COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Division

IN THE MATTER of Article 20(2)(c) and 28 of the Constitution of the Commonwealth of The Bahamas

BETWEEN

R B

Applicant

And

THE ATTORNEY-GENERAL

OF THE COMMONWEALTH OF THE BAHAMAS

Respondents

BEFORE: **The Honourable Mr Justice Bernard Turner**

APPEARANCES: **Ms Lisa Bostwick-Dean and Mr Tavarrie Smith for the Applicant**

Ms Abigail Farrington for the Respondent

HEARING DATES: 14 & 15 August, 6 November 2018

DECISION

TURNER J

1. By an Originating Notice of Motion filed 18 June 2018 in the Supreme Court, the applicant herein sought the following:

1. **A declaration that:**
    a. **The Applicant's constitutional right has been infringed;**
    b. **Article 20(2)(c) of the Constitution of The Commonwealth of The Bahamas which affords the Applicant the right to be given adequate time and facilities for the preparation of his defence has been infringed due to the Respondent's failure to give full and frank disclosure of four material items:**
        i. **Results of Laboratory analysis from the Applicant's blood collected by Detective Corporal 63 Javod Frazer and marked as collected and marked JF1A and JF1B;**
        ii. **Results of Laboratory analysis for two (2) bullets removed from the Applicant by surgeon Dr. Madhu at Princess Margaret Hospital which were then handed over to the Police;**
        iii. **Findings from the Identification Parade conducted on or about the 21st day of November, 2014, with the Applicant; and**
        iv. **Access to the vehicle recovered at the scene and photographed by Detective Sergeant 1212 Lavardo P. Sherman.**
2. **The Applicant be afforded constitutional redress pursuant to Article 28 of the Constitution of The Bahamas;**
3. **That the proceedings be permanently stayed, or, in the alternative, that the Respondent not be permitted to lead any evidence not disclosed, namely evidence as to:**
    a. **Blood samples and/or DNA evidence of the applicant;**
    b. **The alleged identification of the Applicant by the virtual complainant;**
    c. **Any offensive instrument to wit a firearm; and/or,**

d. Crime scene photos of the vehicle recovered at the scene and photographed by Detective Sergeant 1212 Lavardo P. Sherman.

Further, or in the alternative

4. That proceedings before the Juvenile Panel on the former counts 3 and 4 of the Voluntary Bill of Indictment be permanently stayed.

AND TAKE NOTICE that upon the hearing of this Motion the Applicant will rely on the Affidavit of R B sworn on the 18th day of June, A.D., 2018 and the exhibits herein referred to.

AND FURTHER TAKE NOTICE that the grounds of this application are:

1. **That the present information is an abuse of the process of the Court.**
2. **That the failure to give full and frank disclosure of the material items is presumptively prejudicial to the Applicant.**
3. **That no reasonable explanation has been given for the failure to give full and frank disclosure.**
4. **That the Applicant has been severely prejudiced in the preparation of his defence by reason of the said failure.**
5. **That the failure to give full and frank disclosure of the material items is likely to result in an unfair trial and a miscarriage of justice.**
6. **That the failure to give full and frank disclosure of the material items is likely to result in a breach of natural justice.**
7. **That the Applicant has lost the benefit of being treated as a juvenile if convicted before the Juvenile Panel.**
8. **That the time which the Applicant has spent on remand at the Department of Corrections exceeds any sentence which he could have been given by the**

Juvenile panel if he had been convicted there of those offences.

2. During the course of the hearing of this Application, counsel also applied for and was granted leave to amend the Motion, by adding as paragraph 2 the following:

"2. Article 20(1) of the Constitution of The Commonwealth of The Bahamas which affords the Applicant the right to be given a fair hearing within a reasonable time."

3. In support of the Motion the applicant filed on the same date as the Motion a lengthy affidavit (some 51 paragraphs stretching over 12 pages, with 8 exhibits attached), relevant portions of which state:

"…

3. That on Tuesday the 18th day of November 2014 I was arrested along with another after having been a passenger in a police chase that resulted in my being shot three times by the police officers. I was eventually arrested and detained by the police on allegations.

4. That on or about the 21st day of November, 2014, I was placed in an identification parade while at the Central Detective Unit (CDU) and the officers only told that "this parade was for you" and that I was picked out. My attorneys have repeatedly requested the results of the identification parade from was early as 2015 and the Respondent has simply said that there was nothing on the file to show that I was placed in an identification parade. I told my lawyers that they made me sign something in the front of my mother before I could participate and my lawyers would ask for a copy of whatever I signed or the results of that parade.

6. The Respondent has denied any and all knowledge of an identification parade which was recorded on my detention record. However, on reviewing my

detention record, my counsel confirmed that I was part of an identification parade. A copy of the relevant page from the detention record is now produced and shown to me marked as "Exhibit RB-2".

7. That on or about the 25th day of November, 2014, when I was 15 years old, I was formally charged before the learned Stipendiary and Circuit Magistrate Joyann Ferguson-Pratt with the following offices:-

a) one count of Armed Robbery – contrary to section 339(2) of the Penal Code, Chapter 84;

b) one count of Receiving – contrary to section 358(2) of the Penal Code, Chapter 84; and

c) two Counts of Possession of Firearm with intent to endanger life – contrary to section 33 of the Firearms Act, Chapter 213.

12. That during my case management hearing on the 30th day of June, 2015, one of my attorneys made requisitions for the following items in open court:

a) Detention record for the applicant;
b) Copy of the compact disc and digital photos taken by Detective Sergeant 1212 Sherman, along with the accompanying photo albums;
c) Copy of the digital video of the record of interview for the Applicant on November 21st, 2014;
d) Lab results taken by Detective Javod Frazier; and
e) Lab results for FSS-14-003436.

and the matter was then adjourned to the 6th day of October, 2015 for further case management.

18. That it was not until the 2nd day of November, 2015 that I was finally admitted to the Princess Margaret Hospital for removal of two bullets from the anterior

chest wall and the left forearm by surgeon Dr. Madhu. This was confirmed by a letter from Dr. Cherilyn Hanna-Mahase, Deputy Medical Chief of Staff at the Princess Margaret Hospital dated the 14th day of April, 2016 which was disclosed to my counsel as evidence that the surgery had been conducted and that the bullets removed from me were both handed over to the police. My attorneys immediately began requesting that these bullets be submitted for ballistic tests removed from me will match the shell casings found at the scene of the crash on the night in question and fired from a police officer's gun, casings which the Respondent is alleging as evidence that I or my co-accused were shooting, which is absolutely false. A copy of the correspondence is now produced and shown to me marked as "Exhibit RB-6".

22. That it was not until on or about the 24th day of May, 2016 that my attorneys finally received the following items:

a) Album of print photos taken by Detective Sergeant 1212 Lavado Sherman; and

b) A Copy of the digital video (CD) from the record of interview (ROI) for R B for November 21st, 2014.

23. That after receiving and reviewing the photo album of the crash scene it became clear to me that certain information I had given my attorneys about distance, seating, the state of the windows, the paint splatter, the point of impact, and the reclining angle of the front passenger seat were not visible in the album and I informed my attorney Mr. Smith who said that he would request the digital album to see if we can blow up the pictures for a clearer view. We did receive the compact disc of photos but they were of no assistance to me because it was impossible to identify those things which I told my attorneys about in the photos.

24. It is my honest belief that if we could the evidence clearly it would show that it was impossible for the incident to have happened as described by the police witnesses, I could not possibly be shooting at the police from a reclined chair while sustaining shots in the back.

25. That since September of 2016, my attorneys have continuously requested access to the vehicle and have not been given a definitive response by the Respondent yet as to whether the vehicle would be available for inspection and/or examination by an independent expert in necessary.

26. That given the ruling by the Court of Appeal on September 21st 2016, concerning the conduct of Justice Vera Watkins towards me during my case management hearing, the written ruling of Justice Vera Watkins when she denied me bail and certain obiter dictum by Justice Vera Watkins, I then informed my attorneys that I did not feel I would get a fair trial before her and I instructed to file a Notice of Motion for Case Transfer. As she refused to do so and as a result the Notice filed on the 2nd December 2016. We were informed by Justice Vera Watkins that she will hear the application on the 5th day of December, 2016 at 10:00am and that at that time we should still be ready to proceed with the trial which was to commence on that date.

27. When we appeared before Justice Vera Watkins on the 5th day of December 2016, to argue to the application, we were inform that the trial would not be beginning at that time because she had to hear another case which was a priority and involved the armed robbery of then former Deputy Prime Minister Phillip Brave Davis. She also informed us that she would not be hearing our application for recusal and falsely accused my attorneys of simply trying to stall the case, despite the repeated requests for disclosure by my attorneys from as early as June 2015 which resulted in the delays. That prior to making the arguments, Justice Watkins then

informed us that the case was being transferred to Justice Bernard Turner.

38. That at all times, during my case management hearings before Justice Bernard Turner, my attorneys continued to request the outstanding evidence which are critical to proving my innocence in the case against me and to date there has been no disclosure by the prosecution. On each occasion, I would witness my attorney giving the prosecutor a sheet of paper, which I later learned to be a copy of the list of outstanding items.

39. That on the 15th day of June, 2018, during my case management hearing before Justice Bernard Turner, Ms. Abigail Farrington appeared for the Respondent and informed the Court that they were seeking leave to amend the information and voluntary bill of indictment as is before the Court. She informed the Court that in regards to count two, the application was to delete the words "R B and", this effectively withdrawing the charge of count two against me and the Court acceded to her application. She then informed the Court that in regards to counts three and four and that based on the Bahamian Court of Appeal decision in *Chevaneese Saha Gaye Hall and Attorney General SCCrApp & CAIS No. 179 of 2014* and the Judicial Committee of the Privy Council in *The Attorney General (Appellant) v Hall (Respondent) (Bahamas) [2016] UKPC 28*, that counts three and four be quashed against me and remitted back to the Magistrate's Court and that since I was a juvenile at the time of the offence and seeing that the charge regarding counts three and four are triable either way, that those matters be remitted to the Juvenile Panel to be disposed of there.

40. That since I am now an 18 year old young man, I am advised that verily believe that since this Court should also permanently stay counts Three and Four as against me which have been quashed and remitted back to the Magistrate's Court Juvenile Panel since I have lost the benefit of being treated as

a juvenile if convicted before the Juvenile Panel and to continue with those counts against me now that I am an adult would be an abuse of process of the court and an abuse of natural justice.

41. I am further advised that even if I were convicted of those offences before the Juvenile Tribunal, the two years and give months that I spent at Fox Hill, "Her Majesty's Prison" is not a sentence that would have been available to that Court and is most likely more time that I would have been ordered to spend at the Simpson Penn Centre for Boys.

42. That I am still awaiting trial for one count of Armed Robbery – contrary to section 339(2) of the Penal Code, Chapter 84.

45. That I believe the delay in my trial to wholly be the fault of the prosecutor who fails to disclosure critical and vital evidence that would prove my innocence and that they are violating my right to a fair hearing within a reasonable time, which is guaranteed by *Article 20(1) of the Constitution of The Commonwealth of The Bahamas.*

46. That I am advised and verily believed that since I was a juvenile at the time of my arrest and arraignment that I was entitled to a quick and speedy trial pursuant to *Article 40 of the United Nations Conventions on the Rights of the Child (CRC)* and under *Sections 3 and 4 of the Child Protection Act of The Bahamas* have been violated.

50. That the intended prosecution should be stayed by declaration that the process is unconstitutional or in the alternative that the Respondent should be excluded from leading or making reference to any and all evidence which has not been disclosed to my attorneys.

4. The Respondent filed a similarly lengthy affidavit of some 45 paragraphs, contesting certain of the factual assertions of the Applicant. Relevant portions of that affidavit are as follows:

> **4. Contrary to paragraph 4 of the Applicant's affidavit, the Applicant was never placed on an identification parade in relation to this matter but was however identified via an identification parade on the 21st November 2014, in relation to another matter for which he was being questioned in case #1-14-097255 and where the complainant in that matter, Mr. Don Hamilton, identified the Applicant as the person who robbed him. There is now produced and shown to me a copy of a Police Narrative Data Entry marked and exhibited as F.J1"**
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> **5. The Respondent on a number of occasions has informed the Applicant and his Counsel that the Respondent is not relying on identification evidence in this matter, however, the Applicant insist that he was identified and continues to request an identification parade form.**
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> **13. Contrary to paragraphs 17 and 18 of the Applicant's Affidavit, the bullets recovered from the Applicant are not vital to the Applicant's defence as the Prosecution has never denied that the Applicant was shot by the Police.**
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> **14. The casings found on the scene were tested in the Police Firearm used during the chase and were found to not be a match.**
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> **15. The Respondent verily believes that it is not required to disclose or test material in this case that are of no assistance to the defence.**
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> **17. In response to paragraph 25 of the Applicant's Affidavit, the stolen vehicle that the Applicant crashed in and from which he was arrested was returned to the owners on 11th December 2014 and is not available for inspection. There is now produced and shown to me a copy of a Release Form marked and exhibited as "F.J8."**
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> **23. Contrary to paragraph 27 of the Applicant's Affidavit, the delay in the prosecution of this matter is attributed to the Applicant, and is not the result of non-disclosure by the Prosecution. The Applicant, nor his Counsel before the present application has never made an application for order of**

disclosure or stay in relation to this matter and the Applicant and his Counsel was at all time aware that the Prosecution was not relying on the items requested by the Applicant.

24. On the 15th March 2017, without hearing the application for "case transfer", and after making reference to the content of the Affidavit filed in support of the application for "case transfer", the Judge transferred the matter to Honourable Justice Bernard Turner, to be fixed for trial before another court.

25. A trial date of the 25th June 2018 was set before the Honourable Justice Bernard Turner.

26. Previous to the matter being set before the Honourable Justice Turner, the only requested item which remained outstanding were the DNA results in relation to swabs taken, Ballistics results requested to be done on bullets retrieved from the Applicant, a request to view the vehicle, the subject of the armed robbery and an identification parade form.

28. On the 17th November, 2017, the Applicant's Attorney advised the Court that they would be making an application for a stay in relation to the items requested, however it was not until the Pre-trial Review Hearing on Friday, 15th June 2018, that the Applicant's Attorney sought leave of the Court to file an application for a stay in relation to the requested items that remained outstanding.

30. In Response to paragraph 40 and 41 of the Applicant's Affidavit, counts three and four on the Indictment of the Applicant relative to Possession of a Firearm with the Intent to endanger life, cannot be remitted to the Juvenile Court, as the Applicant was never charged with those counts before the Magistrate and they therefore fall away. See Charge Sheet at exhibit "F.J.2".

34. Contrary to paragraph 45 of the Applicant's Affidavit, any delay in the trial of this matter cannot be attributed to the Respondent and is wholly that of the Applicant and his Attorney, and the remaining outstanding items requested by the Applicant and his Counsel do not assist Applicant in any way or any material way in his defence and cannot prove the innocence of the Applicant.

39. Contrary to paragraph 49 of the applicant's Affidavit the Respondent has made full and Frank disclosure of evidence in this matter on which the Respondent intends to rely and does not have in its possession any material that will assist the defence or that undermines the prosecution's case. The items requested by the Applicant and his Counsel can in no way prove the Applicant's innocence, or assist the Applicant in the preparation of his defence in any way or any material way. The applicant is not prejudiced in any way by the non production of items requested and not supplied to the Applicant.

5. This affidavit in turn was replied to by the Applicant, by an affidavit by a Ms Ashley Minnis, dated 13 July 2018, which stated, in part:

4. That I am informed that counsel with carriage of this matter believe that the Attorney General's Office attempt to now make mention of case #1-14-097255, which was withdrawn, and the alleged identification evidence in that matter to prejudice the Applicant in the eyes of the Court. Counsel are of the view that the Attorney General's Office must be aware that this alleged evidence is extremely prejudicial to the Applicant and as it has no relevance to the matter which is currently before the Court the mention of its serves no purpose other than to 'poison' the mind of the Court towards the Applicant. I am informed that had this information been communicated directly to counsel with carriage of this matter they most likely would have taken another course of action in relation to that specific requisition.

8. Contrary to paragraph 13 of the Respondent's Affidavit, counsel with carriage of this matter are of the view that it is not for the Crown to determine how the Applicant must run his defence or what is vital to the Applicant's defence. The Applicant intends to rely on the bullets recovered from him not for the purpose of establishing that he was shot by the Police was is suggested by the Crown, but for the purposes of establishing that bullets recovered from the Applicant do not match the sole firearm submitted by the Police for ballistic testing. The Applicant believes that this evidence would be vital for establishing that other firearms, in the possession of the police, were present during the shooting which would cast reasonable doubt on the Applicant being in possession of any firearm which is an essential element in proving the case of Armed Robbery against the Applicant. Further, the Applicant's instruction to his Counsel is that the shell casing recovered at

the scene were discharged from the police firearms and did not come from him or his co-accused since they had no firearm in their possession.

9. Contrary to paragraph 14 of the Respondent's Affidavit, the casings found on the scene were tested in the Police Firearm identified as one (1) IMI 9mm Luger caliber model UZI sub machine gun serial number 115356 marked ACD#1 and submitted by ASP Earl Thompson on the 22 of February 2016 to Firearms Examiner Charles Bain for examination. The fired cartridge cases marked as LS#1 and LS32 were only microscopically examined and compared to test fire from the Police Firearm marked as ACD #1 but were not microscopically examined and compared to test fire from the other police firearms which the Applicant says were present at the scene. The Applicant desires to lead evidence at trial that other police firearms were present, that the fire cartridge cases marked as LS#1 and LS#2 were likely to come from one of the untested police firearms and be able to establish this by examining the bullets which were removed from him at Princes Margaret, since it is already admitted by the Prosecution that the Applicant was shot by the Police. Now produced and shown to me marked as "Exhibit AM-3" is a copy of the Final Forensic dated Firearms Report dated March 17th, 2016 and signed by Firearms Examiner Charles Bain.

10. The Applicant and his Counsel verily believe that it is not for the Prosecution to determine whether evidence is of any assistance to the defence and that the duty of the Prosecution is to disclose all "relevant" facts and witnesses known to him, whether tending towards guilt or innocence.

11. The Applicant and his Counsel verily believes that there is a duty on the Prosecution to make available to the Applicant all information it has and that the Applicant must then decide whether it intends to rely on that information or not. Counsel verily believe that the Prosecution cannot conduct our defence for us and determine what information we wish to lead whether it goes towards proving the Applicant's innocence or casting reasonable doubt in the case.

22. In response to paragraph 25 through to 45, counsel with carriage of this matter verily believe that:

a) the Respondent is not at liberty to determine what material is or is not relevant to the Applicant in the preparation of his defence and that it is a violation of the Applicant's Constitutional right for the Respondent to attempt to marshal evidence in the Applicant's defence;

b) the delay in the hearing of this matter, particularly for a juvenile, is exceptionally long and is a gross violation of his Constitutional rights, his rights under the *Child Protection Act and his rights under the United Nations Convention on the Rights of the Child* and that such delay amounts to an abuse of process of the court;

c) the Applicant has been prejudiced by the delay in this case having been charged when he was 15 years old and now being the age of 19 years of much different features and physical development in that his youthful innocence is no longer available to be displayed to a jury;

d) according to the authorities in the Applicant's written submissions, that the requested items must not exclusively prove the innocence of the Applicant but that they can be relevant on the grounds of allowing the Applicant to cast sufficient doubt on the Prosecution's case;

e) though The Bahamas has not set time limits for speedy trials for juveniles, it is for the Courts to determine what is a reasonable time limit and even in the absence of such a determination, the Bahamian Court of Appeal authority of R.B. *(a Juvenile) v The Attorney General* is clear that children have all rights under the *United Nations Convention on the Rights of the Child* (CRC) save an except those that The Bahamas has taken a reservation to and that there being no reservation to Article 40 of the CRC that the Applicant was entitled to a quick and speedy trial;

f) should this Court not grant a permanent stay of the trial of this matter, that the Respondent ought to excluded from leading any evidence or making reference to any evidence not disclosed, namely the Photographs of

Officer 1212 Sherman and the Final Ballistics Report of Firearms Examiner Charles Bain; and

g) that in the circumstances, it would otherwise be unfair to try the Applicant in this matter given the Prosecution's conduct and failure to disclose in this matter."

6. Finally, the Respondent replied to this affidavit, with an affidavit filed 9 August 2018 which asserted, in part:

4. Paragraph 4 of the Applicants Affidavit is denied and Respondent submits that a thorough presentation of the facts relative to the alleged identification parade ought to be before the Court, particularly given the fact that the Applicant has exhibited an entry on his Detention Record in support of his allegation. While the information relative to the Applicant being identified in relation to another matter is not relevant to this case per se, it is relevant to this present application in refuting the allegations made by the Applicant. The Applicant is in no way prejudiced in the eyes of the Court due to the revelation of this information and the assertion of prejudice and poisoning the Court is at best an insult to the Court.

5. Contrary to paragraph 12 of the Applicant's Affidavit, a request by the Applicant and or the Applicant's Counsel to view the vehicle was not made until sometime in September of 2016. At that time and on various occasions thereafter, requests were made by the Respondent for the Royal Bahamas Police force to check on the status of the said vehicle. It was not until June 2018, that the Respondent was made aware that the vehicle had been given to the insurance company since the 11th December 2014. For the Applicant and or the Applicant's Counsel to allege, without more, that the Respondent was in possession of this information since December of 2014 and did not provide it to the Applicant in an effort to somehow thwart the Applicant's defence, is not only irrational, since their request was not made until September 2016 and the car had been gone since December of 2014, but is also reckless, scandalous and completely without merit

6. The Respondent avers that at no time the Respondent was knowingly in possession of the requested documents and/or exhibits and intentionally and knowingly withheld them from the Applicant or his Counsel.

7. The constitutional provisions said to be infringed are found in Article 20(1) and (2)(c), they read:

"20. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence

……..;

(c) shall be given adequate time and facilities for the preparation of his defence;

The reference to Article 28 in the heading is a reference to the procedural mechanism for the enforcement of constitutional rights, the relevant portion of that Article reads:

"28. (1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction —

(a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

8. Detailed submissions on these issues were crafted and presented to the court. There are a number of factual disputes on the affidavit evidence, as

detailed above, and it was only through a series of responses on these factual disputes than an apparent position, still clouded by factual assertions and counter assertions, has emerged on several of the issues.

9. For instance, in respect of the applicant's alleged identification, and the subsequent request for information about this alleged identification, which forms one of the basis on which the applicant contends that the prosecution has breached his constitutional rights; which is based on a reference to an identification parade on the applicant's detention record; counsel complains that the failure to provide this information hampered the applicant in his ability to prepare his defence. The respondent submitted that no such identification evidence exists and is based on a misconception formed from an entry in the detention record of the applicant.

10. A reading of the statements attached to the voluntary bill of indictment filed in this matter clearly indicates that the virtual complainant did not purport to be able to identify anyone. If any attempt were made to produce at some stage of the trial any such identification evidence, that issue could be dealt with within the context of the usual trial process, indeed as the application itself concedes, this is an alternate remedy, as set out in paragraph three of the Notice of Motion (ibid): "**That the proceedings be permanently stayed, or, in the alternative, that the Respondent not be permitted to lead any evidence not disclosed,…".** I find that the entirety of the applicant's submissions on this issue are misconceived.

11. Related to this issue is the applicant's contention, as found in paragraph four of the affidavit filed 18 July 2018, that the Respondent's answer was improper in that it disclosed to this court the fact that the applicant had been investigated for another matter which has since been withdrawn. This, it is asserted, was done with the intention to prejudice the mind of the court and should have been information presented directly to the applicant,

notwithstanding that it featured as a major component of the applicant's complaint of a failure of full and frank disclosure. I find that that concern is misconceived, as it implicitly attributes to the court and inability to separate from the consideration of any legal issue in a trial, information about an investigation which did not even reach the level of an allegation forming a criminal complaint before a court.

12. The inappropriateness of the use of constitutional redress in matters which include substantial factual disputes has been consistently addressed by appellate and first instance courts. In **Jaroo v The Attorney-General of Trinidad and Tobago, No. 54 of 2000, the Privy Council stated that:**

> **36. Their Lordships wish to emphasise that the originating motion procedure under section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law. As Lord Mustill indicated in *Boodram v Attorney General of Trinidad and Tobago* [1996] AC 842, 854, in the context of a complaint that adverse publicity would prejudice the appellant's right to a fair trial, the question whether the appellant's complaint that the police were detaining his vehicle was well founded was a matter for decision and, if necessary, remedy by the use of the ordinary and well-established procedures which exist independently of the Constitution. But instead of amending his pleadings to enable him to pursue the common law remedy that had always been available to him, the appellant chose to adhere to what had now become an unsuitable and inappropriate procedure. Moreover, having decided to adhere to that procedure, he did not challenge the statements in Sergeant Flemming's affidavit that further inquiries were being undertaken which would lead to the apprehension of those concerned in the theft of the vehicle and that it was necessary to preserve it as material evidence.**
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> **37. Dr Ramsahoye said that it was sufficient for him to meet this challenge to show that there had been a breach of**

section 4(a). This was because it was provided by section 14(1) that his right to apply to the High Court by way of originating motion was without prejudice to any other action with respect to the same matter that is lawfully available. He said that Lord Diplock's observations in *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265 at p 268 had been misunderstood by the Court of Appeal. He maintained that it was the making of a "mere allegation" of a contravention of a human right or fundamental freedom that was being criticised in that passage by Lord Diplock. He accepted that a mere allegation was not enough to entitle the applicant to proceed by way of an originating motion. But he said that, provided that he could establish that there had been a breach of the constitutional guarantee, the choice of remedy was a matter for the individual.

38. Their Lordships do not accept this argument. The appropriateness or otherwise of the use of the procedure afforded by section 14(1) must be capable of being tested at the outset when the person applies by way of originating motion to the High Court. All the court has before it at that stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future. The point to which Lord Diplock drew attention was that the value of the important and valuable safeguard that is provided by section 14(1) would be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures are available. His warning of the need for vigilance would be deprived of much of its value if a decision as to whether resort to an originating motion was appropriate could not be made until the applicant had been afforded an opportunity to establish whether or not his human rights or fundamental freedoms had been breached.

39. Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to

resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.

Conclusion

40. For these reasons their Lordships agree with Court of Appeal that for the appellant to proceed in this case by way of a constitutional motion was an abuse of process. It follows that the appellant is not entitled to a declaration in these proceedings that his constitutional rights have been infringed. The appeal must be dismissed.

13. I find their Lordships advice to be applicable to this matter on the resolution of a number of the issues which the applicant raises. As the affidavit evidence indicates, the reference to an identification parade in a detention record, forms now a part of the basis of a constitutional application, despite the fact, as gleaned from the statements filed in support of the voluntary bill of indictment, that there was no reference to an identification parade in those papers and no indication that the virtual complainant was purporting to identify anyone. The normal trial process would have been sufficient for the resolution of such an issue.

14. Any person, including the applicant, charged with a criminal offence certainly has a right to defend himself in any manner which he chooses, and must be provided with his constitutionally protected right to adequate time and facilities for the preparation of his defence, without the prosecution circumscribing same by determining for itself what is and is not relevant. However that issue must be looked at within the context of the available, apparent evidence. In this matter, the allegation is that of an armed robbery of a vehicle together with other items. The police assert that they spotted and pursued this vehicle and that shots were fired from that vehicle at them. When this vehicle eventually came to a stop, the applicant, it seems, was present in the vehicle and provided an innocent explanation of his presence, with a denial

of any participation in an armed robbery. They are the allegations, and remain mere allegations subject to proof at a criminal trial.

15. Within this context, and consonantly with his constitutional rights, all of the other complaints of on-disclosure can be dealt with within the trial context, without impacting, and I so find, the applicant's constitutional rights. The request for the report of the analysis of the applicant's blood could not conceivably be of any assistance to the applicant in this matter, the allegation being of armed robbery. Any attempted use by the prosecution of any such information, to somehow implicate the applicant in any criminal offence, is a matter which can be addressed within the trial context. Similarly, the failure to produce any analysis of the bullets taken from the body of the applicant, which the applicant asserts might undermine the account of the chase and shots fired by the police, does not, I find impact upon the applicant's constitutional rights.

16. Neither does the fact that the car, the subject of the armed robbery allegation, was returned to the owner impact, I find, the applicant's constitutional rights. He can still have a fair trial and the ordinary trial process is sufficient to secure same, notwithstanding the submissions to the contrary.

17. As already indicated, the application itself seeks as an alternative remedy:

> **"…that the Respondent not be permitted to lead any evidence not disclosed, namely evidence as to:**
>
> **a. Blood samples and/or DNA evidence of the applicant;**
>
> **b. The alleged identification of the Applicant by the virtual complainant;**
>
> **c. Any offensive instrument to wit a firearm; and/or,**
>
> **d. Crime scene photos of the vehicle recovered at the scene and photographed by Detective Sergeant 1212 Lavardo P. Sherman."**

These are all eminently trial issues, which do not require recourse to the constitution for resolution. Indeed, such an application, on those issues, is inappropriate, and that portion of the application is dismissed. In respect of the alternative remedies sought on those issues, they remain trial issues and can be dealt with, if they even arise, within the context of the trial process.

18. On the issue of the applicant's loss of a right to a possible trial before the juvenile panel on the firearms related charges, as indicated in the affidavits, the court, consonantly with the decisions of The Bahamas Court of Appeal and the Privy Council in **Chevaneese Saha Gaye Hall and Attorney General SCCrApp & CAIS No. 179 of 2014** and **Attorney General (Appellant) v Hall (Respondent) (Bahamas) [2016] UKPC 28,** had quashed those counts and remitted them to the juvenile court. The applicant's complaint then of this loss of a right to a juvenile panel trial is misguided and ignores the actual decision of the court. Further, the respondent asserts that in fact, although not stated at the time of the decision, the applicant had not initially been charged with these offences, they only being added, as provided for by the Criminal Procedure Code, when the voluntary bill was filed; and therefore those charges have fallen away.

19. On the added (by amendment) issue of delay, counsel for the applicant submitted that the passage of time since the applicant was charged makes any trial now presumptively prejudicial and in breach of the applicant's rights to a fair trial within a reasonable time. Counsel cited in support of this submission the provisions of sections 3 and 4 of the Child Protection Act, Article 40 of the United Nations Convention on the Rights of the Child and the decision of The Bahamas Court of Appeal in **R.B (a Juvenile) v AG SCCrimApp 205 of 2015**.

20. The Court of Appeal, in the cited decision of **R.B. (a juvenile) v AG**, primarily addressed the issue of the applicant's remand into custody to await his trial, but their Lordship's did make the following observations generally; Isaacs

JA stated in respect of the applicability of section 3 of the Child Protection Act, that:

> **19. "Sub-section 2 is not limited by the preceding sub-section 1. The reference to "all matters relating to a child" clearly admonishes that those persons dealing with children whether in a court or not, must do so with the welfare of the child as the paramount consideration. To my mind, this provision requires a court to act with expedition on applications, e.g., for bail; and the determination of the guilt or innocence in a trial.**
>
> **20. The principle is reinforced by section 4(c) of the CPA which incorporates into Bahamian law the United Nations Convention on the Right of the Child ("the Convention"), subject to any reservations that apply to The Bahamas and with the appropriate modifications to suit the circumstances that exist in The Bahamas with due regard to its laws. As far as I am aware, The Bahamas lodged one reservation which has no relevance to this appeal."**

and Crane-Scott JA indicated, in concluding the decision of the Court on this matter that:

> **92. "By signing, ratifying and incorporating the Child Rights Convention, the government of the Bahamas has demonstrated a commitment to the four main principles expounded therein: namely that all the rights guaranteed by the Convention must be available to all children without discrimination of any kind (Article 2); that the best interests of the child must be a primary consideration in all actions concerning children (Article 3); that every child has the right to life, survival and development (Article 6); and that the child's views must be considered and taken into account in all matters affecting him or her (Article 12).**
>
> **93. In light of these principles and the facts in the present case I take this opportunity to remind the relevant authorities of their respective duties and obligations under the Convention and the Child Protection Act and further urge that more attention be paid to the rights afforded Bahamian children therein."**

21. Courts in The Bahamas are clearly therefore enjoined to hear and consider matters involving defendants who were juveniles at the time of the

alleged offences with expedition. Counsel for the applicant has helpfully provided the Court with legislation from other jurisdictions dealing with the rights of children. In the case of Uganda, The Children Act, amendments to which in 2016 by the Children (Amendment) Act, 2016, bring it broadly into line with the provisions of the Child Protection Act of The Bahamas, requires, in section 99 the following:

> **"(3) Where, owing to its seriousness, a case is heard by a court superior to the family and children court, the maximum period of remand for a child shall be six months, after which the child shall be released on bail.**
> **(4) Where a case to which subsection (3) applies is not completed within twelve months after the plea has been taken, the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence."**

22. I note that there are no similar provisions in the Child Protection Act in The Bahamas. The similarity of the legislation indicates a common source or draft model legislation from which jurisdictions basing their legislation on same would determine which of the particular provisions they would implement in their domestic laws. The legislation of other jurisdictions therefore indicates a course the legislators in The Bahamas decided not to take.

23. The Court of Appeal has however also made it clear that The Bahamas has committed itself to the United Nations Convention on the Rights of the Child and the four main principles expounded therein. Counsel for the applicant asserts that effectively The Bahamas has committed itself to expedited speedy trials for juvenile defendants and that the delay in the trial of this matter, having regard to the said Convention and the Constitution of The Bahamas is unreasonable and as a result the prosecution of this matter ought to be stayed.

24. Undoubtedly there has been a delay in the trial of this matter, the allegations stem from an incident said to have taken place on 18 November 2014,

now more than four years ago. The earliest trial date set was for 7 March 2016. The case management notes in this matter indicates that this matter was throughout actively case managed by the initial trial Judge, with items of evidence being requested at various stages. The matter did not proceed to trial in March 2016 for a variety of reasons, inclusive of the fact that counsel for the co-accused of the applicant was still in trial before another court.

25. The progress of the trial ultimately became a contentious issue as between the applicant and the initial trial court, reflected in the unacceptable and scandalous assertion by the applicant in his initial affidavit, filed in June of 2018, that (in referring to the initial trial Judge:

> "..**She also informed us that she would not be hearing our application for recusal and falsely accused my attorneys of simply trying to stall the case, despite the repeated requests for disclosure by my attorneys from as early as June 2015 which resulted in the delays."**

26. It is not lost on the court that this detailed affidavit was crafted by counsel and not the affiant, and that the decision to make this accusation is therefore the responsibility of counsel and not merely the affiant. Moreover, it is entirely unnecessary and gratuitous to the present proceedings, more so since the Learned Trial Judge, when the animus became clear, transferred the matter, without hearing a recusal application, in December 2016.

27. The unfortunate impact of that transfer however, has been a further delay brought about by the applicant's misapprehension as to the impartiality of a trial judge. Having inherited this matter then in March of 2017, the present court has tried to bring about a trial by setting a trial date, having regard to the fact that there are two defendants, separately represented. The initial date set by this court, in November of 2017, could not be met as counsel indicated an inability to start due to the outstanding requested items (the subject of the other portion of

this constitutional application), and another date was fixed for 25 June 2018 with a mention date in January of 2018.

28. In January 2018, counsel for the applicant foreshadowed an intention to file an application in respect of these requested items. That application was not filed until 18 June 2018, which resulted in a further adjournment in the trial of this matter, since it would not have been possible to hear and determine the matter prior to the start of the trial.

29. Considerable portions of the delay in this matter are therefore directly attributable to the actions of the applicant in seeking to obtain what the defence considered to be necessary information prior to the start of the trial in order for them to have adequate information prepare their defence. A part of the delay is no doubt also attributable to the prosecution in not providing certain of the requested items, but the prosecution also seemed to have been sent on what amounted to wild goose chases for things which simply did not exist, such as evidence of an identification parade, which from the context of the statements in the matter, it should have been obvious did not exist. If an attempt had been made at any trial to put into evidence any such undisclosed and unmentioned evidence, the ordinary trial process would have always been sufficient to prevent any such admission.

30. As a result, a considerable period of time has passed since the alleged incident and the trial. I do not discount the important consideration that this applicant was a juvenile at the time of the incident and that the courts should give primary consideration to causing such trials to proceed as quickly as possible. Counsel in that regard properly referred the court to a matter in which a trial court (as it happens, me) set down a murder trial involving school aged children as defendants, within a year of the date of the allegations, but that matter was not beset by the number of applications which has clouded this matter from trial.

31. The general principles relating to abuse of process because of delay are found in among many other decisions, **Attorney General's Reference (No. 1 of 1990)**, where Lord Lane stated at page 636:

> **"An indictment should be stayed on the grounds of delay, whether justified or not, only if the defendant proves on a balance of probabilities that the delay complained of will not enable the trial judge to ensure a fair trial or result in such genuine prejudice and unfairness to the defendant in his presentation of the case at trial that the trial judge will not be able to take steps to ensure a fair trial... The prejudice must be so serious that, having regard to the nature and weight of the evidence against the defendant, the trial judge will not be able to ensure a fair trial.'**

At page 644 he stated:

> **"..no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court. In assessing whether there is likely to be prejudice and if so whether it can be properly described as serious, the following matters should be borne in mind: first, power of the Judge at common law... to regulate the admissibility of evidence; the trial process itself which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the Judge to give appropriate directions to the jury before they consider their verdict. ... in our judgment the decision of the judge to stay the proceedings in the instant case was wrong."**

32. The respondents also cited the decision of the Court of Appeal of The Bahamas, in the Attorney General v Jermaine Samuel Seymour Appeal No. 29 of 2004, where their Lordships stated at paragraph 20:

> **"..it must be borne in mind however, that there are at least two sides to justice in every criminal case - the side of the alleged victim (the**

> **prosecution) and the side of the accused (the defence) and, as noted by Lord Morris of Borth-y-Gest in Connelley's case ... "generally speaking, a prosecutor has much right to demand a verdict of the jury on an outstanding indictment, and where either demand a verdict, a judge has no jurisdiction to stand in the way of it."**

The court found that the Learned Trial Judge was wrong to stay a matter where the delay was five years. They deprecated the fact that the Judge gave undue weight to the fact that in an unrelated case, an accused person was arrested, tried and acquitted in less than one year.

33. Counsel also cited the Court of Appeal's decision in **Stubbs v The Attorney General (2013) 1BHS J. No. 15** where it was stated by the court that:

> **"It cannot be in the interest of justice that stays be granted whenever there is a constitutional breach. A permanent stay must only be granted in very exceptional circumstances."**

In that matter, the delay was ten years, at that time, and a stay was not granted.

34. In respect of the present matter, I do not find that there are any exceptional circumstances which justify the granting of a stay. On balance, having considered the submissions on this issue of delay, the authorities cited by counsel for the applicant and the respondent, and the reasons indicated in the affidavit evidence and from the notes from the trial court, I consider that the applicant can still have a fair trial and that the ordinary trial process will be sufficient to deal with all of the issues related to the delay in this matter, inclusive of the issues related to the applicant and his present appearance, having aged from a juvenile to a young man. For these reasons, I do not accede to this portion of the application.

35. For the reasons which are provided, I did not make any of the declarations sought in the Notice of Motion at paragraph 1 - 4, nor did I make any

of the orders sought in paragraphs 2 - 3. As already indicated, the alternative remedies requested are all trial court applications, should they even arise. The entirety of this application is therefore dismissed. There is no order as to costs.

Dated this 3rd day of December, A D 2018

Bernard S A Turner
Justice