# COMMONWEALTH OF THE BAHAMAS

# IN THE SUPREME COURT

# PUBLIC LAW DIVISION

## 2015/PUB/con/00015

**IN THE MATTER OF ARTICLES 20 (1) and 28 (2) of The Constitution of the Commonwealth of The Bahamas**

**AND**

**IN THE MATTER of a Complaint Laid by the Commissioner of Police against Missouri Bain Thompson on the 7th December 2006 in accordance with Section 58 (3) of The Criminal Procedure Code Act**

**AND**

**IN THE MATTER of a decision of The Bahamas Court of Appeal dated 27th March 2014 quashing the decision of a Stipendiary & Circuit Magistrate and remitting the matter for rehearing before a different Magistrate**

## BETWEEN

## MISSOURI BAIN-THOMPSON

**Applicant**

## AND

## THE COMMISSIONER OF POLICE

**Respondent**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mr. Damian Gomez QC with him Mr. Krisspin R. Sands of Lockhart & Co. for the Applicant
Mr. Garvin Gaskin, D.P.P. with him Ms. Destiny McKinney for the Respondent

**Hearing Date:** 5 April 2017

**Civil law - Constitutional motion - Fundamental rights and freedoms guaranteed under Article 20(1) of the Constitution of the Bahamas - Right to fair hearing within reasonable time - Whether delay in bringing applicant to trial unreasonable - Factors to be**

**considered in determining whether delay unreasonable –Length of delay – Reason for delay –The responsibility of the Applicant to assert her rights – Prejudice.**

**Whether procedure for approaching court for relief was appropriate - Stay of proceedings – When proceedings may be stayed - Principles to be applied.**

On 7 December 2006, the Applicant and her co-accused, alleged to be deceased, were charged with conspiracy to abet fraud by false pretenses and abetment of fraud by false pretenses. The Applicant was discharged by the presiding magistrate after her Counsel made a submission of no case to answer. The Respondent appealed to the Court of Appeal. On 27 March 2014, the Court of Appeal allowed the appeal, quashed the decision of the Magistrate and remitted the matter to the Magistrate Court for a re-hearing *de novo* before a different magistrate.

To date, the retrial has not taken place despite correspondence from both sides urging the Chief/Deputy Chief Magistrate to fix a retrial date.

On 29 September 2015, the Applicant filed this originating motion seeking (i) a declaration that by reason of the delay in fixing a date for the retrial of the complaint laid against her, there has been a violation of her right to a fair hearing within a reasonable time as guaranteed by Article 20(1) of the Constitution; and (ii) a declaration that by reason of the delay a retrial of the matter would be an abuse of the process of the court.

The Respondent raised a preliminary objection namely that the originating motion is an abuse of the process of the court since other adequate means of redress are available to the Applicant pursuant to Article 28(2) of the Constitution namely a mandamus. The Respondent further stated that, despite the delay, if the court finds that there was a breach under Article 20(1) of the Constitution, a fair hearing could still ensue. The Respondent next submitted that a permanent stay should not be granted since the court could direct the Chief/Deputy Chief Magistrate to hear the matter without delay.

The Applicant submitted that she would be unable to receive a fair trial since (i) there had been a delay of approximately 11 years; (ii) no reasons have been given as to why the Chief/Deputy Chief Magistrate have not assigned a date for the retrial; (iii) she and/or her co-accused have not caused or contributed to the delay and (iv) she faces serious prejudice since her potential witnesses would be seriously disadvantaged in recalling accurately events of the distant past.

**HELD:**

1. **The bringing of this constitutional motion is not an abuse of the process of the court as no parallel adequate remedy was available to the Applicant. The mere existence of an alternative remedy does not automatically warrant excluding constitutional proceedings under the proviso to Article 28(2) of the Constitution. The crux is its adequacy. The power to decline jurisdiction arises only where the alternative means of redress is considered to be adequate. In this case, a mandamus is not an adequate alternative means of redress since not even an Order from the Court of Appeal, four letters from both parties and numerous telephone calls to the Chief Magistrate were persuasive enough to move the Chief/Deputy Chief Magistrate to fix a retrial date: Hillard Thompson v The Attorney General *[2013] 1 BHS J. No. 134* distinguished.**

2. **Where there is an alleged breach of a specific provision of the Constitution, for example, the right to a fair hearing within a reasonable time, the courts will be**

**more inclined to allow a constitutional motion to proceed because the applicant should not have to prepare for a trial or retrial that will take place after an unreasonable delay: Bell v Director of Public Prosecutions of Jamaica and another *[1985] 2 All ER 585* applied.**

3. **In determining whether there has been a breach of Article 20(1) of the Constitution, the court must consider four main factors namely (i) the length of delay; (ii) the reasons given by the prosecution to justify the delay; (iii) the responsibility of the accused for asserting his rights and (iv) prejudice to the accused: Bell v Director of Public Prosecutions of Jamaica and another *[1985] 2 All ER 585* applied.**

4. **A breach of the right to a trial within a reasonable time is not fatal to the continuation of the trial if the Applicant can still receive a fair trial. The Applicant in this case had shown that because of the delay and the continued delay since no retrial date has been fixed since March 2014, when the matter was remitted to the Magistrate Court, any potential witness whom she may wish to call would be severely disadvantaged in recalling accurately events which occurred eleven years ago. In addition, she and/or her co-accused have not caused or contributed to the delay.**

5. **A permanent stay is not the normal remedy when delay has resulted in a breach of an individual's constitutional right. Where the applicant seeks a permanent stay the burden is on him to establish, on a balance of probabilities, that as result of the excessive delay he cannot receive a fair hearing. Further, permanent stays imposed on the ground of delay should only be employed in exceptional circumstances: Stephen Ronel Stubbs v The Attorney General *[SCCrApp No 153 of 2013]* applied. The Applicant has satisfied the court that exceptional circumstances exist and she will not be able to receive a fair trial within a reasonable time.**

**JUDGMENT**

**Charles J:**

**Introduction**

[1] There are two principal issues to be determined in this Originating Notice of Motion filed on 15 September 2015 namely:

1) Whether the delay in fixing a date for the retrial of the complaint laid against the Applicant is in contravention of her right to a fair hearing within a reasonable time as guaranteed in Article 20(1) of the Constitution of the Commonwealth of The Bahamas ("the Constitution") and;

2) Should the court make such a finding, what is the appropriate remedy?

**Factual matrix**

[2] Missouri Bain Thompson ("the Applicant") and Mr. Dwight McCoy, ("the co-accused"), allegedly deceased, were charged with one count of conspiracy to abet fraud by false pretenses contrary to sections 89(1) and 348 of the Penal Code, Chapter 84 and one count of abetment of fraud by false pretenses contrary to sections 86(1) and 348 of the said Code. The offences are alleged to have been committed between 1 January 2005 and 8 June 2006. On 7 December 2006, the Applicant was arraigned before a Stipendiary and Circuit Magistrate sitting in Magistrate's Court No. 1, Freeport, Grand Bahama.

[3] The allegation of the Respondent is that the Applicant's pharmacy, Personal Touch Pharmacy ("Personal Touch") was used to import counterfeit pharmaceutical products in place of Lipitor, Singulair, Celebrex, Hyzaar and Plavis. The Respondent further alleged that Personal Touch brought these items into Freeport, sold them in Freeport and exported them to patients in the United States.

[4] At the close of the case for the Respondent, the Applicant made a submission of no-case to answer. On 8 June 2011, the learned Magistrate acceded to the Applicant's submission and acquitted her on both charges.

[5] Aggrieved by the decision of the Magistrate, the Respondent filed a Notice of Appeal on 29 June 2011. On 27 March 2014, the Court of Appeal allowed the appeal, quashed the decision of the Magistrate and remitted the matter to the Magistrate Court for a re-hearing *de novo* before a different magistrate.

[6] It is common ground that the then Counsel for the Applicant, Mr. Harvey O. Tynes QC as well as the learned Director of Public Prosecutions ("DPP") wrote to both the Chief and Deputy Chief Magistrate in an attempt to secure a retrial date as soon as possible. On 24 April 2014, the learned DPP wrote to the Chief Magistrate, advising of the decision of the Court of Appeal, enclosing the Notice of Result of Appeal, and humbly requesting that the matter be set down for

hearing as soon as possible. On 15 May 2014, the Applicant, through Mr. Tynes QC, wrote to the Deputy Chief Magistrate and copied to the learned DPP imploring her to secure an urgent date for the retrial of the matter. Mr. Tynes QC wrote another letter on 1 July 2014. On 2 July 2014, the learned DPP again wrote to the Chief Magistrate enquiring on the status of the matter. In addition to the written requests for the matter to be set down for hearing, the Respondent also made oral requests through multiple phone calls with the Chief Magistrate. The most recent oral requests took place during April to June 2016. To date, the requests have fallen on deaf ears.

[7] On 29 September 2015, the Applicant filed an Originating Notice of Motion ("the present motion") supported by an affidavit seeking:

i. A declaration that by reason of the delay in fixing a date for the retrial of the complaint laid against the Applicant there has been a violation of her right to a fair hearing within a reasonable time as guaranteed by the Constitution; and

ii. A declaration that by reason of the said delay, a retrial of the said matter would be an abuse of the process of the court.

**The Preliminary Issue**

[8] At the outset of this hearing, the learned DPP, Mr. Gaskin raised a preliminary issue. He submitted that the present motion is an abuse of the process of the court since other adequate means of redress are available to the Applicant pursuant to Article 28(2) of the Constitution. The proviso to Article 28(2) provides that the Supreme Court shall not exercise its power 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.

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[9] To fortify this argument, the learned DPP relied heavily on the Privy Council decision of **Thakur Persad Jaroo v. Attorney General of Trinidad and Tobago** [2002] UKPC 5 where, at paragraph 29, the Board stated:

**"Nevertheless, it has been made clear more than once by their Lordships' Board that the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy. In *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265, 268, Lord Diplock said with reference to the provisions in the Trinidad and Tobago (Constitution) Order in Council 1962:**

> **"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. <u>The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.</u> In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."** [Emphasis added]

[10] The learned DPP also cited the case of **Hillard Thompson v. The Attorney General** [2013] 1 BHS J. No. 134 [17] – [20], where Hariprashad- Charles J applied the principles in **Jaroo** and stated:

> **"17. In Jaroo, at paragraph 29, the Privy Council reverberated that the right to apply to the High Court under the Constitution should be exercised only in exceptional circumstances where there is a parallel remedy.**
>
> **18. In the present case, I am of the considered view that a parallel remedy is available to the Applicant to enable him to enforce his right to the return of the confiscated money. The appropriate remedy for him to pursue at common law was an action for delivery of property. Furthermore, the Applicant could have applied for an order of mandamus to move the Magistrate Court to re-hear the matter.**
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> **19. At [39] of Jaroo, it is stated:**

> **"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."**
>
> **20. In the end, their Lordships held that the appellant is not entitled to the declaration sought."**

[11] It is the Respondent's position that the Applicant has and had other adequate means of redress available to her, namely by seeking an order of mandamus to move the Chief/Deputy Chief Magistrate to assign the matter pursuant to Order 53, Rule 1(1) of the Rules of the Supreme Court ("RSC") which provides that:

> **"(1) An application for —**
>
> **(a) an order of mandamus, prohibition or certiorari; or**
>
> **(b) an injunction under section 18 of the Act restraining a person from acting in any office in which he is not entitled to act,**
>
> **shall be made by way of an application for judicial review in accordance with the provisions of this Order."**

[12] In short, the Respondent asserts that a mandamus, by way of judicial review, was available to the Applicant and consequently, the present motion is an abuse of the process of the court.

[13] Learned Queen's Counsel Mr. Gomez who appeared for the Applicant succinctly submitted that judicial review is inappropriate in these circumstances having regard to the fact that there is a Court of Appeal order. According to him, the Supreme Court is an inappropriate enforcer of orders of the Court of Appeal unless statute permits it. Mr. Gomez QC also submitted that if that were the case, then **Bell v Director of Public Prosecutions** [1985] 2 All ER 585 would have

not gotten off the ground. He urged the court to apply the reasoning of **Bell v DPP**, the facts of which are not dissimilar to the facts in the present motion.

**Analysis and findings**

[14] The preliminary issue engages the question of whether a person who is charged with a criminal offence and alleges that her constitutional rights have been infringed by an unreasonable delay in bringing her to retrial must bring a mandamus to move the Magistrate Court to hear her case, as advocated by the learned DPP or whether that person can bring a constitutional motion, as submitted by learned Queen's Counsel Mr. Gomez.

[15] A convenient starting point is Article 28(2) of the Constitution which provides that:

> **"The Supreme Court shall have original jurisdiction –**
>
> **(a) to hear and determine any application made by any person in pursuance of paragraph (i) 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 <u>shall</u> not exercise its power 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."**

[16] It is well-established that the fundamental rights jurisdiction of the court is special and exceptional and should only be used in circumstances in which the common law does not provide adequate means of redress. It is a jurisdiction that should be used very sparingly and only in exceptional cases where there is a parallel remedy. See: **Jaroo** [supra]; **Kemrajh Harrikissoon v Attorney General of Trinidad and Tobago** [1980] AC 265; **Chokolingo v Attorney General of Trinidad and Tobago [**1981] 1 WLR 106 at pp. 111-112, **Hinds v The Attorney General** [2001] UKPC 56.

[17] Given that special and exceptional jurisdiction, it is not always straightforward to determine what case is appropriate for relief under the Constitution. In **Urban St. Brice v The Attorney General** SLUHCVAP2012/0027 (unreported) [judgment delivered on 31 October 2016], Webster JA (Ag.) grouped the cases dealing with this issue into three broad categories. According to him, at one extreme are cases like **Harrikissoon** which concerned a teacher who was transferred from one school to another. He sought redress under the Constitution. Clearly, no constitutional right was implicated by these facts. The Privy Council was resolute in stating that constitutional redress could not be used as a substitute for judicial control of administrative action.

[18] The second category of cases is illustrated by **Jaroo**. The appellant filed a constitutional motion seeking relief for infringement of certain of his rights. The Privy Council held that a parallel remedy was available to the appellant to enable him to enforce his right to the return of the vehicle. He could have pursued an action for delivery in detinue. The Privy Council reverberated its salutary warning that the right to apply to the High Court under the Constitution should be exercised only in exceptional circumstances where there is a parallel remedy.

[19] The third category of cases is illustrated by **Bell v DPP**, **Frank Errol Gibson v Attorney General of Barbados** [2010] CCJ 3 and **Director of Public Prosecutions and another v Tokai and others** [1996] UKPC 19.

[20] **Bell v DPP** involved a delay in the retrial of the appellant for illegal possession of a firearm, wounding, shooting with intent, burglary and robbery with aggravation. He brought a constitutional motion under section 25 of the Constitution of Jamaica alleging that his fundamental right to a fair trial within a reasonable time guaranteed by Article 20(1) of the Jamaican constitution (Article 20(1) of the Bahamas Constitution) had been infringed. In allowing the appeal and ordering that his right to a fair hearing within a reasonable time by an impartial court had been contravened, the Privy Council had no difficulty with the

fact that the appellant had applied prior to his retrial by way of a constitutional motion as opposed to waiting for the retrial to address his concerns about the fairness of the trial. Lord Templeman has this to say at page 587:

> **"If the constitutional rights of the appellant had been infringed by failing to try him within a reasonable time, he should not be obliged to prepare for a retrial which must necessarily be convened to take place after an unreasonable time."**

[21] In **Gibson v Attorney General,** a decision of the Caribbean Court of Justice emanating from the Court of Appeal of Barbados, the applicant applied by motion before trial for relief on grounds that his right to a fair trial had been infringed by the failure of the State to provide him with a forensic odontologist at the State's expense and by the unreasonable delay of his trial, both in breach of his right to a fair trial enshrined under section 18(2) of the Constitution of Barbados. On the issue of procedure, Saunders J noted, at paragraph 34 of the unanimous judgment of the Court, that:

> **"Since the Constitution permits him to complain of threatened infringements of his fundamental rights he was not obliged to wait and make this allegation at the trial. In a case like this one, the complaint should ideally be made as early as possible by way of a constitutional application brought in a timely manner."**

[22] In making this observation, Saunders J was dealing with the breach relating to the failure to provide the appellant with the services of an odontologist but he did not suggest that the breach relating to unreasonable delay should have been dealt with by a different procedure.

[23] **Tokai**, a case emanating from Trinidad & Tobago**,** concerns a delay of twelve years in bringing the applicant to trial on a charge of wounding. Unlike The Bahamas, the Constitution of Trinidad and Tobago does not have a specific guarantee of a right to trial within a reasonable time. The right to a fair hearing within a reasonable time in Trinidad & Tobago is guaranteed by the more general right to a fair hearing combined with the common law right to a trial within a reasonable time. Tokai applied by motion for a stay of the trial under the

fair hearing provisions of the constitution on account of the delay. The Privy Council found that there were no exceptional circumstances and the alleged breach could be dealt with by the procedures available to the trial judge at the trial. The Privy Council dismissed the motion. It is obvious that this case did not involve a breach of a specific provision of the Constitution dealing with delay as in **Bell v DPP** and **Gibson v Attorney General**. However, the observations of the Board regarding the difference between the pure constitutional right and the common law right to a trial within a reasonable time are noteworthy of mention. In delivering the advice of the Board, Lord Keith of Kinkel said, at paragraph 16:

> **"Their Lordships consider that the difference between the common law position and that where there is an express constitutional right to trial without undue delay or within a reasonable time is that in the latter case complaint by way of constitutional motion can more readily be regarded as the appropriate remedy."**

[24] In analyzing these cases, Webster JA (Ag.) in **Urban St. Brice** made the following reasoned deductions which I gratefully adopt:

> **(a) "Where there is an alleged breach of a constitutional right but the right is not set out in the Constitution, and the applicant has a parallel right at common law or by statute, the bringing of a constitutional motion is misconceived and will be struck out. *Harrikissoon v Attorney General* is an example of this principle.**
>
> **(b) Where the allegation involves a breach of a specific provision of the Constitution but there is a parallel right at common law the applicant is still expected to challenge the breach at his criminal trial and not by a constitutional motion: *Jaroo v Attorney General*. A constitutional motion is possible for this type of breach if the matter is urgent or otherwise exceptional.**
>
> **(c) <u>Finally, where there is an alleged breach of a specific provision of the Constitution, for example, the right to a fair hearing within a reasonable time in section 8(1) of the Constitution of Saint Lucia and its equivalent in Barbados and Jamaica (and I add The Bahamas), the courts will be more inclined to allow a constitutional motion to proceed because the applicant should not have to prepare for a trial, or retrial, that will take place after an unreasonable delay</u>…."**[Emphasis added]

[25] In my considered opinion, the present motion falls squarely under reasoning (c) above; essentially, that where there is an alleged breach of a specific provision of the Constitution, for example, the right to a fair hearing within a reasonable time, as is the allegation in the present motion, the courts will be more inclined to allow a constitutional motion to proceed because the Applicant should not have to prepare for a retrial that will take place after an unreasonable delay.

[26] In the present motion, the undisputed facts are that the Applicant was discharged by the presiding magistrate on 8 June 2011. The Respondent appealed. On 27 March 2014, the Court of Appeal allowed the appeal, quashed the decision of the Magistrate and remitted the matter to the Magistrate Court to be heard *de novo* before a different Magistrate. Counsel for the Applicant as well as Counsel for the Respondent wrote to both the Chief/Deputy Chief Magistrate in an attempt to secure a date for the retrial of the matter. In fact, learned Counsel for the Respondent followed up his correspondence by telephone calls up to June 2016. To date, no date has been fixed for the retrial.

[27] Against this backdrop, the Respondent submitted that the Applicant should have brought judicial review proceedings since a mandamus was an adequate alternative means of redress in these circumstances. The Respondent relied heavily on the case of **Hillard Thompson** where I stated that furthermore, the Applicant could have applied for an order of mandamus to move the Magistrate Court to re-hear the matter.

[28] It is my firm view that the facts of **Hillard Thompson** are distinguishable from the facts in the present motion. Mr. Thompson made no efforts to bring the matter to a rehearing. His sole complaint was one of delay in the rehearing of his matter. No prejudice or other circumstance was alleged. In addition, he could have pursued an action for delivery of property, a common law remedy. In the present motion, the Applicant has no such common law remedy.

[29] The further question here is whether a mandamus is an **adequate** alternate means of redress? I am convinced that if an order of the Court of Appeal (a Superior Court); two letters from a learned Queen's Counsel, two letters from the Learned DPP coupled with numerous telephone calls were not convincing enough to move the Chief/ Deputy Chief Magistrate to act, a mandamus from this court would receive the same outcome. Furthermore, the mere existence of an alternative remedy does not automatically warrant excluding constitutional proceedings under the proviso to Article 28(2). The crux is its adequacy. The power to decline jurisdiction arises only where the alternate means of redress is considered to be adequate.

[30] In the circumstances, I find that the bringing of this constitutional motion is not an abuse of the process as no parallel adequate remedy is/was available to the Applicant.

**The present motion**

**The law**

[31] On 29 September 2015, the Applicant filed the present motion with supporting affidavit seeking redress for breach of her right to a fair trial within a reasonable time as enshrined in Articles 20(1) and 28(2) of the Constitution. Article 20(1) provides as follows:

> **"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."**[Emphasis added]

[32] Put another way, the Constitution entrenches the right for criminal offences to be heard fairly and within a reasonable time before an independent and impartial court.

[33] Article 28 (2) gives the Supreme Court original jurisdiction to try breaches of the Constitution. The proviso mandates the Supreme Court to refuse to exercise its

power where adequate alternate means of redress are available to an accused person under any other law.

[34] In determining whether there has been a breach of Article 20(1), the court must consider four main factors extrapolated from the Privy Council case of **Bell v DPP** applying guidance derived from **Barker v Wingo** (1972) 407 US 514.

[35] In **Bell v DPP**, in giving the advice of the Board, Lord Templeman had this to say (at pages 590 – 591):

> **"Their Lordships agree with the respondents that the three elements of s. 20, namely a fair hearing within a reasonable time by an independent and impartial court established by law, form part of one embracing form of protection afforded to the individual. The longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial. But the court may nevertheless be satisfied that the rights of the accused provided by s 20(1) have been infringed although he is unable to point to any specific prejudice.**
>
> **The question then is whether in the circumstances of the present case the appellant's right to 'a fair hearing within a reasonable time' has been infringed.**
>
> **Some guidance is provided by the judgments of the Supreme Court of the United States in *Barker v Wingo* (1972) 407 US 514. The sixth amendment to the Constitution of the United States provides:**
>
> > **'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury .... '**
>
> **Powell J pointed out (at 521-522):**
>
> > **'... the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate ... The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that the defendant who may be guilty of a serious crime will go free, without having been tried.'**
>
> **Powell J then identified four factors which in his view the court should assess in determining whether a particular defendant has been deprived of his right.**

**(1) Length of delay (at 530-531):**

> **'Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.'**

**In the present case it cannot be denied that the length of time which has elapsed since the appellant was arrested is at any rate presumptively prejudicial.**

**(2) The reasons given by the prosecution to justify the delay (at 531):**

> **'A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.'**

**In the present case part of the delay after arrest was due to overcrowded courts, part to negligence by the authorities, and part to the unavailability of witnesses.**

**(3) The responsibility of the accused for asserting his rights (at 531):**

> **'Whether, and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain.'**

**Their Lordships do not consider this factor can have any weight in the present case. The appellant and his counsel no doubt took the view that strenuous opposition to an application sought by the prosecution from time to time for an adjournment or an appeal from an order granting an adjournment would be a waste of time. The appellant's complaint is that he was discharged and told to go free and was subsequently in 1982 rearrested for an offence for which he had first been arrested in 1977. The appellant raised that complaint as soon as he was rearrested.**

**(4) Prejudice to the accused (at 532):**

> **'Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent**

> **oppressive pretrial incarceration (ii) to minimize anxiety and concern of the accused and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last ... If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory however, is not always reflected in the record because what has been forgotten can rarely be shown.'**
>
> **The appellant did not allege the death or disappearance of a witness. Where, as in Jamaica, for a variety of reasons, there are in many cases extensive periods of delay between arrest and trial, the possibility of loss of memory, which may prejudice the prosecution as much as the defence, must be accepted if criminals are not to escape. Nevertheless, in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed, the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the eventual date of retrial cannot be left out of account. The fact that the appellant in the present case did not lead evidence of specific prejudice does not mean that the possibility of prejudice should be wholly discounted.**
>
> **The four factors considered relevant in *Barker v Wingo* to the constitutional right to a speedy trial were reproduced and adopted by McDonald J sitting in the Alberta Queen's Bench Court in *R v Cameron* [1982] 6 WWR 270. In that case the applicant alleged infringement of the right granted by s 11 of the Canadian Charter of Rights and Freedoms in Pt I of the Constitution Act 1982 to 'Any person charged with an offence ... *(b)* to be tried within a reasonable time.'**
>
> **Their Lordships acknowledge the relevance and importance of the four factors lucidly expanded and comprehensively discussed in *Barker v Wingo*. Their Lordships also acknowledge the desirability of applying the same or similar criteria to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case.**
>
> **Their Lordships accept the submission of the respondents that, in giving effect to the rights granted by ss 13 and 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time."**

[36] The Board decided that although section 20(1) of the Jamaican Constitution (same as Article 20(1) of the Bahamas Constitution) expressly conferred on a person charged with a criminal offence the right to a fair hearing within a reasonable time by an independent and impartial court established by law, and

that such right could be infringed without proof of specific prejudice, in deciding whether an applicant's right to a fair trial has been infringed, the following factors ought to be taken into account:

1) the length of delay;
2) the justification put forward by the prosecution for the delay;
3) the responsibility of the Applicant to assert her rights; and
4) any prejudice to the Applicant.

**Discussion and analysis**

**Length of delay**

[37] It is common ground that the offences with which the Applicant and her co-accused are alleged to have committed occurred between 1 January 2005 and 8 June 2006. The summary trial commenced on 17 March 2008 and ended on 8 June 2011. The Respondent appealed. The first hearing of the appeal of the decision of the Magistrate commenced on 8 July 2013 and the decision of the Court of Appeal was given on 27 March 2014.

[38] The Applicant submitted that there has been an 8-year delay in the prosecution of this matter from the date the complaint was laid to the date in which the Court of Appeal quashed the decision of the learned Magistrate and ordered a retrial. Furthermore, an additional 3 years have elapsed since the Order of the Court of Appeal. In the aggregate, there has been an 11-year delay in proceedings. Such a delay, says Mr. Gomez QC is presumptively prejudicial.

[39] The learned DPP submitted that delay by itself cannot be said to amount to a breach of the constitutional guarantee of a hearing within a reasonable time. He relied on the case of **Stephen Ronel Stubbs v The Attorney General** SCCrApp No. 153 of 2013. In dealing with the issue of delay, the Court of Appeal, at paragraph 18, quoted from **Barker v Wingo** (supra) where Powell J pointed out at page 522:

> "
>
> **"... the right to a speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision**

**when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate."**

[40] Further, in **Prakash Boolell v The State (Mauritius)** [2006] UKPC 46, the Board, at paragraph 32, stated the following regarding delay under section 10(1) of its Constitution (same as section 20(1) of the Bahamas Constitution):

> **"(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.**
>
> **(ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all."**

[41] At paragraph 36, the Board stated that it is necessary to consider an amalgam of factors before reaching a conclusion on the reasonableness of the time taken to complete a trial. So, in order to determine whether there has been a breach of a person's constitutional rights, the court is obliged to look at the whole picture and on a case to case basis.

**Reasons for delay**

[42] The Respondent advanced no reason for the delay. The Applicant asserted that the delay in setting the matter down for a retrial was not due to the actions of the Applicant or her co-accused, but was due to the negligence of the government to fix a trial date despite numerous efforts of both parties to do so.

[43] In the present motion, no reason has been given for the delay as the both the Chief/Deputy Chief Magistrate are uncommunicative. This is mind-boggling especially since the learned DPP himself had written and/or telephoned the Chief Magistrate. Such silence does not portend well for the Magistracy. In a fledgling democracy such as The Bahamas, magistrates and judges must forever be vigilant less we fail to detect the subtlety that sometimes slowly emasculates the administration of justice.

**Responsibility of the Applicant for asserting her rights**

[44] The Applicant, through her counsel, contacted the Magistrate Court after the Court of Appeal remitted the matter for a retrial on 27 March 2014, in an effort to have the matter set down for trial. The period of time that has elapsed since that date and this present motion is three years. The learned DPP maintained that the Applicant has not crossed the threshold of proving a breach of the reasonable time requirement in all the circumstances.

[45] In **Bell v DPP**, their Lordships had to address this same point. At page 593, the Board said:

> **"The accused having been arrested, detained and submitted to a defective trial and conviction had, through no fault of his own, endured two wasted years and must for a second time prepare to undergo a trial. In these circumstances there was an urgency about the retrial which did not apply to the first trial. A period of delay which might be reasonable as between arrest and trial is not necessarily reasonable between an order for retrial and the retrial itself. Far from recognizing any urgency, the Full Court excused delay which occurred after March 1979 on the ground that it was partly due, in their words, to 'bureaucratic bungling'."** [Emphasis added]

[46] The same can be said here. Three years have elapsed since the remittal of the matter to the Magistrate Court and to date a retrial date has not been fixed. In **Bell v DPP**, a reason was given for the delay. In this case, to date, no reason has been proffered for the delay. In my opinion, the Applicant had done all that she could reasonably be expected to do. In addition, there is no evidence to demonstrate that she caused or contributed to the delay.

**Prejudice to the Applicant, if there is a finding that the alleged right has been breached**

[47] The Applicant alleged that she has suffered a grave and genuine prejudice as her co-accused who was a potential witness has since died. She next asserted that, due to the delay, any potential witness whom she may wish to call at her trial would be severely hampered in accurately recalling events which occurred eleven years ago.

[48] The Applicant further alleged that she has been employed by the Public Hospitals Authority as a pharmacist at the Rand Memorial Hospital since March 2011 and she is deeply concerned that she is at the risk of being interdicted by her employer so long as these charges remain outstanding against her.

[49] The learned DPP asserted that despite the long passage of time and the reticence of the Chief/Deputy Chief Magistrate, a fair trial could still ensue and the Applicant would not be prejudiced.

[50] He next submitted that there is no evidence that her co-accused is deceased and, even if he was not deceased, the co-accused cannot be a potential witness for the Applicant. Mr. Gaskin cited section 171(a) of the Evidence Act which deals with competency of witnesses in criminal cases. The section in effect provides that where a person is charged solely or jointly with any other person, the person so charged **shall** not be called as a witness except upon his own application. These are sound submissions and I agree with them.

[51] In any event, says the learned DPP, it cannot be disputed that during the actual hearing in the Magistrate Court in 2011, a warrant of arrest was issued for the co-accused. So even before the Magistrate's decision, he had absconded himself.

[52] On the issue of prejudice, the learned DPP relied on **Prakash Boolell** where the Board, at paragraph 30, quoting the House of Lords decision of **Attorney General's Reference (No. 2 of 2001)** [2003] UKHL 68, stated:

> **"The House sat in an Appellate Committee of nine members and decided by a majority that although through the lapse of time in itself there was a breach of article 6(1), <u>the appropriate remedy would not necessarily be a stay but would depend on all the circumstances of the case.</u> Lord Bingham of Cornhill, who gave the leading opinion for the majority, set out as two of the fundamental first principles applying to article 6(1), that (a) the core right guaranteed by the article is to a fair trial (para 10) and (b) the article creates rights which though related are separate and distinct (para 12)."** [Emphasis added]

[53] Further at paragraph 31, the Board, quoting paragraphs 24 and 25 of the said **Attorney General's Reference** stated:

> **"If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time."**

[54] Additionally, in the Court of Appeal (UK) decision of **Attorney General's Reference (No. 1 of 1990)** [1992] 3 All ER 169 at page 176, the Court 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 properly be described as serious, the following matters should be borne in mind. First, the power of the judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence secondly, 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."** [Emphasis added]

[55] Mr. Gomez QC submitted that inordinate delay in criminal proceedings can lead to an abuse of the court's process. He submitted that pursuant to Order 18 Rule

19(1) of the RSC, the court may at any stage of the proceedings strike out the entire case.

[56] Learned Queen's Counsel further submitted that the criteria which the court has to consider when determining whether to strike out an action for an abuse process was considered in the case of **R v. Derby Justices, ex parte Brooks** (1948) 148 JP 609 which was referred to by Lord Justice Watkins in **R v Bow Street Stipendiary Magistrate ex parte Director of Public Prosecutions; R v Bow Street Stipendiary Magistrate ex parte Cherry** (1989) 154 JP 237 (at page 10):

> **"The effect of these cases can be summarized this way. The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been or will be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution is unjustifiable: for example, not due to the complexity of the inquiry an preparation of the prosecution's case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service. We doubt whether the other epithets which are sometimes used in relation to delay such as 'unconscionable', 'inordinate', or 'oppressive', do more than add an emotive tone to an already sufficiently difficult problem."**

[57] Mr. Gomez QC next submitted that in order to strike out an action based on delay, it must be demonstrated that the delay complained of has produced a genuine prejudice. In **R v Bow Street Stipendiary Magistrate ex parte Director of Public Prosecutions** [supra], Lord Justice Watkins at page 11 of his judgment stated:

> **"Obviously what has to be demonstrated to the Court is that the delay complained of has produced genuine prejudice and unfairness. In some circumstances as the cases show, Mr. Lawson referred to them in his skeleton argument, prejudice will be presumed from substantial delay. Where that is so it will be for the prosecution to rebut, if it can, the presumption."**

[58] In the case at bar, in determining whether the constitutional right of the Applicant to a fair hearing within a reasonable time has been infringed, the prejudice

inevitable in the lapse of approximately eleven years from the date of the Applicant's arraignment to the present motion cannot be left out of the picture. Thus, on a balance of probabilities, I find that not only had there been an unjustifiable and inordinate delay in the retrial of this matter but no reason has been given for the delay. In addition, the Applicant is likely to suffer grave and genuine prejudice since the memories of her potential witnesses are likely to fade away with every day that passes by. Thus, she will be seriously prejudiced in the preparation of her defence. In addition, there is no evidence that she and/or her co-accused caused or contributed to the delay. Coupled with this, the burden of uncertainty continues to hang over her head.

[59] For all of these reasons, I find that there has been a breach of the Applicant's right to a fair trial within a reasonable time as enshrined in Article 20 (1) of the Constitution.

**The appropriate remedy**

[60] The case does not end here. The learned DPP submitted that the appropriate remedy is for the court to order that the retrial be heard as soon as practicable. I would add that, implicit in the Order of the Court of Appeal, was this very notion.

[61] To fortify his point, Mr. Gaskin referred to **Attorney General's Reference (No. 1 of 1990)** [supra]. The Court stated at page 176:

> **"In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay."**

[62] Furthermore, in **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26, the Board stated at paragraph 28:

> **"The Board would affirm that the law as stated in the Attorney General's Reference case, [2004] 2 AC 72 and as summarised in *Boolell*, represents also the law of Jamaica. Although those judgments were not directed**

> **specifically at the effect of delay pending appeal, the same approach applies. It follows that even extreme delay between conviction and appeal, in itself, will not justify the quashing of a conviction which is otherwise sound. Such a remedy should only be considered in a case where the delay might cause substantive prejudice, for example in an appeal involving fresh evidence whose probative value might be affected by the passage of time."**

[63] Additionally, in **Stephen Ronel Stubbs** [supra], the Court of Appeal quoted the House of Lords decision of **Attorney General's Reference (No. 2 of 2001)** at paragraph 25, where Lord Bingham stated:

> **"The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawful and executive manipulation of the kind classically illustrated by *R v Horseferry Road Magistrates' Court, Ex P Bennett* [1994] 1 AC 42, … There may well be cases (of which *Darmalingum v The State* [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (*Martin v Tauranga District Court* [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognizable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right."**

[64] The Court of Appeal, at paragraph 38 continued:

> **"In addition to the exceptional circumstances mentioned above, I am of the view that any adjudicating body considering the grant of a permanent stay as a remedy for an alleged breach of Article 20(1) of the Bahamian Constitution must take into consideration 1. The period of time which has elapsed in the matter 2. The complexity of the case 3. The nature and extent of any delay instituted by the defendant and 4. The manner in which the case has been handled by the prosecuting, administrative and judicial authorities. These factors combined with the existence of any exceptional circumstances will determine whether the grant of a permanent stay is appropriate in the circumstances of a case."**

[65] In this instant case, the Court of Appeal, after hearing submissions from both sides on whether the Magistrate's decision to dismiss the proceedings should be upheld, held that the matter should be remitted to the Magistrate's Court for a retrial. I agree with the learned DPP that in allowing the appeal, the Court of Appeal opined that the case had some merit which requires a retrial. I also agree

with the learned DPP that it can be reasonably inferred that the Court of Appeal held the view that it is still possible for this matter to have a fair hearing. I believe that when the Court of Appeal remitted the matter to the Magistrate Court, it never contemplated that 3 years later, this matter will still be pending before the Magistrate Court without even the assignment of a trial date.

**Conclusion**

[66] A person's right to be afforded a fair hearing within a reasonable time by an independent and impartial tribunal is enshrined in Article 20(1) of the Constitution. In the landmark case of **Bell v DPP,** Lord Templeman, in delivering the judgment of the Board, reasoned that the right to a fair hearing within a reasonable time is not an absolute right and the court must balance it against public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions.

[67] Thus, a court considering the right to a fair trial within a reasonable time is not constrained in the ambit of its considerations and it must apply a weighing process. In other words, there should be a subjective balancing of several factors, on a case by case basis: **Dyer v Watson** [2002] 3 WLR 1488 per Lord Bingham at 1508. It should include as part of its consideration the length of delay, reasons for the delay, the responsibility of the accused for asserting her rights and any prejudice suffered.

[68] The Court of Appeal in **Stephen Ronel Stubbs** re-stated these factors and held that any adjudicating body, considering as a remedy for an alleged breach of Article 20(1) of the Constitution, the grant of a permanent stay, must consider, in addition to the existence of exceptional circumstances, the following: (1) the period of time which has elapsed in this matter; (2) the complexity of the case; (3) the nature and extent of the delay caused by the Applicant and (4) the manner in which the case has been handled by the prosecuting, administrative and judicial authorities.

[69] The court has a discretionary power to stay criminal proceedings if it finds that to continue them would amount to an abuse of the process. In **Stephen Ronel Stubbs**, the Court of Appeal held that a permanent stay is not the normal remedy when delay has resulted in a breach of an individual's constitutional right. Where the applicant seeks a permanent stay the burden is on him to establish, on a balance of probabilities, that as a result of the excessive delay he cannot receive a fair hearing. Further, permanent stays imposed on the ground of delay should only be employed in exceptional circumstances.

[70] In my deliberations, I have considered all of the factors identified in the above mentioned cases. Having considered the facts and the guiding legal principles, it is my judgment that the Applicant has satisfied this court that her right, though not absolute, to a fair trial within a reasonable time before an independent and impartial court has been infringed. She has also adduced sufficient evidence to satisfy the requirement of exceptional circumstance, namely the serious prejudice caused not only by the delay but the lurking unpredictable state of when her retrial will take place. No accused person should be placed in such a state of uncertainty.

[71] In **Connelly v DPP** [1964] AC 124, it was highlighted that the courts have an inescapable duty to secure the fair treatment for those who come or are brought before them. Omerod J in **R v Derby Crown Court, ex parte Brooks** [1984] 80 Cr App Rep 164, 169 said:

> **"The ultimate objective of this discretionary power (to stay proceedings) is to ensure that there should be a fair trial according to law which involves fairness both to the defendant and the prosecution, for, as Lord Diplock said in *R v Sang (1979) 60 Cr. App Rep 282 at page 290* "the fairness of trial… is not all one sided; it required that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted."**

[72] Undoubtedly, the interest of society in bringing offenders to justice must be measured against the need to protect the citizen from the invasion of his fundamental rights.

[73] For all of these reasons, I will permanently stay the criminal proceedings which are before the Magistrate Court in Freeport, Grand Bahama.

[74] Last but not least, I am grateful to Mr. Gomez QC and the learned DPP Mr. Gaskin for their industry and immeasurable assistance to the court.

**Dated 28th day of September, A.D., 2017**

**Indra H. Charles**
**JUSTICE**