Justice delayed is justice denied: Proposed law reform

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'Justice delayed is justice denied. Delay devalues judgments, creates anxiety in litigants, and results in loss or deterioration of the evidence upon which rights are determined. . . . Delay signals a failure of justice and subjects the court system to public criticism and the loss of confidence in its fairness and utility as a public institution.'

Introduction

Two recent judgments of the High Court in New Zealand, in Russell v Stewart (1988) BCL 1891 and Watson v Clarke (1988) BCL 1890, examined a court's inherent power to control abuse of its process and extended such power to regulate the time within which a prosecution should be instituted and to grant a dismissal of the charge with the same effect as an acquittal on the merits in appropriate circumstances — this despite the fact that the prosecution was properly instituted within the time limitation prescribed by law.

These decisions were fully considered in their historical context in an article entitled 'The inherent power of the District Court: Abuse of process, delay and the right to a speedy trial' by Johnnie Kovacevich in (1989) New Zealand Law Journal 184.

South Africa

The position in South Africa, broadly speaking, is that the State is dominus litis in preferring charges as well as in conducting the trial. Once a court is seized of a case, the court has the statutory power to regulate its procedure, and may grant or refuse requests for remand by the State as well as the defence. The court can, in the exercise of its discretion, refuse further requests by the defence for remand and order the case to proceed. Once an accused has pleaded, the court can also compel the State to proceed with its case, or consider its case closed if the prosecution is not in a position to proceed on the merits.

However, if an accused has not pleaded, and a request for a remand by the State is not granted, the prosecution may simply withdraw the charge and enrol it again at any time thereafter. Moreover, a complaint may be lodged, and the State may, subject to the period of prescription laid down by law, bring the case to trial at any time. The same applies to the lodging of a complaint with the police, no time limit being prescribed by statute other than the said limitation of prescription.

It is true that any interested party, including a person who has reason to believe that a criminal charge is being considered against him, is free to apply to the Supreme Court for a mandamus directing the attorney-general concerned to make a decision as to whether or not a prosecution is to be instituted, the rule being that where there is a legal duty on an official to decide, there is a consequential duty to act. However, an applicant in such proceedings must prove mala fides on the part of the prosecution in its failure to reach a decision, mere delay in coming to a conclusion being insufficient.

England

Subject to statutory provisions to the contrary, prescribing limitations of time in criminal proceedings, criminal prosecutions may be commenced at any time after the commission of the offence. However, in 1982 in R v Grays Justices, e.p. Graham it was held that delay in bringing criminal proceedings could of itself render the proceedings an abuse of the process of the court where the delay after the events alleged to constitute an offence was sufficiently prolonged — but only where malicious or some improper use of the court's procedure can be inferred. The court based its decision on an inherent discretionary right.

Australia

In Australia the right to a speedy trial is considered a common law right. The statement in chapter 40 of the Magna Carta of 1215 which guarantees the right to a trial without delay is considered to be the affirmation of this right, and not its origin.
The USA

The basic right to a speedy trial in the United States of America flows from the Sixth Amendment of its Constitution (which in turn is based upon the Magna Carta). That Amendment inter alia provides as follows:

‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .’13

New Zealand

In New Zealand the right to a speedy trial is considered a statutory right by virtue of the incorporation of the Magna Carta via various enabling statutes operative in that country.14

International Covenant

Article 14 (3) (c) of the International Covenant on Civil and Political Rights (1966)15 provides:

‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

c. To be tried without undue delay.’

Once it is recognised that the right to a speedy trial is fundamental to the process of justice, it remains to define this right, set its limits and quantify its contents.

Abuse of process

The basis of the approach in New Zealand is the inherent power of the court to prevent an abuse of its process.16 As to what constitutes an abuse of process, it is assumed that ‘the categories of abuse are never closed’.17 Delay is then recognised as a category of abuse of process.18 Its contents were then examined in the two decisions supra and the court’s power was extended to control even delay in bringing an accused to trial.

The approach was succinctly summarised as follows by Kovacevich:19

‘Excessive delay may constitute an abuse. Whether it does will depend on the circumstances of the case.

‘The inherent power to prevent abuse of process applies to both the instituting and the continuing of proceedings against a defendant. The whole period of delay from the time of

the commission of the offence is to be considered in assessing the probability of prejudice or unfairness. It may include the period before the filing of an information as well as delay thereafter. It may include delay in service of a summons where not due to evasion by the defendant. It is the cumulative effect which is material and this is not lessened by compliance with a statutory limitation period.

‘Even in the absence of proved fault or contribution to delay by either party, if the delay is so excessive as to raise a presumption of prejudice or unfairness (and whether such presumption will arise may depend on the nature of the case) then there is an abuse and the Court must act to prevent it. This “presumptive prejudice” arises where there is deterioration in the quality of the evidence through: (1) loss of memory; (2) loss of witnesses by death or disappearance; (3) loss of relevant evidence; (4) difficulty in gathering evidence; and (5) a general risk that a fair trial is no longer possible.

‘The factors to be taken into account are: (1) the entire length of the delay from the time the event arose through to the date of the trial; (2) the reasons given by the prosecution to justify the delay; (3) whether the delay is due in part to the accused or is consented to by them; (4) actual and presumptive prejudice to the accused; (5) the effect of the delay on the accused’s personal and private life; (6) the seriousness of the charge; (7) the complexity of the case; and (8) any institutional resources that gave rise to the delay.

‘The test is whether on the balance of probability, the defendant has been, or will be prejudiced in the preparation or conduct of their defence by unjustifiable delay on the part of the prosecution.

‘When given for an abuse of process, it is a substitute for an acquittal.

‘The right to a speedy trial is not a right to be protected against any delay but against delay which could reasonably be avoided. Lack of availability of resources including congested Court lists is not of itself a justification if avoidable. The Court must first decide whether there has been a breach and then decide what effect the breach has had before considering a remedy.

‘Only where the delay has substantially prejudiced or is likely to prejudice the fair trial of a person or has become oppressive, is it necessary to take the very serious step of staying the action for abuse of process.’

South African position

As stated above, the position in South Africa is that an accused is only entitled to a verdict on the merits after plea.20 The right to demand that the State continues with its case after plea was recognised in the decision of S v Magoda.21 That right is based upon an accused’s right to a speedy trial,22 which in turn is based upon an accused’s right to a verdict on the merits after plea.23

However, as can be seen from the approach in New Zealand, the necessity to control an abuse of the process of court because of delay in bringing matters to trial is real. As a matter of procedural justice, governed by the dictates of public policy, the guilt or otherwise of an accused on the merits does not enter the picture.24

Law reform

There is no doubt that a lacuna exists in our law which ought to be rectified. Once a Bill of Rights, on the basis suggested by the SA Law Commission,25 has been adopted, judicial interpretation will allow a development in South Africa largely on the same lines as those indicated supra in relation to New Zealand and other common law countries.26 Many years may, however, elapse before such a Bill of Rights is placed on our statute book and many more years may elapse thereafter before the matter comes up for decision by the Supreme Court. It is therefore suggested that the legislature should consider a speedier method to bring about the necessary reforms to the existing law, ie by way of appropriate amendments to the Criminal Procedure Act. It is trusted that this matter will receive the necessary attention by the authorities.

Footnotes


2 Sections 2, 3, 4 and 6 of the Criminal Procedure Act, 51 of 1977

3 Section 186 of the Criminal Procedure Act, 51 of 1977

4 R v Zackey 1945 AD 505, 511

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5 S v Geritis 1966(1) SA 753(W), S v Magoda 1984(4) SA 462(C) 466C
6 Section 6(a) of the Criminal Procedure Act, 51 of 1977
8 Wronsky en 'n Ander v Prokureur-generaal 1971(3) SA 292(SWA) 294C-295A. This procedure would normally be invoked by the complainants, who might wish to institute a private prosecution in terms of s 7 of the Criminal Procedure Act, 1977 and who would need a certificate nolle prosequi. Accused persons would presumably be loath to wake sleeping dogs. Indeed, no authority could be found wherein such a course was adopted by such persons.

See also Halsbury's Laws of England 4th Ed Vol 1 Administrative Law para 89-127 at 100 n 14 and Ex parte Blackburn (1956) 3 All ER 334 AC at 337 C-D.
11 Kovacevich, op cit 190
12 Kovacevich, op cit 189, 190
14 American Jurisprudence 2nd Ed Vol 21A (as annotated up to July 1988) para 849-875, at 856 and 874.
15 Watson v Clarke supra 14
16 Kovacevich, op cit 190

18 Kovacevich op cit 187
19 Kovacevich op cit 186
20 Russell v Stewart supra 15
21 Kovacevich op cit 187
22 At 191
23 Section 106(4) of the Criminal Procedure Act, 51 of 1977
24 1984(4) SA 462(C)
25 At 465 C
26 At 466 D-E; also s 106(4) of the Criminal Procedure Act, 51 of 1977
27 S v Mushimba 1977(2) SA 829(A) 844H
28 Werkstuk 25, Projek 58: Groeps- en Menseregte, p 481, para 24(e)
29 Comparative research into the construction of such clauses in legal systems with Bills of Rights, eg the USA, will no doubt assist a speedy development of principles.