Privy Council Appeal No. 56 of 1992

The Attorney General of Hong Kong *Appellant*

v.

Charles Cheung Wai-bun *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH MARCH 1993

Present at the hearing:-

LORD GRIFFITHS
LORD BRIDGE OF HARWICH
LORD LOWRY
LORD SLYNN OF HADLEY
LORD WOOLF

*[Delivered by **Lord Woolf**]*

This is an appeal by special leave granted to the Attorney General of Hong Kong on 5th August 1992 from an order made by Duffy J. on 16th June 1992. That order permanently stayed criminal proceedings against the respondent for the reasons set out in a detailed written ruling handed down on 1st July 1992.

The respondent had been arrested on 31st August 1988 and he was charged on 6th May 1989. He was one of six defendants who were charged in connection with a cheque cycle conspiracy designed to defraud the Hong Kong Industrial and Commercial Bank ("HICB"). The respondent was charged with one offence of conspiracy to defraud contrary to common law (count 1) and two offences of false accounting, contrary to sections 19(1)(a) and (b) of the Theft Ordinance of the Laws of Hong Kong (counts 2 and 3).

Count 1 was alleged to have been committed between 1979 and March 1982 with the complicity of employees of HICB, including the respondent who was the general manager of HICB and employees of a second bank, First Hong Kong ("FHKC"). Count 2 was alleged to have been committed between February 1982 and June 1982 with the object of covering up the alleged conspiracy; and count 3 in October 1982.

[14]

The proceedings against the respondent and his co-accused were the first proceedings conducted under the provisions of the Complex Commercial Crimes Ordinance of the Laws of Hong Kong. The offences were serious and cheques to the value of US$13.24 million were dishonoured by the banks in the United States and ultimately as a result of the conspiracy HICB was faced with an indebtedness to FHKC amounting to approximately US$27 million.

The first preparatory hearing under the Complex Commercial Crimes Ordinance into the offences was held by Duffy J. on 28th October 1989. On 5th September 1990, on the application by the other defendants, Duffy J. ordered the respondent to stand trial separately from his co-accused and directed that the trial of the co-accused should begin immediately. On 24th September 1990 after one accused had pleaded guilty to the offence of conspiracy, the trial of the other co-accused commenced and on 6th December 1990 two were convicted of conspiracy and one accused was also convicted of the offence of false accounting. They were sentenced to terms of imprisonment ranging from $4\frac{1}{2}$ years to 6 years imprisonment. The trial judge was Duffy J.

Originally the trial of the respondent was rescheduled to commence in 2nd December 1991. However because of counsel being unavailable and the prosecution being involved in extradition proceedings in Canada involving a co-accused, the commencement of the trial was deferred to 28th April 1992. Having previously considered a number of other applications, including an application on behalf of the respondent that he should disqualify himself, which he rejected, Duffy J. commenced the hearing of the respondent's application for a stay on 7th May 1982. The hearing of that application continued for 18 days during which expert medical evidence was called on behalf of the prosecution as well as the respondent. The respondent contended that he was entitled to a stay both at common law for delay amounting to an abuse of process and under the provisions of articles 11(2)(c) and 10 of the Hong Kong Bill of Rights Ordinance.

The terms of article 11(2)(c) and article 10 of the Bill are as follows:-

> "11.(2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality.
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> ...
>
> (c) to be tried without undue delay;
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> ...
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> 10. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons

> of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

Duffy J. decided that for all intents and purposes his power to grant a stay at common law and under the Bill were the same. The Attorney General accepts that this is the position. The respondent contends that this ruling is unduly favourable to the Attorney General as article 11(2)(c) of the Bill, "by guaranteeing a right to a defendant not to be tried after undue delay (irrespective of the prospect of such trial being unfair), ... imposes a stricter duty on the prosecution than Duffy J. was prepared to make it shoulder".

A question was raised in the papers before their Lordships, as to whether it was appropriate for an appeal to proceed directly from the decision of Duffy J. to their Lordships' Board. However at the outset of the hearing both sides conceded that this was the correct course. This concession is not surprising since in *George Tan Soon Gin v. Judge Cameron* [1992] 3 W.L.R. 249 ("the *Tan* case"), in a judgment of their Lordships delivered by Lord Mustill, the Board indicated that this was the appropriate procedure when the appeal was by a defendant to the Board against the refusal to grant a stay of a criminal prosecution on the grounds of alleged abuse of process. The fact that the present appeal is by the prosecutor rather than the defendant does not alter the situation.

On an appeal a prosecutor is in no better position than a defendant who seeks to appeal by special leave. In his judgment in the *Tan* case Lord Mustill referred to "the long established reluctance of the Board to interfere where the appeal is brought by special leave, except in cases of a serious miscarriage of justice, a reluctance which is even greater where the appeal is concerned with matters of procedure". This is an approach which echoes the judgment of the Board delivered by Lord Keith of Kinkel in *Sattar Buxoo v. The Queen* [1988] 1 W.L.R. 820 and a long line of earlier authority. In this case there has to be added to this onus which an appellant faces the fact that Duffy J. was in a peculiarly advantageous position in considering the merits of the respondent's application to stay since he was intimately acquainted with the issues which would be involved in the trial, having had the conduct of the preparatory proceedings and the trial of the respondent's co-accused.

Certain of the arguments in the Attorney General's case and skeleton argument suggested that on the hearing of this appeal their Lordships should act as a court of appeal in relation to findings of fact made by Duffy J. after the 18 day hearing. To do so would be totally inconsistent with the approach of their Lordships on an appeal by special leave and these arguments were very properly not persisted in by Mr. Nicholls Q.C. on behalf of the Attorney General.

Included in the findings made by Duffy J. was a finding that, in preparing the prosecution, there had been a failure by the prosecution to take account of the defendant's position so that the Crown were responsible for the need to order a separate and subsequent trial of the respondent. In addition he made a finding that the defendant had recently suffered a serious blood loss from a bleeding duodenal ulcer and that a possible, if not the probable, cause of this condition was the stress to which the defendant had been subjected due to the long delay in his criminal proceedings. Duffy J. therefore had "no doubt whatsoever that the very long period of waiting for his trial has seriously prejudiced the defendant's general health". He was further of the view that there had been "excessive delay in this case, none of which has been caused by the Defendant. He has been seriously prejudiced as a result of that delay and the fairness of these proceedings have been jeopardised".

Having regard to these findings and the proper approach to them on this appeal, the only possibility which the Attorney General has of succeeding on this appeal is if he can point to some serious misdirection by Duffy J. which undermined his conclusions. However Duffy J., having surveyed the leading authorities from various Commonwealth, European and United States courts, as Mr. Nicholls accepts, correctly set out the test which he had to apply when he said:-

> "Ultimately what has to be determined is whether proceedings can be fair, and it is for the defendant, if he is to succeed, to establish on the balance of probabilities that they cannot be fair."

That test does not materially differ from that laid down by Lord Lane C.J. in *Attorney General's Reference No. 1 of 1990* (No. 1 of 1990) [1992] 3 W.L.R. 9 at page 11, which was approved by their Lordships' Board in the *Tan* case (at page 263). Lord Lane stated at page 19 that "no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer prejudice to the extent that no fair trial can be held".

The approval of the Board in the *Tan* case of that statement of Lord Lane was made subject to one exception, which the Board identified, namely as to whether it was appropriate in certain circumstances to presume that the delay has caused prejudice. As to this Lord Mustill, in his judgment, said (at page 264):-

> "Naturally, the longer the delay the more likely it will be that the prosecution is at fault, and that the delay has caused prejudice to the defendant; and the less that the prosecution has to offer by explanation, the more easily can fault be inferred. But the establishment of these facts is only one step on the way to a consideration of whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any longer to hold the defendant to account. This is a question to be considered in the round, and nothing is gained by the introduction of shifting burdens of proof, which serves only to break down into formal steps what is in reality a single appreciation of what is or is not unfair."

The opinion of the Board in the *Tan* case was given on 29th June 1992 and was understandably not cited to Duffy J. He was therefore unaware of the comment of Lord Mustill to which reference has just been made and so it is not surprising that he should in his reasons, in accord with earlier authorities, have used language with regard to the burden of proof shifting which are inconsistent with the correct approach indicated by Lord Mustill. Just after the passage of his judgment which has already been cited in which he set out the test correctly, Duffy J. went on to say that delay could be so excessive that a presumption of prejudice arises and it is for the Crown to rebut that presumption. He also indicated that in his view the amount of delay which has occurred in this case was such as to put the case into "the category of the presumptively prejudicial". Duffy J. then went on in his judgment to examine "whether the Crown has rebutted the inference of prejudice that inevitably arises". While Mr. Nicholls was justified in his criticism of this approach, he recognised that there were limits to the extent to which he was entitled to pray this in aid since in a subsequent passage of his judgment Duffy J., without relying on any presumption, made a finding that the defendant had actually suffered substantial prejudice. His earlier error does not therefore affect the outcome.

The only criticism which Mr. Nicholls makes, which, if it was well-founded, would be of substance, is with regard to Duffy J.'s conclusion that the respondent had not contributed to the delay which had occurred. Mr. Nicholls submitted that this was a conclusion to which the judge was not entitled to come. Indeed he argued that the only proper approach for the judge to adopt was that the defendant had or at least could have contributed substantially to the delay and that this case should have been regarded as falling within an earlier passage of the opinion of Lord Lane C.J. to which reference has already been made. That passage (page 19A) is in these terms:-

> "Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay."

In support of his submission, he relied on the nature of the prosecution's case as to the false accounting charges (counts 2 and 3). This was that the respondent with others had committed these offences in order to cover up and conceal the conspiracy offence and accordingly by so doing the respondent had contributed to the delay. Mr. Nicholls submits that the approach of the judge involved ignoring this responsibility of the respondent. However the difficulty in the way of Mr. Nicholls' argument is that unless and until the respondent's guilt or innocence was established at the trial, it would not be known whether the respondent had been responsible for concealing the fraud offence. His involvement was the very question around which the trial would revolve. Mr. Nicholls had to acknowledge this was the situation and his solution was that, in cases of this nature, an application to stay the proceedings would have to be deferred until the issue could be resolved at the trial. With respect this obviously cannot be an acceptable solution because it would mean that in relation to this category of crime a defendant would be deprived of the protection of not having to stand trial where the trial would amount to an abuse of process. In his remark as to the consequences of delay contributed to by the actions of a defendant, Lord Lane was presumably referring to collateral acts or conduct which would not be the subject of the charge and disputed at the trial by the defendant, for example jumping bail. In relation to conduct which will be an issue at the trial the correct approach is for the judge to bear in mind the nature of the prosecution's case as part of the factual background against which the alleged delay has to be considered and not as necessarily being a bar to the application succeeding. In this case there can be no doubt that Duffy J. was well aware of this and there is nothing in his judgment to indicate that he did not give due consideration to the nature of the prosecution's case in reaching his decision to grant a stay.

The remaining criticisms of Mr. Nicholls were directed to the judge's assessment of the facts. These are not matters which, for reasons already explained, could possibly constitute a ground of appeal which would succeed before their Lordships' Board.

The judge in his initial ruling stated that he was "not insensitive to the predicament of the prosecution" and that his "decision was taken purely on the particular merits of this defendant's case". He concluded his reasons by describing the case as being "exceptional" although he saw the balance as coming "down heavily on the defendant's side". By these remarks he was presumably indicating, correctly in their Lordships' view, that this is very much a case on its own facts, the decision on which should not be taken as a precedent in other cases. While there was no prospect of this appeal succeeding, the fact that their Lordships are of the opinion that the appeal ought to be dismissed should not be regarded as an indication that in the ordinary way, in the absence of exceptional circumstances, the time scales of the order of those under

consideration will result in prosecutions of fraud being stayed.

There remains the question as to whether Duffy J. was correct in saying that there is no material distinction between the onus on a defendant who seeks to have a prosecution stayed as being an abuse of process at common law and the onus which faces a defendant who wishes to establish that he is entitled to have the proceedings stayed under the Bill of Rights. Mr. Nicholls having accepted that, if there was any distinction between the approach at common law and under the Bill, this distinction could not avail him on this appeal their Lordships had to decide whether to determine this issue. In the circumstances their Lordships decided not to do so and did not call on Mr. Robertson Q.C. to address the Board as they had already decided that his help was not needed as to the outcome of the appeal. Their Lordships recognise that it is possible to argue that there is a difference of approach at common law and under the Bill. However, as any difference in the approach to be adopted is only likely to be of significance in a very small minority of applications for stay, their Lordships have decided that it is preferable not to determine the extent of the difference in this case, where it would be merely an academic exercise, but to leave it to be determined in a case where the existence of the difference would materially affect the result of the appeal. The issue is one which can be more satisfactorily examined in the context of a case where a difference in approach could have practical consequences.

In these circumstances their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The Attorney General must pay the respondent's costs before their Lordships' Board.