513). Before commenting on those decisions, I want to review some of the earlier authorities.

6. Many of the earlier authorities on abuse of process focused on prosecutorial misconduct which I emphasize is not the case here. For example, in *R v Derby Crown Court, Ex p Brooks* (1984) 80 Cr App R 164, 168-169 Sir Roger Ormrod, delivering the judgment of Lord Lane CJ and himself, set out the categories of abuse, all of which were limited to prosecutorial misconduct. It may for instance be that the prosecution "manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality." The court has a discretionary power to ensure that there should be a fair trial according to law, which involves fairness both to the defence and prosecution.

7. In *R v Horseferry Road Magistrates' Court ep Bennett* [1993] 3 ALL ER. 138, 151 HL, the Court held that proceedings should be stayed where a defendant demonstrates that on the balance of probabilities:
   a) It would be impossible to give the accused a fair trial; or
   b) Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

   These two categories of abuse have been developed in a number of cases that followed.

8. In *R v Latif* [1996] 1WLR 104, 112, a case of entrapment involving illegal conduct on the part of customs officers, the defendant had been lured into the UK by the unlawful acts of customs officers and he argued that the resulting proceedings should be stayed as an abuse of process. Lord Steyn stated: "*In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of*

his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: R v Horseferry Road Magistrates' Court, Ex p Bennett...."

9. Bennett was a case where a stay was appropriate because the accused had been forcibly abducted and taken to the United Kingdom to face trial contrary to the extradition laws. Lord Lowry stated *"the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused."* Lord Griffiths said: *"If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law which embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. .....I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it. . ."* I mention this category of abuse not because there any suggestion in this case of executive abuse or a deliberate manipulation of the system but because it is relevant to identify the kind of exceptional matters that are capable of giving rise to a successful abuse of process submission and to emphasize the high bar that must be met.

10. In *R v Maxwell [2010] UKSC 48,* the Appellant had his conviction for murder set aside after a finding of "gross prosecutorial misconduct on the part of the police", after the police misled the prosecution, the defence and the Court as to benefits provided to the informant on whose evidence the case was largely based. The Appellant appealed against the Court of Appeal's decision to order a retrial. The question for the House of Lords was whether the Court of Appeal was right to do so. The appeal failed (Brown, Collins LL dissenting) but *Lord Dyson* in his

judgment stated that in the first category of cases, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of cases, the court is concerned to protect the integrity of the criminal justice system.

11. In R v Mullen [1999] EWCA Crim 278, British authorities, in disregard of available extradition procedures, initiated and procured the unlawful deportation of the appellant from Zimbabwe to England. The appellant was charged and tried for conspiracy to cause explosions likely to endanger life or to cause serious injury to property. It was alleged that he was a member of the IRA. In 1990, he was convicted and sentenced to 30 years imprisonment. Some years later, the circumstances in which he was deported to England came to light. His conviction was quashed. The Court stated: "*Furthermore, although abuse of process, unlike jurisdiction, is a matter calling for the exercise of discretion, it seems to us that Bennett-type abuse, where it would be offensive to justice and propriety to try the defendant at all, is different both from the type of abuse which renders a fair trial impossible and from all other cases where an exercise of judicial discretion is called for. It arises not from the relationship between the prosecution and the defendant, but from the relationship between the prosecution and the Court. It arises from the Court's need to exercise control over executive involvement in the whole prosecution process, not limited to the trial itself.*" Recognizing the nature of the crime with which Mullen was charged and acknowledging the revulsion the public would feel that a terrorist was effectively being allowed to walk free, Rose LJ stated: "*This court recognises the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the I.R.A. and other terrorist organisations. In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case. Against that, however, the conduct of the security services and police in procuring the unlawful deportation of the defendant in the manner which has been described represents, in the view of this court, a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts. The need to discourage such conduct on the part of those who are responsible for criminal prosecutions is a matter of public policy to which, as appears from R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42 and R v Latif [1996] 1 WLR 104, very considerable weight must be attached.*"

12. In the Canadian Supreme Court case of R. *v.* Regan, [2002] 1 S.C.R. 297, 2002 SCC 12. The Learned Justices stated: "*A stay of proceedings will only be granted as a remedy for an abuse of process in the "clearest of cases". (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice. .....Only in exceptional, relatively very rare cases will the past misconduct be so egregious that the mere fact of going forward in the light of it will be offensive. Where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay, a third criterion is considered: the interests that would be served by the granting of a stay of proceedings are balanced against the interest that society has in having a final decision on the merits.*" This case involved sex-related charges and allegations of misconduct by the police and the prosecuting authority.

13. These cases demonstrate that the inherent power to stop proceedings as an abuse of process is to be exercised in exceptional circumstances as in most cases the trial process will be sufficiently equipped to ensure that an accused can receive a fair trial.

14. I now turn to the issue of delay. Article 7(3) of The African Charter on Human and Peoples' Rights (The Banjul Charter) enshrines the right of citizens to be tried within a reasonable time and is reflected in Section 23 (1) Constitution of Sierra Leone.

15. Self-evidently, the mere fact of delay does not give rise to an abuse of process. Delays can be caused by a variety of factors including the nature and complexity of particular cases. The delay must be inordinate or excessive before a court will countenance staying a case. The threshold is a high one. Most human right conventions contain a "reasonable time" provision for criminal trials. See *Dyer v Watson [2002] 3WLR 1488* a case dealing with the 1950 European Convention on Human Rights. In conjoined appeals, the Privy Council held that (1) a delay of 28 months between the charging of a 13 year old boy with serious sexual offences and his proposed trial would breach Art.6(1), and (2), whilst a delay of 20 months between the charging of two police officers with perjury and their proposed trial was **not** a sufficient delay to breach Art.6 The distinguishing factor between the two cases was that one involved a child and the other police officers. In the case of the child the court had regard to the time requirements of the

Convention on the Rights of the Child 1989 (United Nations) and the Beijing Rules when considering the reasonable time requirement within Art.6(1). The court observed that cases involving children required careful and sensitive handling and there had been no satisfactory explanation provided for the delay. In the case of the police officers the court was of the view that although it was desirable that there should be a shorter period between the bringing of charges and the proposed trial, the 20month delay between charge and trial did not infringe the reasonable time requirement because police officers accusations of misconduct need to be careful and independently investigated and such investigations take time. Lord Bingham of Cornhill stated: "*In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed.*"

16. In *Culpepper v. The State (Trinidad and Tobago) [2000] UKPC 51 (20th December, 2000)* the defendant appealed against his conviction for the murder of an elderly lady who had also been raped. Evidence had been destroyed in a fire at the police station, and the prosecution relied upon fingerprints found on a pair of glasses found near the body. The defendant argued that the very substantial delay of six years after arrest and before trial prejudiced his ability to defend himself, and was an abuse. Denying his appeal Lord Bingham on behalf of the Privy Council stated: "*It is well-established that a trial court can stay proceedings on grounds of delay, but the circumstances must be exceptional and the defendant must show on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held, in other words that the continuance of the prosecution amounts to a misuse of the process of the court: see Attorney-General's Reference (No. 1 of 1990) [1992] QB 630 at 643-4. This condition could not have been met in the present case. It is also well-established that in some cases, where the defence has been hampered or prejudiced by the passage of time, an appropriate explanation and warning by the trial judge may be called for. But the direction, if any, which is called for will depend on the circumstances of the particular case, and there may be no need for any explanation or warning if there is nothing to suggest that the defence has been in any way prejudiced or hampered: see Reg. v.*

Henry H. [1998] 2 Cr. App. R. 161 at 168E; Reg. v. Lloyd (unreported, CACD, 30 November 1998); Reg. v. Graham W. [1999] 2 Cr. App .R. 201. It might indeed be damaging to a defendant to warn the jury of the risk that recollections may fade with the passage of time if the defendant has not complained of any difficulty in remembering."

17. These cases illustrate that the issue of whether a delay is inordinate or exceptional is fact specific. An obvious question that arises for consideration is when does time begin to run? The answer was provided by Lord Hope of Craighead in Montgomery v HM Advocate [2003] 1 A.C. 641 when he said *"The requirement that the hearing be "within a reasonable time" predicates that there has been a charge from the date of which the reasonableness of the time can be measured."* It follows therefore that "reasonable time" in this case began when the Plaintiffs were charged in 2013. In my judgement the reasonable time requirement does not stop running at the start of the trial and continues to run until its conclusion. In the particular circumstances of this case the trial started but came to an abrupt and unmovable halt before judgement was delivered. In the circumstances it is not for us to determine the merits of the case or to substitute our own judgment for that which might have been delivered.

18. I have given examples of prosecutorial misconduct and delay as examples of circumstances that might found an application to stay proceedings for abuse of process. These are just two. Section 23 of the Constitution guarantees that the trial or hearing must be fair, in "public," before an "independent and impartial court" and "established by law." If these provisions are infringed then the courts are the custodians and will ensure that they are remedied. In exceptional cases this may mean that what would otherwise be proper proceedings will be stayed. Whatever the basis of the abuse, the breach complained of, must be manifestly unfair and be incapable of being remedied by the ordinary trial process. In other words, not all breaches will result in a stay of proceedings. There may be more appropriate and practical remedies, for example expediting a delayed trial or granting bail, as the case may be. The public interest is that criminal charges once brought must be taken to their logical conclusion after a fair trial. Therefore, any application for a stay should be refused if the unfairness complained of can be mitigated during the course of the trial by measures such as the exclusion of evidence where appropriate or making orders for necessary disclosure when relevant and permissible.

However, if a person cannot be guaranteed a fair trial or to try him or her would be unconscionable, then he/she ought not to be tried at all and it will be appropriate for the case to be stayed. Applications for a case to be stayed are separate and distinct from appeals or 'no case to answer' submissions and must not be conflated with them. If an application is to be made it should not be delayed till the end of the trial because that would mean that there would be an unacceptable postponement of the question whether there should have been a trial in the first place.

19. Relying on the above authorities and the citizens' constitutional right to a fair trial, it is appropriate to set out some guidance as to how such matters should be dealt with.

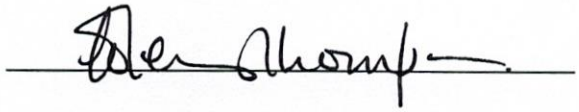
(i) The onus is on the accused to show on a balance of probabilities that a fair trial is no longer possible. (*R v Canterbury and St Augustine Justices Ex p Klisiak (1982) Q.B.398).*

(ii) Arguments of abuse of process should not be put forward unless justified;

(iii) If the application to stay for abuse of process is on the grounds of delay, it cannot succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice to the accused person occasioned by the delay which cannot fairly be addressed in the normal trial process. The presence or absence of explanation or justification for the delay is relevant only insofar as it bears on that question;

(iv) A written application must be served on the prosecution and any co-accused and the court before the hearing setting out the grounds on which it is made, including or identifying all supporting materials, specifying relevant events, dates and propositions of law. The application must also identify any witness the applicant wants to call to give evidence. Any response from the prosecution must similarly be served on all parties.

20. I thank both Counsel for their submissions.



THE HON MS JUSTICE G THOMPSON. JSC