DELAYS IN THE CRIMINAL JUSTICE SYSTEM OF VANUATU

DON PATERSON*

INTRODUCTION

Delays in the hearing of cases, both civil and criminal, in the Supreme Court of Vanuatu are becoming a matter of some concern to both the legal profession and litigants. In his address to the National Conference on Prevention of Crime in 2008,[1] the Attorney-General of Vanuatu, Mr Ishmael Kalsakau, opined that the delays occurring in the administration of the criminal justice system of Vanuatu were a matter of concern. Unfortunately the Public Prosecutor was not present at the conference to provide any confirmation or reasons for these delays, and the police representatives who were present offered no enlightenment on the issue, either by way of statistical information as to the times between arrest and charge, and between charge and trial, or by way of explanation or justification.

The purpose of this case note is to draw attention to these delays in court hearings, so far as they affect criminal cases, and to provide some examples of what the Attorney-General was referring to. It will also endeavour to explore some reasons for the delays that are occurring, and what should be done to reduce them.

EXAMPLE CASES

Public Prosecutor v Peter [2006] VUSC 27

In this case the defendant was charged in July 2004 with sexual intercourse with a girl under his protection. In October 2004 he pleaded guilty. The hearing for sentencing was scheduled for 14 October 2004 but it was not until February 2006 that the hearing for sentencing was actually held. He was sentenced in March 2006 - seventeen months after pleading guilty. It seems that during that period hearings had been scheduled some 15 times, but on 12 occasions counsel for the defendant had not shown, usually without explanation, and on 3 occasions the judge had been unable to attend. No comment or criticism of this lengthy delay between the time of the conviction and the time of the sentencing was made by the Court (Bulu J).

Public Prosecutor v Marcel - Sentence [2006] VUSC 88

The facts of this case are scanty as only the sentence is reported, not the judgment or verdict. However, it appears that the three accused were charged and convicted of kidnapping or unlawful imprisonment. The charges arose out of an incident in Tanna whereby a man and his family were expelled from a village on the ground that the man practised black magic and cast magic spells over the villagers. The Supreme Court, which apparently tried the case at Port Vila, held that the ringleader and his

* Emeritus Professor of Law, University of the South Pacific.

[1] Held at the University of the South Pacific, Emalus Campus, Port Vila, Vanuatu, 13 -16 May 2008.

right hand man, who were elder men and the main instigators of the incident, normally should expect sentences of 3 years' and 2 years' imprisonment, respectively, and that the third accused, a younger man who acted on the direction of the other two, could expect a sentence of 1 year's imprisonment. However, these sentences were not imposed. The Court (Tuohy J) said, 'purely because of these delays and the time passed since offending, I intend to suspend each of these sentences for 2 years.'[2]

The delays and time passed to which the Court referred were that the offences were committed in February 2003, whilst the Court was sitting in November 2007 - nearly four years after the event. The Court detailed the delays that resulted in this great lapse of time from the commission of the offence to the sentencing:

> The complaint was laid in the Court by the Public Prosecutor on 28 May 2005 - more than two years after the event. But the file shows that all the Police statements were taken within the first months of 2003 except one, the latest, 16 January 2004 - so I assume the file was sent to the Public Prosecutor's Office shortly after that, but no complaint laid till the end of May 2005. That is not good enough. The people of Tanna are entitled to expect that when serious crimes are committed in the community they will be investigated and the people responsible prosecuted within a reasonable time - and more than 2 years is not a reasonable time….
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> Then there has been a further serious delay, I do not know why, in the Court system in having the preliminary enquiry which did not take place until more than 1 year after the complaint laid for reasons I do not know. The only place there has been no delay is, I am pleased to say, in the Supreme Court. The defendants were called on to plead, convicted and sentenced in the 1st session after committal to the Supreme Court.[3]

The Court commented severely upon these delays:

> It is not good enough for this delay in criminal justice. Police, Public Prosecutor, and Court must all have systems in place so there are time limits in completion of investigations, laying complaints, and disposing of charges and questions should be asked if those are not met.[4]

***Public Prosecutor v Tokoro* [2007] VUSC 16**

In this case a husband and wife in Tanna were charged with involvement in two incidents of unlawful sexual intercourse by the husband with a female aged under 15 years. The victim was the younger sister of the wife, who actively procured her sister and stood by witnessing the incidents. These incidents occurred in February 2003. The trial was held in Tanna in April 2007, just over four years later. It was clear from the submissions of counsel that during this period three custom ceremonies had been held, one for the victim, one for the father of the victim, and one for the island council of chiefs, and that both the defendants and the victim were living peacefully together in their community.

[2] *Public Prosecutor v Marcel - Sentence* [2006] VUSC 88 [19].
[3] Ibid [17] – [18].
[4] Ibid [19].

The Court (Lunabek CJ) held that both defendants should be sentenced to 12 months' imprisonment, but suspended for 12 months:

> The appropriate sentence is one for 12 months imprisonment for both Defendants. I consider the respective circumstances of the offending, the personal history of each of the Defendants. I sentence both Defendants for a term of 12 months imprisonment and I suspend their imprisonment sentence for a period of two years.[5]

From these words, it is not apparent that the Chief Justice took any exception to the long period of time that had elapsed from the time of the commission of the offences and the trial - four years, which was three months longer than the period of time that drew the ire of Tuohy J in the earlier case. Nor is it apparent that this delay of four years was the reason for suspending the terms of imprisonment - rather the reason for the suspension was stated to be the circumstances of the offending and the personal history of the defendants.

***Public Prosecutor v Napu* [2007] VUSC 18**

In this case a man was charged with arson committed in July 2002. The trial was held in Tanna in April 2007, four and three-quarter years later. The defendant pleaded guilty, and the Court (Lunabek CJ) held that the defendant should be sentenced to 100 hours community work. No order for compensation was made because the defendant had rebuilt the building that he had burnt down. As in the preceding case, the Chief Justice made no mention of the long period of time that had elapsed since the commission of the offence, and expressed no criticism of that lapse of time.

COMMENT

1. No reference to constitutional requirement of trial within a reasonable time.

The *Constitution* of Vanuatu expressly provides in article 5(2)(a) that 'everyone charged with an offence shall have a fair hearing within a reasonable time by an independent and impartial court….' It is rather surprising that this constitutional provision was not referred to by the court in any of the cases, and was presumably not referred to by counsel. One would have expected that, as the supreme law of Vanuatu, it would have been at the forefront of discussions. It is true that there is room for argument as to whether this constitutional provision refers only to delays up to the time of hearing, and not to delays in sentencing process, as in the situation that arose in the case first noted, *Public Prosecutor v Peter*, but such argument apparently did not take place in that case, and in the other case there appears to have been no discussion as to what was a "reasonable time" in terms of the constitutional provision.

2. Divergence of judicial views about seriousness of delay and effect upon sentence

[5] *Public Prosecutor v Tokoro* [2007] VUSC 16 http://www.paclii.org.

It is very obvious that there was quite a different attitude adopted by the judges in the cases with regard to delay and as to the effect it should have. In *Public Prosecutor v Marcel - Sentence* the judge clearly considered that the delay of three and three quarter years from commission of the offence until the trial was unacceptable, and said so in no uncertain terms, expressly stating that it was the reason for suspending the sentences. On the other hand, the judges in the other three cases appear to have paid no regard to the delay that occurred, and certainly did not criticise it, nor state it as a reason for lessening the sentences.

3. Should delay in prosecution or in defence be a ground for lessening a sentence?

In *Public Prosecutor v Marcel – Sentence*, the judge clearly and very explicitly stated that the terms of imprisonment which the defendants merited for their wrongdoing would be converted into suspended sentences purely and solely because of the delay in the prosecution of the case. That raises the question of whether the delay of the prosecution process is a relevant factor to be taken into account when sentencing a person who has been convicted of a crime. If a person has been convicted of a crime, should his or her punishment for that crime be affected by the delays in bringing the prosecution? In principle, it would seem that a person should be punished for what that person has done or not done, not for what some other person has done or not done.

Likewise, prosecutors who are slack or are slow or are overburdened should, in principle, be dealt with by their superiors, and should not be punished by seeing the persons whom they have prosecuted in the name of the State walk away free from the courts. Similarly, defence counsel who are slack or are slow or are overburdened should be dealt with by the court or the disciplinary body of the legal profession, and their clients should not be punished for, nor profit from, their delays.

4. What should be done to stop these delays in criminal process of Vanuatu?

One wonders what systems are in place in the police, and the Office of the Public Prosecutor, and in the courts for placing time limits on the various stages of the criminal process, and what systems are in place for monitoring to see whether those time limits have been met, and what questions will be asked and by whom? In the light of the tardiness displayed in the cases discussed above, the answer to those questions would appear to be zero. For civil proceedings, the rules of procedure have been increasingly tightened by the courts to diminish delays in the process, and these have been found to be very effective. There has, however, been no similar revision of the rules of criminal procedure.

The first step is obviously to obtain some general agreement as to how long each of the various stages of the criminal process should take, for instance: how long should the investigations of the police continue before the file is forwarded to the Office of the Public Prosecutor? How long should a file rest in the Office of the Public Prosecutor before a charge is laid in the Court Registry? How long should a charge remain at the Court Registry before a preliminary enquiry is held? How long should a file remain in the Supreme Court, after committal for trial, before the trial actually takes place? How long should a person who has been convicted have to wait before

being sentenced? Once there can be agreement about the optimum times for each stage, it is then necessary to obtain agreement as to who is then to monitor them. In the case of civil proceedings it is the court. Could it not also be the court in the case of criminal proceedings? Would it be helpful to adopt or adapt the French system followed in the neighbouring country of New Caledonia and require magistrates to monitor the progress of criminal files?

There seems to be a need for a closer linkage between the Office of the Public Prosecutor and the police investigators, and between the Office of the Public Prosecutor and the magistrates' courts. One fairly obvious way in which that could be achieved without impairing the independence of any of the parties involved might be to bring them all within the ultimate supervision of the magistrates' courts. Delays caused by defence counsel should normally also be monitored by the disciplinary bodies of the Law Society, and it is to be hoped that the *Legal Profession Act 2005* will prove to be effective in this regard, once it actually comes into force.[6]

There may be other methods for reducing those delays that should be explored. If, as is rumoured, the breath of life is to be given to the Law Reform Commission, which has lain inert since its creation in 1980, such an issue would be an ideal one for it to tackle in its first years of existence.

[6] The Act has not yet been gazetted.