PRE-TRIAL INCARCERATION IN SOLOMON ISLANDS AND THE REASONABLENESS OF ITS LENGTH –

A POST CONFLICT INTERVENTION CONTEXT

By Ken Averre[1]

"Injustice anywhere is a threat to justice everywhere." *Martin Luther King*

Regulating Pre-Trial Detention

"Every government has the duty to bring to justice those responsible for crimes. When an individual stands trial on criminal charges, he or she is confronted by the whole machinery of the state. How the person is treated when accused of a crime provides a concrete demonstration of how far that state respects individual human rights."[2]

Article 9(3) of The International Covenant of Civil and Political Rights[3] states:

> "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for the execution of judgment."

In many jurisdictions the issue of pre-trial incarceration is one governed more by statute than by case law. In Solomon Islands there is no Bail Act and save for some provision in the Constitution and the Criminal Procedure Code much of the law has developed from the common law.

Since the arrival of the Regional Assistance Mission to Solomon Islands (RAMSI) in July 2003 there have been a large number of arrests and a significant number of remands in custody. The sheer volume of work coming before the Courts has inevitably led to delays and pre-trial detention for those remanded in custody now stands at more than two and a half years. The majority of those are charged with murder. Some of these remandees are young, one in particular was 15 or 16 when initially arrested, on suspicion of murder, and has been in custody since September 2003 with a trial date now fixed for July 2006. Much of his remand has been spent with adults in a specially high profile designated wing within the prison.

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[1] Public Solicitor, Solomon Islands

[2] Introduction to Amnesty International's Fair Trial Manual AI Index: POL 30/02/98, ISBN: -86210-277-4

[3] Solomon Islands is not a signatory

The Public Solicitor's Office is established under the Constitution and mandated to provide legal advice and representation to all those who seek assistance with Criminal charges and to those who qualify for civil matters (means and merits test).

The office acts for something in the region of 95% of those appearing before the Courts who are represented. It represents those from all sides of the tension (notably leading members of the Malaita Eagle Force, the Guadalcanal Liberation Front and the Istambu Freedom Movement).

The office also represents former cabinet Ministers, Members of Parliament and other high profile figures on corruption and other charges.

Recent disturbances following the election of the Prime Minister in April of this year has seen pre-trial detention on the top of the political agenda with two remandees being appointed as Ministers, one being appointed as Minister of Police and National Security. The Public Solicitor's Office represented these two accused in High Court bail applications.

Background to the Conflict on Guadalcanal

A synopsis of the difficulties faced by Solomon Islands in the period prior to the Regional Assistance Mission to Solomon Islands (R.A.M.S.I.) is contained within the report "Our Failing Neighbour: Australia and the Future of Solomon Islands[4]". At page 21 of the report it is noted:

> *"In the early 1990s the Bougainville crisis intruded into this stagnant but volatile mix. Guadalcanal became a haven and base for Bougainvilleans fighting for independence. They brought with them the experience of a violent civil conflict and direct action, as well as small arms. The displaced Bougainvilleans' accounts of rebellion had a significant impact upon Guadalcanal men."*

The report continues:

> *"These problems and pressures meant that Solomon Islands had very little chance of making headway, and that it was vulnerable to disturbances and disruptions which could push the government and state over the edge. The push came in 1998 and 1999, in the form of disputes between ethnic groups over land in and outside Honiara. Over many years, starting when the US established Honiara as a military base, people from the neighbouring island of Malaita moved to Guadalcanal to work. They settled throughout rural Guadalcanal intermarrying and buying traditional lands from Guadalcanalese landowners. Over two generations Malaitans came to dominate both Guadalcanal's agricultural economy and a large proportion of the jobs in Honiara itself, including the public service.*

[4] Australia Strategic Policy Institute Report 2003, Dr Elsina Wainwright.

Resentment among Guadalcanalese (who passed their land matrilineally through their married women) towards Malaitans (who maintained their patriarchal traditions even in the face of their host's culture) grew as conditions became tougher in the decades following independence. In 1998 groups of Guadalcanal men presented the government with a set of demands, including compensation for people allegedly killed at the hands of Malaitan settlers. When the government did not respond positively, groups of the Guadalcanal men – some loosely organised into nascent militia variously called the Guadalcanal revolutionary Army or the Isatabu Freedom Movement (IFM) and armed with homemade guns, bushknives, and bows and arrows – started to use violence and intimidation to force Malaitans occupying lands on Guadalcanal to return to Malaita."

The report discusses the forced repatriation of some 20,000 Malaitans in 1999 and the formation of the response in the form of the Malaitan Eagle Force (MEF). The MEF are said to have quickly gained control of Honiara and the government became paralysed in the face of these problems. On the 5th June 2000 the government of Uluafalu was deposed and Australia and New Zealand evacuated their foreign nationals. The Townsville Peace Agreement was signed on the 15th October 2000 but even by its expiry in October 20002 there were problems.

The primary problem was the absence of law and order. The disarmament planned under the TPA had only been partially realized and mostly on the Guadalcanal side.

The report continues to analyse the problems at this time and states:

"Outside Honiara itself, the worst affected area is the southern coast of Guadalcanal, called the Weather Coast. One of the leaders of the IFM, Harold Keke, is an outlaw on the Weather Coast and has established what appears to be a sinister cult among his small group of followers. Police and others sent to deal with him (including a government minister) have been killed, and only Guadalcanal police are able to serve on this part of the Weather Coast which is generally a no-go area for the Government."

This group formed by Harold Keke became known as the Guadalcanal Liberation Front (GLF). These police operations on the Weather Coast have come in for international criticism through Amnesty International in terms of alleged human rights abuses committed by members. In an article entitled 'Solomon Islands: Women confronting violence[5]" Amnesty International discuss the appointment of William Morrell as Police Commissioner in January 2003 and in that context spoke of his attempt to prevent the police from being further implicated in torture and violence against people on the Weather Coast, where police had joined forces with IFM militants in an operation against Harold Keke. There were allegations of human rights abuses as a result of these joint operations.

[5] Solomon Islands: Women confronting violence, Amnesty International 8th November 2004, AI Index 43/001/2004.

The fall out from those these tensions is the large number of people charged in and around 2003 with murders, abductions and related offences. Many of those arrested still await trial.

The Numbers

Solomon Islands has what will appear to be a very small prison population. There are currently 229 prisoners[6] in the main prison. However, of those 117 are convicted prisoners and 112 are remanded in custody awaiting trial. Many of those convicted prisoners (around 40) have additional matters to be heard at trial.

In the other prisons around the Solomon Islands the figures are: at Tetere (on Guadalcanal) there are 27 convicted prisoners; in Gizo (Western Province) 25 prisoners[7]; in Auki (Malaita Province) 6 prisoners; in Kira Kira (Makira Province) there are 19 prisoners; and in Lata (Temotu Province) there are 8 prisoners.

Many of those remanded in custody are awaiting trial for murder.

According to the International Centre for Prison Studies this is the second highest remand population in the Pacific Region. Some 48.9% of the prison population, in Honiara, are prisoners on remand, compared to 8.6% for Vanuatu and 7.5% for Fiji. In Rwanda the remand population is now only 2.4% of the prison population. Solomon Islands is second only, in the Pacific Region, to East Timor where there exists an extraordinarily high remand population (70.9% in 2003).

Of a total population of 500,000[8] the prison population is reasonably high by world standards, being 63 per 100,000 of population (e.g. East Timor had 41 per 100,000 of national population in 2003[9]) but it also ought be remembered that 85% of the population are in the rural areas, living a subsistence lifestyle which has not changed so much in the past 100 years. These communities are self regulating with few law and order problems. Many of the general populace have no dealings with the mainstream legal system.

Of the 94 accused due to stand trial in the 35 High Court trials listed for 2006, 74 are in pre-trial detention (around 10 of those have already been convicted of offences and are serving sentences). The remaining twenty are on bail. Those trials are mainly murder, armed robbery and rape with some offences of dishonesty/corruption.

One accused, represented by the Public Solicitor's Office, has twenty two murder charges. He stands convicted of seven of those, is currently on trial for another murder and in 2007 faces a trial for nine murders. Another accused has fifteen murder charges.

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[6] As at 22nd May 2006

[7] Figures not available as to how many are on remand in provincial prisons and how many are serving a sentence (estimates have it that it is 50/50 in Gizo and that all prisoners in other prisons are convicted)

[8] Approximate estimation, census 1999 with modifications

[9] According to the International Centre for Prison Studies

The penalty upon conviction is mandatory life imprisonment with the trigger for release being the prerogative of mercy through the Governor General or release on licence by the Minister, the former being the usual method used. There is therefore little scope for guilty pleas on murder though significant work is done in terms of negotiating matters so as to enable a reduction in charges.

General Rule as to Pre-Trial Detention

The RAMSI Law & Justice Project provides personnel for all parts of the legal system from Magistrates to Prosecutors to lawyers in the Public Solicitors Office.

RAMSI itself, as explained to the Conference last year by the Director of Public Prosecutions, is a unique post conflict operation.

In the initial stages of RAMSI there were a large number of remands in custody and from a defence perspective bail was difficult even on less serious offences. For example there were a number of people remanded in custody by the Magistrate on offences such as demanding with menaces, defilement and other offences which would not attract lengthy custodial sentences upon conviction.

The tide has hardly shifted some 3 years since RAMSI arrived and defendants see the issue of bail as still very much weighted in favour of the prosecution.

Whilst there is presumption in favour of bail the clients' view is that this is much more readily displaced by the seriousness of the charges or their standing in the community. In many of the cases the nature of the offence charged is sufficient to displace the presumption in favour of bail.

The Human Rights Committee has stated that "pre-trial detention should be an exception and as short as possible"[10].

Reasonableness of Pre-Trial Detention

The Constitution of Solomon Islands provides for the presumption of innocence and the right to a fair trial within a reasonable time[11].

It may be observed that there is a further fundamental principle which is enshrined in s.5(3) of the Constitution as to the reasonableness of the length of pre-trial detention.

> "Any person who is arrested or detained –
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> (a) for the purpose of bringing him before a court in execution of the order of a court; or

[10] UN Human Rights Committee General Comment 8, para.3.
[11] Section 10, Constitution of Solomon Islands

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Solomon Islands,

and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

What the courts have had to grapple with is what is a reasonable period of pre-trial incarceration.

Amnesty International's Fair Trial Manual sets out a number of factors which the Human Rights Committee and regional bodies consider to be relevant when assessing the reasonableness of a period of pre-trial detention:

(i) the seriousness of the offence alleged to have been committed;
(ii) the nature and severity of the possible penalties;
(iii) the danger that the accused will abscond if released;
(iv) whether the national authorities have displayed "special diligence" in the conduct of proceedings, considering the complexity and special characteristics of the investigation;
(v) whether continued delays are due to the conduct of the accused (such as refusing to cooperate with the authorities) or the prosecution.

There are widely divergent views held as to what is a reasonable period of pre-trial detention. The Hon. Greg James QC, a retired New South Wales Supreme Court judge, said, when visiting to conduct a training workshop) in an interview with the local daily newspaper the Solomon Star[12]:-

"A criminal justice system can only proceed as fast as possible if we get fair trials by the number of judges available and having regard to how witnesses have to be called to give evidence and brought, sometimes from far provinces."

He also said:

"Sometimes remand periods of that kind are unavoidable if you're going to do justice to the people facing trial"

He added:

[12] Solomon Star Newspaper 2nd November 2005

> "By some international standards, the sort of times that people are being detained here are not as long as in other countries that people are being detained. Every detainee has an important right to have a quick trial."

The delays are understandable and unavoidable. For example, the High Court in 2006 has had listed before it a large number of trials involving an even larger number of co-accused (ranging from 13 downwards). This saps the resources of all agencies involved in the criminal justice system.

However, the question is whether the length of pre-trial incarceration is reasonable? The length of pre-trial detention has been subject to some analysis in the Solomon Islands but there is no definitive answer as to at what point delay will become unreasonable.

This is small comfort for the large number of remandees who have been waiting for their cases to come on. The longest remand prisoner has been on remand for just under three years on charges carrying a maximum of life imprisonment (not murder) and whose trial is now listed for later this month. Such an inordinate period on remand would not be acceptable in most countries, including Australia, New Zealand or the United Kingdom.

In the case of a murder suspect in Panama held without bail for three and a half years before his acquittal, the Human Rights Committee stated that "in cases involving serious charges such as homicide or murder, where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible".[13]

In the case of McLawrence[14], which was before the UN Human Rights Committee, 16 months imprisonment was held to be inappropriate in all of the circumstances.

The problem clearly is that there is no particular formula to be applied. In **Klamecki v Poland (No.2)[15]**, the European Court of Human Rights assessed the question of pre-trial detention and stated[16]:

> "..the question of whether or not a period of detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its specific features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty..[17].

[13] del Cid Gomez v Panama (473/1991, 19 July 1995).
[14] McLawrence v Jamaica, UN Document CCPR/C/60/D/702/1996, 29 September 1997, para 5.6
[15] Klamecki v Poland (No.2)[15] (2003) ECHR 142
[16] Paragraph 118
[17] see among other authorities, *Kudla v Poland (GC)*, no. 30210/96, §§110-111 with further references, ECHR 2000-XI

> It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of presumption of innocence, examine all of the facts arguing for or against the existence of the above-mentioned requirement of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release."

The Court continued[18]:

> "The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings (ibid.)"

This concept of the persistence of a reasonable suspicion that the person arrested has committed the offence as a condition *sine qua non*, a necessary condition. Many of the decisions of the European Court of Human Rights and Commonwealth caselaw show that this concept of the persistence of a reasonable suspicion loses its power and influence as time passes.

In **The Queen (on the application of 'O' and The Crown Court at Harrow[19]** the High Court considered the issue of a right to a trial within a reasonable time or to release pending trial.

In **Attorney General's Reference**[20] The House of Lords discusses at length the consequences of a breach of the right to a trial within a reasonable time in the light of the Human Rights Act and the relevant European Convention. The majority determined that this did not automatically give rise to a stay of proceedings. The discussion in the case provides an interesting analysis of the right. Citing a New Zealand authority, reference was made to Hardie Boys J's observation[21] that "The right to a trial without undue delay; it is not a right not to be tried after undue delay".

Lord Bingham[22] stated:

> "A defendant who is not guilty should have the opportunity of clearing his name without excessive delay. A guilty defendant, facing conviction and punishment,

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[18] At paragraph 199
[19] (2003) (EWCH 868)
[20] **[2/2001]** 2003 UKHL68
[21] Martin v Tauranga District Court (1995) 2 NZLR 419, 432
[22] At para 16

should not have to undergo the additional punishment of protracted delay, with all the implications it may have for his health and family life."

Lord Hope of Craighead, dissenting, considered[23] concerns raised with the remedies for breach and stated:

> "One ought not to overlook the benefits of taking a firm line on elimination of delays in the criminal justice system. Of course, the prospect of releasing dangerous criminals on the public is unattractive. But so too is the prospect of long delays in bringing those who are accused of crimes to trial, bearing in mind the presumption of innocence which is guaranteed by article 6(2) of the Convention".

Closer to home this issue of pre-trial delay has been considered in cases in Papua New Guinea and Kiribati. The decisions of neighbouring countries provide an interesting perspective.

In **R v Borarae**[24]

The Constitution of Papua New Guinea, provides that on complaint made that a person is unreasonably detained, the National Court shall inquire into the complaint and unless satisfied that the detention is lawful and does not constitute an unreasonable detention having regard, in particular, to its length, shall order the person's release either conditionally or subject to such conditions as the court thinks fit.

In July 1983 seven accused were charged with wilful murder following the death of an alleged sorcerer at Maragis village in the Madang Province. In February 1984 the court, because of the long delay granted bail to the accused which they were unable to raise.

In April the court indicated its expectation that the accused would be brought to trial but arrangements were not made to that end.

It was held:

(1) The delay in bringing the proceedings on was unreasonable and the right of the accused under the *Constitution* to be afforded a fair hearing within a reasonable time was being denied.

(2) In the circumstances, and despite the charge being one of willful murder, the court should exercise its power under the *Constitution* and order the release of all seven accused from detention pending hearing on condition that they report to the next sitting of the National Court in Madang.

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[23] At para 85
[24] PNG LR 1984 99

The following is an extract from a Papua New Guinea newspaper[25]:

> "MT HAGEN resident judge Justice Timothy Hinchliffe has expressed concern that a man had been kept in the police cells for eight months without conviction. Justice Hinchliffe said such action was unconstitutional and a breach of human rights. He wants police to explain why this has happened. The judge became aware of the detention after receiving a letter from Mr Henry Yama, expressing his concern at being locked up in the cells for the past eight months.
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> The letter was actually addressed to Justice Gibbs Salika. Justice Hincliffe said it was wrong to keep a person in the police cell for that long without a conviction.
>
> "I don't want to be kept in the police cell for eight months," he told police, public prosecutor and other people inside his courtroom yesterday.
>
> He wondered if the police hierarchy was aware of this detention. In his letter seeking help from the court, Mr Yama claimed that he was mistreated while in custody. Mr Yama was detained after being charged with six counts of false pretence, last year. Police prosecutors said outside the court that Mr Yama was arrested and charged with false pretence on March 11 last year and was released on bail. While out on bail, he committed the same offence again and that time, he was charged with four counts of false pretence on Nov 4, last year, and detained at the police cell."

In **Republic v Taabere**[26] The High Court of Kiribati considered the wider issue as to trial within a reasonable time. In March 1980 the applicants were charged with arson. In April 1982, not having been brought to trial, they applied to the High Court seeking to be discharged on the ground of unreasonable delay contrary to the protection guaranteed by the Constitution of Kiribati. The applications were allowed and the applicants discharged unconditionally.

In **Republic v Teoiaki**[27] the wider issue of a trial within a reasonable time was considered. In 1990 both applicants were charged with offences of dishonesty concerning financial irregularities during the course of their employment with the same financial organisation. Both pleaded not guilty to all charges. On 7 November 1990 amended charges were put to the applicants and again both entered not guilty pleas. The case was originally set down for trial on 11 November 1990 but the prosecution were unable to proceed on that date as their witnesses were unavailable. Nothing happened until April 1992 when the lawyer for the first applicant wrote to the Attorney General requesting him to proceed with the trial, but he received no reply. The applicants claimed that their right to a fair hearing within a reasonable time guaranteed by s 10(1) of the Constitution was

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[25] Post Courier 24/3/06
[26] (1982) KIHC1; 1985 LRC (Crim) 8
[27] (1993) KIHC 1

violated by the delay which had taken place to the prejudice of their defence. The application was allowed.

The decisions are in stark contrast to decisions within the jurisdiction in Solomon Islands.

The Solomon Islands Perspective

The issue of the reasonableness of the length of pre-trial detention has been raised in only a few matters. For a large number of detainees the number of murder charges they individually face is so significant that applications have been pointless.

On a bail application[28] for an accused charged in relation to the shooting of Participating Police Force officers (now in fact also charged with conspiracy to murder in connection with the killing of an Australian officer), the court considered the fact he had been in custody for nine months and that there would be at least another 12 months of pre-trial detention. The judge determined:

> "One main thrust of the bail application was the length of time that the applicant may spend in custody pending trial. With this in mind the Constitutional provision of a trial within a reasonable time was cited. This provision must, and should, be complied with. Whether this applicant will receive a trial within a reasonable time has not yet been ascertained. Indeed there are no decisions yet on what constitutes a reasonable time. Certainly he has not yet been in custody for such a long period as to already suggest that the reasonable time has passed.
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> In determining what constitutes the reasonable time, a court will have to take into account the nature of the allegations and the amount of time that is reasonably required to investigate and present the matter properly and fairly, as well as fully, to a court. This will vary from case to case. The court will also have to take into account the resources available to it to schedule cases without undue delay. No doubt when matters are being considered for listing, account will be taken of whether the accused remains in custody pending trial or otherwise. I do not think that at this stage the court should determine that this trial will not take place within a reasonable period and therefore apply the provision instanter."

An accused charged with two murders (arising from the same incident) sought bail and attempted to invoke the provisions of the Constitution. His application[29] was heard on the 1st August 2005. He had been in custody since May 2004. The Chief Justice considered the issue of delay, discussed the reasons for delay and determined:

> "It is important to appreciate that this case is not as simple as it looks on the surface or first impression when trying to allocate a trial date to it. As mentioned earlier, this Applicant has been listed together with some 13 other co-accuseds to stand trial on similar or related serious charges. The total number of witnesses

[28] Kwaimani v R (2005 SBHC 12; HC-CRC 318 of 2004
[29] Roddy Seko v Regina (2005 SBHC 100; HCSI-CRC 350 of 2005 (1st September 2005)

> from the police briefs before this court runs up to 73, with a further 24 consisting of police and expert witnesses. Of those police witnesses, the majority appears to be witnesses from the RAMSI-PPF contingent, most or all of whom now reside overseas. To bring them back into the country requires careful coordination and will be a very costly exercise. Without the assistance from RAMSI-AusAID[30] under the Case Support Unit Project, it would have been extremely difficult to confidently forecast any successful listing of this case and trial so soon. Further, nearly all of the accused it seems may have to be separately represented and so will be tying up nearly all or most of the resources of the Public Solicitor's Office during the period when the trial will be on. The sheer size of coordinating most of the local 73 witnesses, who reside at the Weathercoast of Guadalcanal and looking after them whilst in Honiara during the trial will involve a lot of time, planning, money and expense. Not to mention security arrangements in having such large numbers in one court room.
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> In listing this case for trial, this court has had to take into account all other factors and try as much as possible to restrict listing of other cases during that time. This required careful consultation with all stakeholders in the listing of cases. This also partly explains the reasons for vacating the original hearing date to a later date in 2006.
>
> In the circumstances, I am not satisfied the delay in the listing of this case can be described as unreasonable or amounting to undue delay and a breach of his Constitutional rights under section 5(3)(b) of the Constitution so as to justify releasing him on bail pending trial."

In another bail application[31] the court was faced with an applicant who had been sentenced to a period of 30 months imprisonment which had been served on remand and who sought bail on a further offence listed for trial two months later. The judge stated:

> "The operative words in this section (s.5(3) of the Constitution) are "not tried within a reasonable time". The question is what is a reasonable time? I can find no local cases on this point."

He continues:

> "I think [that] section 5(3) of the Constitution of Solomon Islands removed the discretion of the courts in granting bail where the trial of a person has not taken place within a reasonable time and the accused continues to languish in custody"

And concludes:

> "There can be no general rule as to what must be a reasonable time in all cases."

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[30] Australian Agency for International Development
[31] Mae v Regina HCSI-CRC 289 OF 2005

In his concluding paragraph the judge indicated that the Constitution was the supreme law of the land:

> "The personal liberty of a person is a fundamental right and freedom of all persons in Solomon islands. It is a right protected by the Constitution under sections 17 and 18 of the Constitution. It is one of the rights and freedoms entrenched in the constitution. It is alive and jealously guarded by the Constitution. The Courts will recognize it when it calls. I have considered the scenario that the flood gates will be opened. So be it."

As to the case itself he states:

> "I will release Mae on the grounds that his trial for robbery has not taken place within a reasonable time. The offence was committed in 2001 and subsequently investigated in early 2004. He was interviewed by the Police on 4th February 2004. He was committed to stand his trial in the High Court on 3rd November 2004. The DPP field the information against him on 9th June 2005, some seven months after his committal. That delay of seven months is unacceptable."

On an application[32] for an accused who faced numerous charges but had been in custody for 12 months prior to the application, delay was considered following a finding that there was a continuing risk to witnesses. The accused had been initially remanded in September 2004 and had made numerous bail applications (and had received additional charges throughout the period). The accused had, at that stage, only one trial listed for late 2006.

The judge considered the issue of pre-trial detention and unreasonable delay and stated:

> "Quite simply there is no hard and fast rule that will result in a reasonable time in each case being determined with mathematical precision. The authorities, though, are useful indicators of the factors that it is proper to take into account in each case to determine what reasonable time is."

He continues:

> "Two years pre-trial detention is substantial. Given periods of remission often applied it amounts to a sentence of three years imprisonment. Taking into account the presumption of innocence, it should be difficult, if not impossible to justify."

The judge also considered institutional or systemic delays and looked to South Africa, Canada and Ireland for guidance on this issue and stated:

> "The events that have resulted in the delays in criminal proceedings before this court affected the whole country, not just the legal system. In particular they affected the police force, and a number of cases were simply not investigated

[32] Bartlett v R HCSI-CRC 427 of 2005 (No. 2) 2nd November 2005

> prior to the intervention of the Regional Assistance Mission to Solomon Islands. Hence a delay in bringing charges. Once charges were brought, the sheer number of those charges has over whelmed the criminal justice system."

He concludes[33]:-

> "The actual, as opposed to potential, period of [the accused's] remand in custody does not, in my view, amount to sufficient to determine that his trial has not taken place within a reasonable time. The potential period, going up to the first trial date sometime towards September 2006 causes more concern. Were that to be taken further to the time likely for this particular set of offences to be tried, probably in 2007 the total period would be unconscionable. That is where any decision to take into account more than one set of offences becomes problematic."

And further[34]:

> "It seems to me that this [s.5(3)(b)] means that release on bail comes at a time when the 'reasonable time' has been arrived at (or exceeded) and not when it is still anticipated, however reasonable that anticipation maybe."

There are a large number of remandees who have spent a substantial period on remand.

The Problem with Bail is…….

The grounds upon which the prosecution oppose bail are ordinarily the seriousness of the offences and the risk of interference with prosecution witnesses. As indicated it appears, from a defence perspective, that the presumption of innocence is the first to go whenever there is an allegation of a "serious offence". The strength or weakness of the crown evidence when used as a lever for bail is often described as "irrelevant" and a matter for the trial judge; when used by the crown for the opposition to bail then it becomes an overwhelming factor that the court cannot ignore. "Having your cake and eating it" is a phrase which springs to mind.

There is no empirical research in Solomon Islands, and perhaps in most jurisdictions, to support the contention that those charged with more serious offences are more liley to abscond. Also the risk in automatically focusing on the seriousness of the offence is that it will obscure the complexity of a bail decision. Issues personal to the accused and the manner of his or her offending are of much more importance., A serious offence can be committed in a variety of ways and by accused with vastly different characteristics – there will always be degrees and variations in offending.

There are no half measures in Solomon Islands, that is to say many of the alternatives to pre-trial detention which exist in Australia and the United Kingdom simply do not exist in Solomon Islands. Bail conditions only go to residence restrictions, reporting conditions

[33] Para 25, page 6
[34] Para 26, page 6

and sureties. Risk of flight is often not the issue. There are problems with reporting and conditions generally but that is more from a lack of understanding and how society works than any deliberate and determined circumvention of the conditions imposed. Furthermore, those on High Court bail well have a very long period on bail awaiting the determination on their charges.

The problem with bail is that the accused might as well start serving their sentence there and then and certainly the public perception appears to be that they would not be charged if they had not done anything.

Conclusion

In its introduction Amnesty International's Fair Trial Manual points out that when an individual stands trial on criminal charges, he or she is confronted by the whole machinery of the state. How the person is treated when accused of a crime provides a concrete demonstration of how far that state respects individual human rights; the test is even more severe when the accused is a political prisoner – when the authorities suspect the person as being a threat to those in power.

How much more resonant is that in a system where the police and prosecution are backed by outside states? The whole RAMSI exercise was to re-establish law and order and ensure justice.

In recent weeks the Australian media have picked up on the messages Helen Clark, Prime Minister of New Zealand and Alexander Downer, Australian Minister for Trade and Foreign Affairs, has been sending to the Solomon Islands as regards the appointment of Ministers in custody. The chief of the Australian Federal Police, Mick Keelty, has also had quite a lot to say about the issue.

The lack of a statutory regime for bail leaves accused, and perhaps even the state, at a disadvantage insofar as pre-trial detention is concerned.

Of course, everyone has a view on the criminal justice system in Solomon Islands and most are not afraid to tell it how they see, even those who know very little about the system or who are in the jurisdiction for a very short period of time. Questions are raised as to why the cases are vigorously defended by the lawyers in the office of the Public Solicitor, when the evidence is, in many cases, strong. Then again what is often overlooked is the fact that there are acquittals and that the accused, regardless of their status, deserve the very best effort to be put into their cases.

The office of the Public Solicitor has 24 lawyers, 19 of whom have a mainly criminal caseload and yet struggle to keep up with the demand for its services. Accused, in many cases, have been arrested by Australian police, are prosecuted by Australian prosecutors and lo and behold have Australian defence counsel! Fortunately, the lawyers in the office have been able to illustrate their independence and abilities and there are few problems as

regards this issue. A greater regional representation within the office is also a great advantage.

Overseas donors have a vested interest in the criminal justice system here since it is a costly exercise for them and for the Regional Assistance Mission in Solomon Islands. Law and order is a vital pillar. However, the cost is minimal when compared to say a fully functioning justice system in a small (population wise) Australian State or Territory. It is amusing to see the flurry of activity from the diplomatic community on issues of bail applications for senior figures.

With the Court of Appeal of Solomon Islands having Lord Slynn of Hadley, a retired Law Lord of the House of Lords, as its President the accused get the Rolls Royce of the justice system. However, that is at the end of a very long process.

The problems which the criminal justice system faces in Solomon Islands are those associated with systemic and institutional delays. Whilst delays can be described as understandable and unavoidable are they, in fact, acceptable or reasonable? The risk which the system faces is perhaps a number of applications for stay of proceedings on the basis that an accused has not received a fair trial within a reasonable period and argument as to the issue of prejudice. Of course the feeling within the legal profession is that the time is not yet right for such applications. But that time is fast approaching and of course the end result is that the court is overwhelmed by such pre-trial applications.

Are there ways in which delay could be ameliorated in Solomon Islands? Is it only a matter of resources? Is case management a problem? Are matters spending too much time in the Magistrates' Court perhaps awaiting the police brief? These are questions which do need to be addressed but of course the natural reaction is to defend those who work incredibly hard at keeping the criminal justice system going in very difficult circumstances. In one case the statements for committal were delivered six months after the initial arrest of one of the accused.

Further, there are, in the High Court at least, demonstrable discounts for early/timely guilty pleas which is welcome. The problem is really the caseload of defence lawyers and simply addressing each case as it comes along and therefore allocated court time being lost when a matter settles on a plea. In one case[35] the total period on remand eclipsed the sentenced imposed by the judge upon pleas entered to alternative counts to those for which the accused were originally committed for trial. In a manslaughter plea[36] on a murder information all four accused had served their sentence on remand.

The number of outstanding appeals from the Magistrates' Court to the High Court has reduced significantly and appeal bail is not necessarily an issue.

The number of cases in the criminal justice system is without parallel and the infrastructure and personnel are simply not there to deal with it. There is also the balance

[35] Regina v Mae SBHC 10 – HC-CRC 120 of 2004
[36] Regina v Tonawane & Othrs Unreported High Court Criminal Case 231 of 2004, 27.3.06

between intervention and interference from outside – he who pays the piper calls the tune. Solomon Islands has a long and proud history of judicial and constitutional independence. The High Court and the Public Solicitor's Office in particular are able to demonstrate such independence and in the case of the Public Solicitor's office by ensuring those accused are properly represented.

By the end of 2006 it is hoped that all those who have been in custody in excess of two years would have had at least one trial, that is to say have had at least one of their charges/cases disposed of. It is anticipated that 2007 will see an even larger number of cases before the Courts and a significant decrease in lengths of pre-trial incarceration.