CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 10/97

BRUCE ROBERT SANDERSON Appellant

versus

THE ATTORNEY-GENERAL – EASTERN CAPE Respondent

Heard on: 2 September 1997

Decided on: 2 December 1997

JUDGMENT

KRIEGLER J:

[1] This appeal concerns section 25(3)(a) of the interim Constitution,[1] which provides:

> "Every accused person shall have the right to a fair trial, which shall include the right –
> (a) to a public trial before an ordinary court of law within a reasonable time after having been charged".

More specifically it relates to the meaning of the two phrases "within a reasonable time" and "after having been charged" at the end of that paragraph, and their

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[1] The Constitution of the Republic of South Africa, 1993 Act 200 of 1993.

effect in the light of the facts of the case.

[2] Those facts, briefly stated, are as follows. Towards the end of October 1994 the Child Protection Unit of the SA Police Service in Port Elizabeth received information that the appellant, the deputy head of a primary school in Port Elizabeth and a well known singer in local church and musical entertainment circles, had sexually interfered with two girls who, at the time, had been standard five pupils at his school. Investigations commenced and on 1 December 1994 the appellant, at the invitation of the investigating officer, attended at the latter's office. There he was informed by the detective that he was suspected of having contravened section 14(1)(b) of the Sexual Offences Act 23 of 1957, that is, the commission of an indecent act with a girl under the age of 16 years, at his home during 1991 and 1993. Having been cautioned in accordance with the Judges' Rules the appellant denied the accusation and declined to make a statement.

[3] The appellant was thereupon informally arrested and released on warning to appear in the magistrates' court the next day. That he duly did and was remanded on his own recognisances until early in the new year without being charged or being called upon to plead. After a succession of remands the Deputy Attorney-General of the Eastern Cape decided on 7 August 1995 to prosecute the appellant in the Port Elizabeth Regional Court on two charges under the said Act. Whether or not that decision was conveyed to the appellant and, if so, on what date and in which terms, does not appear from the record. What is clear though is that no specific charges had yet been formulated. The matter was set down for trial for five days during the December 1995 school holidays. This was done to suit the convenience of the appellant and both the complainants who were still at school.

[4] One of the incidents forming the subject matter of the envisaged charges had allegedly taken place in Kimberley and it was necessary to apply to the Minister of Justice for an order under section 111 of the Criminal Procedure Act 51 of 1977 to enable all the charges to be heard in the Port Elizabeth Regional Court. The ministerial directive was delayed and in consequence it was not possible to proceed with the case on the dates that had been arranged. The case was thereupon remanded to 1 July 1996, that is, to the next long school holidays.

[5] Although the appellant's attorneys had been pressing for several months for a charge sheet and various other documents, a charge sheet was served on the appellant for the first time on 10 May 1996. It alleged two contraventions of section 14(1)(b) of Act 23 of 1957 in respect of each of the complainants and specified the places and dates of their alleged commission. The following month the prosecution furnished a reply to a request for further particulars to the charge sheet and supplied the defence with copies of the investigation diary and of certain witnesses' statements.

[6] However, the trial did not commence on the date arranged, namely 1 July 1996. During June 1996 the prosecution added an additional charge (subsequently withdrawn) relating to another complainant and the defence successfully anticipated the trial date and applied for a postponement. In doing so, the appellant reserved his right to rely on a violation of his rights in terms of section 25 of the interim Constitution. The new dates arranged were from 7 to 18 October 1996 during the October school holidays. It transpired that one of the complainants had moved to the Western Cape, and had different school holidays, and another essential state witness was due to have a baby at that time. The prosecution therefore applied during August 1996 for a further remand. The application was granted and the period from 9 to 20 December

1996 was fixed for the hearing.

[7] Once again supervening events prevented the trial from starting. On 12 November 1996, some three months after the latest trial dates had been fixed, the appellant launched an urgent application in the South Eastern Cape Local Division of the Supreme Court (as it was then still called) seeking, in the main, an order permanently "staying" the proceedings pending against him in the Regional Court and "[p]ermanently prohibiting the respondent . . . from reinstituting any prosecution against [him] in respect of the charges set out in the indictment" (sic).

[8] The nub of the case made out by the appellant in his founding affidavit is that "an unreasonable and inexcusable delay in the prosecution of this matter has resulted in a serious infringement of my rights to a speedy trial as contained in" section 25(3)(a) of the interim Constitution. In amplification he alleges that he "was first charged on 1 December 1994 in relation to the charges arising out of the complaints made by the two complainants" and that he "was eventually served with a formal charge sheet on 10 May 1996". He stresses that from the time he became aware of the allegations against him in December 1994 he had constantly exerted pressure on the respondent to conclude the investigation and made clear that he reserved his constitutional right to a speedy trial.

[9] The appellant alleges two broad categories of prejudice suffered by him as a result of what he describes as "the unreasonably long time period which has passed since the allegations were made against myself on 1 December 1994 up until the date set for my trial." The first is what I shall call social prejudice, that is, harm that has befallen him other than in relation to the actual court proceedings against him. Under this head he mentions, first, the very substantial

embarrassment and pain he has suffered as a result of the negative publicity engendered by the nature of the charges, coupled with his occupation and his prominent position in society. His active participation in the affairs of his church has been curtailed and he has had to forego opportunities to supplement his income by stage performances. At the same time his wife's business has been harmed by the adverse publicity.

[10] In the second instance he describes his own emotional and personal reactions of anxiety and stress of such severity as to necessitate the use of medically prescribed tranquillisers and sleeping tablets. He further makes the point that the drawn out proceedings have put great strain on his limited financial resources. None of these allegations has been challenged and there is no reason not to accept them at face value.

[11] With regard to forensic prejudice, however, the appellant's case is not that clear cut. This is what he alleges:

> "I will suffer prejudice if the defence witnesses are unable to recall accurately events of the past. An inordinately long delay negates the concept of a fair trial, since memory is a flimsy and wayward faculty. The credibility of the State witnesses is of cardinal importance in this matter and therefore, the longer the delay the greater the prejudice to myself. The most material and crucial evidence would by the very nature of the complaints, be the version of the Complainants as opposed to my version in denial. The quality of justice deteriorates the longer it is delayed.
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> Furthermore, the long delay also impairs my ability to defend myself as my memory may be affected, bearing in mind that it is difficult to find corroborating evidence of where I was and what I did all those years ago."

Not only are those allegations rather general and argumentative but, once they had been specifically denied by the principal deponent on behalf of the respondent, the appellant changed tack in his replying affidavit, stating that the essence of his prejudice was the possibility that the complainants, with the passage of time, "may be more susceptible to suggestions by the variety of persons who have interviewed them".

[12] The respondent filed extensive affidavits deposed to by the various persons who were involved in the prosecution, from the investigating officer to the Deputy Attorney-General. Between them they give a detailed account of the numerous steps that were taken from October 1994, when the complaints were first brought to the attention of the police, through to October 1996, shortly before the application was launched. Without at this stage evaluating the cogency of the explanations given for the time that elapsed, it should be mentioned that the respondent's affidavits seek to explain each step taken and the time it took to complete.

[13] In the event the application failed in the High Court and the appellant, having obtained the requisite certificate in terms of rule 18(e) of this Court's rules from the judge of first instance, Ludorf J, was granted leave to appeal to this Court. The basis upon which the learned judge dealt with one aspect of the case occasioned the respondent to lodge an application to cross-appeal. The application was not pressed, the respondent having decided that his complaint could be ventilated and remedied in the course of the appeal. The point was that the learned judge had erred in accepting that it was common cause, and as a result had erred in finding,[2]

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[2] *Sanderson v Attorney-General – Eastern Cape* [1997] 1 All SA 242 (SE) at 244e.

> "that the two-year delay in bringing [the appellant] to trial is inordinately long so as to constitute the lapse of an unreasonable time within the meaning of section 25(3)(a) of the Constitution . . . ."

The respondent had indeed not conceded that the time taken in bringing the case against the appellant to trial had been "inordinate" or "unreasonable" and disputed that there had been any breach of the appellant's rights under section 25(3)(a). In any event, so the respondent contended in the High Court, even if there had been a delay amounting to such a breach, a stay of the prosecution was not appropriate relief.

[14] Although holding in the appellant's favour on the issues of unreasonable delay and significant social prejudice, the learned judge concluded that no real trial prejudice had been established. Finding the presence or absence of significant trial prejudice to be decisive, and balancing the right of the appellant to a speedy trial against the interests of society in bringing suspected criminals to book, he dismissed the application with costs. Hence the appeal.

[15] In this Court the appellant persisted in the substantive relief sought, namely a permanent stay of any prosecution against him based on the complaints foundational to the charge sheet, and he adhered to the basic supporting argument advanced on his behalf in the High Court. The contention that there had been an infringement of the right guaranteed to him by section 25(3)(a) of the interim Constitution (to which I will henceforth refer as "the section") was founded on two interrelated propositions. The first was that the events that took place in the investigating

officer's office on 1 December 1994 and/or the events in court the next day meant that he had been "charged" within the meaning of the section. The appellant's second foundational proposition was that the time that had elapsed between his being so charged and the commencement of the trial against him was unreasonable.

[16] Before turning to examine the soundness of the appellant's case, a brief digression is necessary to deal with a preliminary question which, although not raised by the parties, requires resolution at the outset; namely, whether the appeal is governed by the interim Constitution or by the final Constitution,[3] which replaced it with effect from 4 February 1997. The case straddles that transition, the application having been disposed of by a judgment delivered on 6 December 1996 under the former constitution and the appeal proceedings continuing under the new. The starting point in answering the question is Schedule 6 to the final Constitution,[4] which contains its transitional arrangements. Item 17 thereof provides as follows:

> "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

On the face of it, therefore, the whole case, including this appeal, falls to be determined under the interim Constitution. I say "on the face of it" because the concluding rider to item 17 obliges one to ascertain whether the interests of justice do not possibly require that the case be dealt with otherwise.

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3 The Constitution of the Republic of South Africa, 1996.

4 Schedule 6 is introduced by section 241 of the final Constitution.

[17] The phrase "interests of justice" denotes an equitable evaluation of all the circumstances of a particular case. In that evaluation an important test is whether the individual's position is substantially better or worse under the final Constitution than under the interim Constitution. The respective sections, though not identical, are substantially the same, however. In any event, the difference in wording is minor and of no consequence in this case. Section 35(3)(d) of the final Constitution, the current equivalent of the section, reads as follows:

> "Every accused person has a right to a fair trial, which includes the right –
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> . . . .
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> (d) to have their trial begin and conclude without unreasonable delay".

It follows that there is no discernible reason to depart from the general rule of item 17 of Schedule 6 to the final Constitution. The appeal is to be decided according to the provisions of the interim Constitution.

[18] I return to the two phrases in section 25(3)(a) of that Constitution that were singled out at the outset of this judgment, namely, "within a reasonable time" and "after having been charged". It will be more convenient to deal with the second phrase first as it requires relatively little discussion. The word "charge" is ordinarily used in South African criminal procedure as a generic noun to signify the formulated allegation against an accused. That is how it is defined in section 1 of the Criminal Procedure Act 1977 and how it is used throughout that statute. Used as a verb it bears no defined or precise meaning in the Act nor in criminal procedure terminology. It therefore comes as no surprise that the precise meaning of the word "charged" as used in section

25(3)(a) of the interim Constitution has elicited judicial debate.[5] Corresponding provisions in other human rights instruments have likewise required analysis.[6] Those cases illustrate that "charged" can be interpreted very narrowly, so as to refer to formal arraignment or something tantamount thereto, or broadly and imprecisely to signify no more than some or other intimation to the accused of the crime(s) alleged to have been committed.

[19] It is neither necessary nor desirable to decide where the word "charged" in section 25(3)(a) falls along the continuum of possible meanings of the word. That is so for a number of reasons. First, because it makes no significant difference in this particular case, as will be shown in due course. Second, because the corresponding provision in the final Constitution does not repeat the word and consequently any interpretation will be of transitory importance only. Thirdly and dispositively, it is not useful to attempt a universally valid interpretation of a word so vague and which therefore derives much of its content and meaning from the particular context in which it may be used. When assessing the anxiety, stress and social embarrassment suffered by a public figure accused of a morally reprehensible crime, it is of little consequence whether nicely worded imputations have been formulated, reduced to writing or put to the person. In the context of section 25(3)(a) and the preservation of the individual's protection against unfair criminal proceedings it can safely be accepted that "having been charged" includes appearing in the dock

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5 See *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329 (E) at 335-41, and *Moeketsi v Attorney-General, Bophuthatswana and Another* 1996 (7) BCLR 947 (B) at 963-4.

6 See *R v Kalanj* [1989] 1 SCR 1594 at 1607; *In re Mlambo* 1992 (4) SA 144 (ZS) at 149-51; 1992 (2) SACR 245 (ZS) at 249-51; *Eckle v Federal Republic of Germany* (1983) 5 EHRR 1 at 27; and *Foti and Others v Italy* (1983) 5 EHRR 313 at 325-6.

for the formal remand of a criminal case.

[20] The next step is to examine the phrase "within a reasonable time". In seeking to understand the scope and effect of the phrase in the context of the section, a useful starting point is to establish why the right to a trial within a reasonable time was included as one of the specifically enumerated elements of a fair trial. More specifically, in the context of the present case, what kinds of interests is the right intended to protect? Apart from denoting that the right is a component of a fair trial, the section gives one few clues. These issues have been constitutionally scrutinized in Canada and the United States, both of which have constitutional provisions (section 11(b) of the Canadian Charter and the Sixth Amendment to the US Constitution) affording the right to a speedy trial. There has also been some consideration in Australia and England of the status of the right to a speedy trial at common law.[7] In the main, the rights primarily protected by such speedy trial

[7] For a useful analysis of the position in Australia and England, see Rosemary Pattenden "Redressing Delay in the Criminal Process" (1990) 106 *LQR* 379. Note that the right to a trial within a reasonable time is not entirely new to South Africa. For a common law expression of the right, see *S v Geritis* 1966 (1) SA 753 (W) at 754F. The remedies for enforcing the right included a refusal of postponements. See, for example, *Kabe and Others v Attorney-General and Another* 1958 (1) SA 300 (W) at 302D-H and 304C; and *S v Magoda* 1984 (4) SA 462 (C) at 465C-466B. See, in general, Michael Donen "In Search of Rights to a Fair Trial" (1985) 102 *SA Law Journal* 310.

provisions are perceived to be liberty, security and trial-related interests.[8] In *R v Morin*, these various interests are defined as follows:

[8] I am using the idiom of the Canadian Supreme Court. In the United States, the Supreme Court speaks simply of preventing oppressive pre-trial incarceration, minimizing the anxiety and concern of the accused, and limiting the possibility that the defence will be impaired. See *Barker v Wingo, Warden* 407 US 514, 532 (1972).

> "The right to security of the person is protected in s. 11(*b*) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimise exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh."[9]

Uncertainty in Canada and the United States has revolved around the inclusion of trial-related interests. Although the position in both jurisdictions is that trial-related interests are included, strong dissenting voices have argued that conceptually, trial-related interests have no place – or only a secondary place – in the relevant speedy trial provisions.[10] Fair trial interests, it is argued, are catered for elsewhere – either in other constitutional provisions, or in statutes of limitation.[11]

[21] No purpose would be served by pursuing that debate. The South African provision, in itself and in its context, is materially different from the United States and Canadian provisions. The right to a trial within a reasonable time is expressly cast as an incident of the right to a fair trial. The result is that in South Africa the question ought to be the inverse of the one that has

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9 *R v Morin* (1992) 8 CRR (2d) 193 at 202.

10 In the United States see *Doggett v United States* 505 US 647, 660-6 (1992) per Thomas J (dissenting) and in Canada see *Mills v The Queen* (1986) 21 CRR 76 at 144 per Lamer J (dissenting), and *Rahey v R* (1987) 33 CRR 275 at 287 per Lamer J. See also *United States v MacDonald* 456 US 1, 8 (1982); and *United States v Marion* 404 US 307, 320 (1971).

11 See Thomas J's dissent in *Doggett v United States* id at 665.

engaged judges in North America; we have to enquire whether non-trial related interests are catered for in the section. Textually, the argument for their exclusion is persuasive. Not only is section 25(3)(a) expressly "include[d]" as one of several incidents of a fair trial, but what "fair trial" means in this context is suggested by paragraphs (b) to (j) of section 25(3), all of which relate directly to the conduct of the trial itself. Furthermore, the trial emphasis in section 25(3) marks a clear contrast from sections 25(1) and (2); the former covering the custodial situation, the latter covering the arrest situation.

[22] Despite the persuasiveness of this textual argument, it appears to me that all three kinds of interests should be regarded as being protected under the rubric of section 25(3)(a).[12] There are two reasons for this. First, this Court has taken a broad and open-ended approach to the scope of section 25(3). Writing for the Court in *S v Zuma and Others*,[13] Kentridge AJ affirmed that:

> "The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (*a*) to (*j*) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force."

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12 Many South African courts have held, perhaps without careful consideration, that this is the case. See, for example, *Du Preez v Attorney-General of the Eastern Cape* above n 5 at 333-4; *Moeketsi v Attorney-General, Bophuthatswana and Another* above n 5 at 968; and *Coetzee and others v Attorney-General: KwaZulu/Natal and others* [1997] 3 All SA 241 (D) at 256.

13 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) at para 16.

Marking a significant break from the common law past, Kentridge AJ suggests that criminal trials should be conducted in accordance with open-ended notions of basic fairness and justice.[14] I will suggest in a moment why the fair trial protection of the accused extends to non-trial related prejudice, but my point here is simply that a narrow textual approach to section 25(3) is likely to miss important features of the provision.[15]

[23] The central reason for my view, however, goes to the nature of the criminal justice system itself. In principle, the system aims to punish only those persons whose guilt has been established in a fair trial. Prior to a finding on liability, and as part of the fair procedure itself, the accused is presumed innocent. He or she is also tried publicly so that the trial can be seen to satisfy the substantive requirements of a fair trial. The profound difficulty with which we are confronted in this case is that an accused person – despite being presumptively innocent – is subject to various forms of prejudice and penalty merely by virtue of being an accused. These forms of prejudice are unavoidable and unintended by-products of the system. In *Mills*, Lamer J explained that

> "[a]s a practical matter . . . the impact of a public process on the accused may well be to jeopardize or impair the benefits of the presumption of innocence. While the presumption will continue to operate in the context of the process itself, it has little force in the broader

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14 Id at para 16.

15 It might also be argued that protecting all the accused's interests (as an accused) under section 25(3) accords with the tenor of the majority judgment in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC). See Chaskalson P at paras 184-5.

social context. Indeed many pay no more than lip service to the presumption of innocence. Doubt will have been sown as to the accused's integrity and conduct in the eyes of family, friends and colleagues. The repercussions and disruption will vary in intensity from case to case, but they inevitably arise and are part of the harsh reality of the criminal justice process."[16]

16 *Mills v The Queen* above n 10 at 143. For other statements suggesting a connection between the presumption of innocence and the right to a trial within a reasonable time, see *R v Askov* (1990) 74 DLR (4th) 355 at 380; *Dickey v Florida* 398 US 30, 41 (1970); *Jago v District Court of New South Wales and Others* (1989) 87 ALR 577 (HCA) at 599-600; and *Wemhoff v Federal Republic of Germany* (1968) 1 EHRR 55 at 89. For an early expression of the same insight in South Africa, see *S v Geritis* above n 7 at 754F-G.

In addition to the social prejudice referred to by Lamer J, the accused is also subject to invasions of liberty that range from incarceration or onerous bail conditions to repeated attendance at a remote court for formal remands. This kind of prejudice resembles even more closely the kind of "punishment" that ought only (and ideally) to be imposed on convicted persons. These forms of non-trial related prejudice have a particular resonance in South Africa. Our recent history demonstrates how the machinery of the criminal justice system can be used to impose extra-curial punishments. Vague statutory crimes which gave the state sweeping scope to investigate, charge and prosecute opponents of the governing party;[17] provisions allowing the attorney-general to prevent bail being considered;[18] invasive bail conditions – all of these have been deliberately used to invade and criminalise people's lives.

[24] The right to a trial within a reasonable time also seeks to render the criminal justice system more coherent and fair by mitigating the tension between the presumption of innocence and the publicity of trial. It acknowledges that the accused although presumed innocent is nevertheless

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17 See Dugard *Human Rights and the South African Legal Order* (Princeton University Press, Princeton 1978); Mathews *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* (Sweet & Maxwell, London 1988); and Manoim "Objects Sublime" (1985) 1 *SA Journal on Human Rights* 55.

18 See *Buthelezi and Others v Attorney-General, Natal* 1986 (4) SA 377 (D), and *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) considering section 30(1) of the Internal Security Act 74 of 1982 which empowered the attorney-general to issue an order prohibiting the release of a person who had been charged with an offence listed in the Act.

"punished" – and in some cases, such as pre-trial incarceration, the "punishment" is severe. The response of the Constitution is a pragmatic one – the trial must be "within a reasonable time". It makes sense, then, that a substantively fair trial, along the lines contemplated by Kentridge AJ in *S v Zuma*, would include a provision that minimised the non-trial related prejudice suffered by an accused. The right in section 25(3)(a) – insofar as it protects non-trial related interests – is perfectly situated in the provision and is fundamental to the fairness of the trial.

[25] Having determined that the section protects three kinds of interest, we are better situated to determine when the provision has been violated. The critical question is how we determine whether a particular lapse of time is reasonable. The seminal answer in *Barker v Wingo* is that there is a "balancing test" in which the conduct of both the prosecution and the accused are weighed and the following considerations examined: the length of the delay; the reason the government assigns to justify the delay; the accused's assertion of his right to a speedy trial; and prejudice to the accused.[19] Other jurisdictions have likewise adopted the flexible "balancing" test of *Barker*.[20] South African courts, too, have used the *Barker v Wingo* balancing test in

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19 *Barker v Wingo* above n 8 at 530-2.

20 The Canadian Supreme Court balances the interests which section 11(b) of the Canadian Charter is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. See *R v Morin* above n 9 at 202. The relevant factors are similar to those mentioned in *Barker v Wingo*.

interpreting and applying s 25(3)(a),[21] as well as considerations set out by the Canadian Supreme Court.[22]

[26] In this context I wish to repeat a warning I have expressed in the past. Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies. Both the interim and the final Constitutions, moreover, indicate that comparative research is either mandatory or advisable. The interim Constitution states in section 35(1) that

> "In interpreting the provisions of this Chapter a court of law . . . shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

The final Constitution's equivalent is section 39 which specifies that

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See *R v Smith* (1989) 45 CRR 314 at 323; and see *R v Morin* above n 9 at 203. For a general discussion of the evolution of the Canadian approach see the judgment of Cory J in *R v Askov* above n 16 at 372-80.

21 See, for example, *Moeketsi v Attorney-General, Bophuthatswana and Another* above n 5 at 965-9; *Du Preez v Attorney-General of the Eastern Cape* above n 5 at 334, and *Coetzee and others v Attorney-General: KwaZulu/Natal and others* above n 12 at 256.

22 See *Moeketsi v Attorney-General, Bophuthatswana and Another* id at 965-9; and *In re Mlambo* above n 6 at 153 (SA).

"(1) When interpreting the Bill of Rights, a court, tribunal or forum–

(a) . . .

(b) must consider international law; and

(c) may consider foreign law."

Nevertheless the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management. Thus, for example, one should not resort to the *Barker* test or the *Morin* approach without recognising that our society and our criminal justice system differ from those in North America. Nor should one, for instance, adopt the "assertion of right" requirement of *Barker* without making due allowance for the fact that the vast majority of South African accused are unrepresented and have no conception of a right to a speedy trial. To deny them relief under section 25(3)(a) because they did not assert their rights would be to strike a pen through the right as far as the most vulnerable members of our society are concerned. It would be equally unrealistic not to recognise that the administration of our whole criminal justice system, including the law enforcement and correctional agencies, are under severe stress at the moment.

[27] Be that as it may, adjudication of claims under section 25(3)(a) requires an assessment of whether there has been a trial within a reasonable time. Reasonableness is not a novel standard in South African law. Here, as in the common law context, one makes an objective and rational assessment of relevant considerations. What these relevant considerations are is treated by the foreign case law – in particular the *Barker* decision. I want to consider some of these factors in turn. I do so cautiously, not only for the reasons already stated, but

because the test in *Barker*, and the related test in Canada, are designed for remedial contexts significantly different from our own. Our flexibility in providing remedies may affect our understanding of the right.[23] Later I will make some general observations about how these different factors should be assimilated in determining whether or not a lapse of time is reasonable.

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[23] In the US and Canada, stay of prosecution is taken to be the only possible remedy. Section 7(4)(a), by contrast, affords a broad range of remedial options when rights are threatened or infringed. See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC). There is reason to think that this remedial difference impacts on the interpretation of the right. La Forest J in *Rahey v R* above n 10 at 310 emphasises the interpretive significance of the remedial context:

> "In *Barker* itself the court stressed that dismissal of the charge was the 'only possible remedy' for a trial unreasonably delayed . . . . In doing so it necessarily allowed its perception of the appropriate remedy to shape its views of the nature of the right, and more or less ensured that the lower courts would take a hostile approach to it. Few judges relish the prospect of unleashing dangerous criminals on the public."

See also Amsterdam "Speedy Criminal Trial: Rights and Remedies" (1975) 27 *Stanford Law Review* 525, 539.

[28] The amount of elapsed time is obviously central to the enquiry. The right, after all, is to a public trial "within a reasonable *time* after having been charged". Understanding how this factor should be incorporated into the enquiry is not straightforward. In the United States and Canada, time is considered to be a "triggering mechanism"[24] which initiates the enquiry and it also functions subsequently as an independent factor in the enquiry.[25] In my respectful view, time has a pervasive significance that bears on all the factors and should not be considered at the threshold or, subsequently, in isolation.[26]

[29] Time does not only condition the relevant considerations, such as prejudice, it is also conditioned by them. The factors generally relied upon by the state – waiver of time periods, the time requirements inherent in the case, and systemic reasons for delay – all seek to diminish the impact of elapsed time.[27] These are factors I consider in greater detail below.

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24 See *Barker v Wingo* above n 8 at 530. The Canadian Supreme Court also appears to consider the length of delay as a triggering or threshold factor. See *R v Morin* above n 9 at 204.

25 See *Doggett v United States* above n 10 at 651-2.

26 For an argument against viewing time solely as a triggering mechanism see Uviller "*Barker v. Wingo:* Speedy Trials Gets a Fast Shuffle" (1972) 72 *Columbia Law Review* 1376, 1385.

27 See *Rahey v R* above n 10 at 289 per Lamer J.

[30] The test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained. In some jurisdictions prejudice is presumed – sometimes irrebuttably – after the lapse of loosely specified time periods.[28] I do not believe it would be helpful for our courts to impose such semi-formal time constraints on the prosecuting authority. That would be a law-making function which it would be inappropriate for a court to exercise.[29] The courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us. Of the three forms of prejudice, the trial-related variety is possibly hardest to establish,[30] and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although

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28 Cory J takes the (somewhat guarded) view for the Court in *R v Askov* above n 16 at 388-9 that prejudice should be inferred from long delays, and that with the passage of time the inference becomes irrebuttable. In America, see Brennan J's concurrence in *Dickey v Florida* above n 16 at 55; and *Doggett v United States* above n 10 at 657.

29 See *Mills v The Queen* above n 10 at 156-8.

30 Perhaps slightly overstating the problem, Brennan J writes in *Dickey v Florida* above n 16 at 53 that "it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses." Earlier in the judgment (at 42) the learned justice provides a useful discussion of how the lapse of time may impair the accused's defence.

tentative generalisation that the lapse of time heightens the various kinds of prejudice that section 25(3)(a) seeks to diminish.[31]

[31] The assumption that prejudice intensifies with the lapse of time needs to be constantly tested against the evidence. It is conceivable that with time a person's associates might forget about the upcoming trial or adjust to it, and the accused might consequently suffer less social prejudice with the lapse of time rather than more. In the case of incarceration or bail conditions, however, it would take a rare combination of factors to show that the lapse of time had not intensified the prejudice.

[31] Let me turn now to a consideration of the most important factors bearing on the enquiry. The first is the nature of the prejudice suffered by the accused. Ordinarily, the more serious the prejudice (on a continuum from incarceration through restrictive bail conditions and trial prejudice to mild forms of anxiety), the shorter must be the period within which the accused is tried. Awaiting-trial prisoners, in particular, must be the beneficiaries of the right in section 25(3)(a). In principle, the continuing enforcement of section 25(3)(a) rights should tend to compel the state to prioritise cases in a rational way.[32] Those cases involving pre-trial incarceration, or serious occupational disruption or social stigma, or the likelihood of prejudice to the accused's defence, or – in general – cases that are already delayed or involve serious prejudice, should be expedited by the state. If it fails to do this it runs the risk of infringing section 25(3)(a).

[32] An important issue related to prejudice should be clarified. It is the relevance of the accused's desire that the trial be expedited. In some American cases, such as *Barker*, the extent to which the accused actually wants to go to trial looms very large.[33] I respectfully disagree. Even if accused would rather avoid their contest with the state, they remain capable of suffering prejudice related to incarceration or the stringency of bail conditions or the exposure to a public charge. An accused should not have to demonstrate a genuine desire to go to trial in order to benefit from the right, provided that he can establish any of the three kinds of prejudice protected by the right.[34] Of course, an accused that has constantly consented to postponements could find it

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32 See Uviller above n 26 at 1387.

33 Despite the fact that the delay in *Barker of* five years was considered "extraordinary" by the Court, the fact that he "did not want a speedy trial" tipped the scales against him. See above n 8 at 533-4.

34 For dicta that favour this view, see *Dickey v Florida* above n 16 at 37-8; and *R v Morin* above n 9 at 212. And see Uviller above n 26 at 1391.

difficult to establish that he has suffered actionable social prejudice from resulting delays. But the question is not whether he *wants* to go to trial, but whether he has actually suffered prejudice as a result of the lapse of time.

[33] On a related issue, I would suggest that if an accused has been the primary agent of delay, he should not be able to rely on it in vindicating his rights under section 25(3)(a). The accused should not be allowed to complain about periods of time for which he has sought a postponement or delayed the prosecution in ways that are less formal. There is, however, no need for the accused to assert his right or actively compel the state to accelerate the preparation of its case. Provided that he has genuinely suffered prejudice as a result of the state's delay, he cannot be responsible for the state's tardiness.[35]

[35] As Brennan J puts it in *Dickey v Florida* above n 16 at 50, "The accused has no duty to bring on his trial."

[34] The second factor is the nature of the case. Unlike the Canadian authorities,[36] I do not believe it appropriate to specify "normal delays" for specific kinds of cases. That seems an enterprise better conducted by the legislature. Instead, judges must bring their own experiences to bear in determining whether a delay seems over-lengthy. This is not simply a matter of contrasting intrinsically simple and complex cases. Certainly, a case requiring the testimony of witnesses or experts, or requiring the detailed analysis of documents is likely to take longer than one which does not.[37] But the prosecution should also be aware of these inherent delays and factor them into the decision of when to charge a suspect. If a person has been charged very early in a complex case that has been inadequately prepared, and there is no compelling reason for this, a court should not allow the complexity of the case to justify an over-lengthy delay. Furthermore, even cases which appear simple may involve factors which justify delay. The personal circumstances and nature of the witnesses, for example, should be considered – and they seem particularly important in this case. There should also be some proportionality between the kind of sentences available for a crime, and the prejudice being suffered by the accused. Pre-trial incarceration of five months for a crime the maximum sentence for which is six months, clearly points in the direction of unreasonableness.[38]

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36 See, for example, Lamer J in *Mills v The Queen* above n 10 at 152.

37 See *R v Morin* above n 9 at 206.

38 See the Indian Supreme Court's treatment of pre-trial incarceration in *Hussainara Khatoon v State of Bihar* AIR 1979 SC 1369.

[35] The third and final factor I wish to mention is so-called systemic delay. Under this heading I would place resource limitations that hamper the effectiveness of police investigation or the prosecution of a case, and delay caused by court congestion. Systemic factors are probably more excusable than cases of individual dereliction of duty. Nevertheless, there must come a time when systemic causes can no longer be regarded as exculpatory. The bill of rights is not a set of (aspirational) directive principles of state policy – it is intended that the state should make whatever arrangements are necessary to avoid rights violations. One has to accept that we have not yet reached that stage. Even if one does accept that systemic factors justify delay, as one must at the present, they can only do so for a certain period of time.[39] It would be legitimate, for instance, for an accused to bring evidence showing that the average systemic delay for a particular jurisdiction had been exceeded. In the absence of such evidence, courts may find it difficult to determine how much systemic delay to tolerate. In principle, however, they should not allow claims of systemic delay to render the right nugatory.[40]

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39 See *R v Morin* above n 9 at 208-11.

40 Lamer J's concern that systemic reasons threaten to "become a source of justification for prolonged and unacceptable delay" is apposite. See *Mills v The Queen* above n 10 at 155.

[36] Having isolated some of the relevant considerations, how are they assimilated in determining whether or not a lapse of time is reasonable?[41] The qualifier "reasonableness" requires a value judgment. In making that judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. Particularly when the applicant seeks a permanent stay of prosecution, this interest will loom very large.[42] The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structured legal system; a system which requires the prosecution to prove its case in a public forum. We also have to be prepared to pay a price for our membership of such a society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused. But we have to acknowledge that these burdens are profoundly troubling and incidental. The question in each case is whether the burdens borne by the accused as a result of delay are unreasonable. Delay cannot be allowed to debase the presumption of innocence, and become in itself a form of extra-curial punishment. A person's time has a profound value, and it should not become the play-thing of the state or of society.

[37] Although this case is concerned with the rights of the accused under section 25(3)(a) of the interim Constitution, the point should not be overlooked that it is by no means only the accused who has a legitimate interest in a criminal trial commencing and concluding reasonably expeditiously. Since time immemorial it has been an established principle that the public interest

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41 The *Barker* judgment speaks of "balancing" the various considerations. The metaphor is harmless, provided it does not conceal the fact that we are not measuring neatly parcelled weights which tip the scale one way or the other. We should also remember that time is not really placed on the scale at all – it conditions all the factors, and they in turn diminish or intensify its significance.

42 See McLachlin J in *R v Morin* above n 9 at 219.

is served by bringing litigation to finality.[43] And, of course, quite apart from the general public, there are individuals with a very special interest in seeing the end of a criminal case. Conscientious judicial officers, prosecutors and investigating officers are therefore always mindful of the interests of witnesses, especially complainants, in bringing a case to finality. Ordinarily the interests of all concerned are best served by getting on and getting done with the case as quickly as reasonably possible, but it may happen that the interests of the accused conflict with those of others. Though the interests of others should not be ignored in deciding what is reasonable, the demands of section 25(3)(a) require the accused's right to a fair trial to be given precedence. It is the duty of presiding officers to assume primary responsibility for ensuring that this constitutional right is protected in the day-to-day functioning of their courts.

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43 The Roman Law maxim *interest reipublicae ut sit finis litium* (it is in the interest of the state that there be an end to litigation) and its more modern equivalent, "justice delayed is justice denied", speak for themselves.

[38] It is appropriate at this juncture to make some brief observations about the remedy sought by the appellant. Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused. An accused's entitlement to relief such as this is determined by section 7(4)(a) of the interim Constitution. In interpreting that provision in *Fose v Minister of Safety and Security*[44] we adopted a flexible approach that is certainly inconsistent with the availability of a single remedy in North American jurisdictions.[45] In our interpretation of section 7(4)(a) we understood "appropriateness" to require "suitability" which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter 3.

[39] Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a

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44 Above n 23.

45 Our approach seems to accord with the minority position of La Forest J in *Rahey v R* above n 10 at 309-313. The criticism of the remedial inflexibility of *Barker's* case is legion. See, for example, Amar "Twenty-fifth Annual Review of Criminal Procedure: Foreword: Sixth Amendment First Principles" (1996) 84 *Georgetown Law Journal* 641; Amsterdam above n 23; and Hogg *Constitutional Law of Canada* 4 ed (Carswell, Toronto 1997) at 49-12.

mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay.

[40] It remains to apply the principles I have attempted to enunciate to the facts of this particular case. I have accepted that the appellant's appearance in the magistrates' court on 2 December 1994 constituted his being "charged" and thereby started the section 25(3)(a) clock running. It must also be accepted that in the 23 months from that date to the launch of the application in the High Court the appellant suffered considerable and fairly prolonged social prejudice. Occupationally the case had no major effect; the appellant retained his position as a deputy principal and continued with his duties. But he was forced to cancel some stage engagements and there must have been quite significant interference with his everyday life. Serious social embarrassment was inevitable from the very nature of the charges and the appellant's occupation. He also made the point that the newspaper publicity at the time of his arraignment in May 1996 was extensive and tarnished his reputation considerably. Such factors are certainly not irrelevant in assessing the prejudice suffered by the appellant. But the object of the current exercise is not the general disadvantages suffered by an accused in consequence of serious charges being preferred. Our focus is on *delay* and the prejudice that *it* causes.

[41] One is therefore not so much concerned with the prejudice flowing from the charges and the publicity they initially generated, but with the aggravation of that prejudice ascribable to the delay. Moreover, when one considers the nature and

cause of that prejudice, a permanent stay of prosecution certainly does not present itself as an obvious remedy. Release from custody is appropriate relief for an awaiting-trial prisoner who has been held too long; a refusal of a postponement is appropriate relief for a person who wishes to bring matters to a head to avoid remaining under a cloud; a stay of prosecution is appropriate relief where there is trial prejudice.

[42] Without setting these as fixed rules, and accepting that there may be cases in which a permanent stay is appropriate without there being trial prejudice, the facts of this case do not warrant such an order. The appellant was not in custody; he continued working; the postponements were to agreed dates that suited him and did not require frequent attendances at court; he was legally represented and could have opposed the postponements earlier and with greater vigour had he wished the trial to proceed. And, of course, a stay will not remedy the main prejudice of which he complains – it will not clear his name. Weighing these factors with the institutional problems described in the respondent's affidavits[46]

[46] Although the deponents furnished a long and circumstantial account in the respondent's answer, they evince no particular sense of urgency. But they do explain virtually each factor that contributed to the delay. In some instances the explanation is somewhat laconic but, in the main, there is a frank account of the difficulties encountered and setbacks suffered in investigating and preparing the prosecution of notoriously delicate charges involving children and reaching back several years. It did take a long time – and probably could have been concluded sooner. To that

and with the difficulty in handling complaints of sexual abuse of children, this is not an appropriate case for a stay.

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should be added that there is no real likelihood that the lapse of time will result in any trial prejudice to the appellant. On the contrary, having regard to the nature of the case and the ages of the complainants, the passage of time is more likely to redound to the appellant's benefit.

[43] This judgment cannot conclude without something being said about costs. The dismissal of the appellant's application in the High Court carried with it an adverse order for costs. That was in conformity with long established practice in that court, even in cases such as this, where the relief sought is tied up with a criminal case. On appeal to this Court the respondent supported that approach as far as the costs in both courts is concerned. The appellant, however, advanced the contention that, as the proceedings in the High Court had been an extension of the criminal case, which violated the appellant's fundamental right, no order as to costs should have been made against him even though the resort to the Constitution had failed and cited the judgment of this Court in *Motsepe v Commissioner for Inland Revenue* [47] in support. In my view the citation is apt and the proposition well founded. The observations of Ackermann J, on behalf of the Court, in the passage cited are directly in point:

> ". . . one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or 'chilling' effect on other potential litigants in this category."[48]

Ackermann J immediately proceeded to point out, however, that such an approach should not be allowed to develop into an inflexible rule which might induce litigants

> ". . . into believing that they are free to challenge the constitutionality of statutory

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47 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC).

48 Id at para 30.

> provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access."

In fact, in that case, an adverse costs order was granted against the unsuccessful individual litigant in order to

> ". . . disabus[e] the minds of potential litigants of the notion that they can approach this Court without any risk of having an adverse costs order being made against them, no matter how groundless the merits of such approach."[49]

At the time the costs order in this case was made that judgment had not yet been reported. We had however already alluded to the possibly dangerous "chilling" effect of an adverse costs order in constitutional cases.[50]

[44] The observations in *Motsepe* and *Ferreira* were based on policy considerations that apply with equal force to other courts. Ordinarily the dismissal of a claim such as this in the High Court should not carry an adverse costs order. It is not a suit between private individuals; it relates directly to criminal proceedings, which are instituted by the state and in which costs orders are not competent; and the cause of action is that the state allegedly breached an accused's constitutional right to a fair trial. Although the appellant failed to establish the constitutional claim he advanced, it was a genuine complaint on a point of

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49 Id at para 32.

50 See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC).

substance and should therefore not have been visited with the sanction of a costs order. However slow a court of appeal should be to interfere with a costs order in a court of first instance, this is clearly a case where intervention is necessary. Although the appeal must fail on the merits, the appellant is entitled to a reversal of that part of the order in the High Court condemning him to pay the costs and should not have to bear the costs in this Court.

[45] In the result the appeal is dismissed, save that the order in the High Court directing the appellant to pay the costs of those proceedings is set aside.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the judgment of Kriegler J.

For the Appellant: Dr A Beyleveld of Loon and Connellan Inc.

For the Respondent: M J Lowe instructed by the State Attorney, Port Elizabeth.