COMMONWEALTH OF THE BAHAMAS **2017**

IN THE SUPREME COURT **CRI/con/00061/**

CRIMINAL DIVISION

CONSTITUTIONAL SIDE

IN THE MATTER of an Application pursuant to Article 20(1) of the Constitution of the Commonwealth of The Bahamas

AND

IN THE MATTER OF an Application by MCKEEL MUSGROVE

BETWEEN

MCKEEL MUSGROVE

Applicant

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: **The Honourable Madam Justice Mrs. Cheryl Grant-Thompson**

Appearances: **Mr. Calvin Seymour- Counsel for the Applicant**

Mrs. Cephia Pinder-Moss- Counsel for the Respondent

Date of Hearing: **3 December, 2019; 20 March, 2020; 2 December, 2020.**

DECISION ON CONSTITUTIONAL APPLICATION

APPLICATION TO STAY THE PROSECUTION

GRANT-THOMPSON J

1. The Applicant claims that:

a) He failed to receive a fair trial within a reasonable time and that there has been "unreasonable delay" and seeks a Declaration in the result.

b) The Notice of Motion dated 24th October, 2017 should be granted, wherein the Applicant prayed for the following relief:

I. A Declaration that the Applicant has not been afforded a fair hearing within a reasonable time in contravention of Article 20 (1) of the Constitution of The Bahamas;

II. A Declaration that the Applicant cannot now be afforded a fair hearing in breach of Article 20 (1) of the Constitution;

III. An order staying the criminal prosecution against the Applicant;

IV. That the further prosecution of the Applicant is an abuse of the process of the Court and that the counts in the indictment are improperly before the Court.

2. BACKGROUND

A Constitutional Motion and supporting Affidavit were formalized and filed on behalf of the Applicant on the 24th October, 2017.

3. The basis of the Applicants Constitutional Motion are:

i. That there has been a breach of his rights to a fair trial within a reasonable time on the charges of Possession of a Firearm with Intent to Endanger Life, contrary to Section 33 Firearms Act, Chapter 213); Possession of an Unlicensed Firearm, contrary to Section 5 (1)(a) Firearms Act, and Damage, contrary to Section 328 (1) Penal Code, Chapter 84;

ii. That these counts are improperly before the Supreme Court; and

iii. His guaranteed rights under Article 20 have been breached; Ten (10) years have passed since he was arrested on the 7th day of August A.D., 2011 and charged with these offences. In the result he is prejudiced as he can no longer locate his witnesses and that he is no way responsible for the delay.

4. DELAY & FAIR TRIAL WITHIN A REASONABLE TIME

In **Bell v DPP[1985]1** AC the four (4) issues for the Court to consider have been set out by the Privy Council as outlined in the case of **Barker v Wingo 919720 US 514:**

> *"…the authorities are quite clear on the approach the Courts must take in an enquiry the Courts must take. There must be sought an element of what is described as presumptive prejudice, not necessarily actual, and which is caused by an infringement on the right to a fair trial within a reasonable time. The Court must have regard to length of delay, the reasons given by the prosecution for the delay, efforts made by the accused to assert his right and finally the prejudice to the Applicant."*
>
> The Applicant alleges that since the 7 August, 2011 to the present date, more than ten (10) years have elapsed without him being tried for the alleged offences, Possession of a Firearm with Intent to Endanger Life, contrary to Section 33 Firearms Act, Chapter 213); Possession of an Unlicensed Firearm, contrary to Section 5 (1)(a) Firearms Act, and Damage, contrary to Section 328 (1) Penal Code,

Chapter 84; and that he is not responsible and "he does not believe that any reasonable reason exists for the delay."

5. <u>BRIEF HISTORY OF CRIMINAL PROCEEDINGS</u> in the case:

i. The Appellant was arrested on 7 August, 2011 and charged on the 10 August, 2011;

ii. He was born on the 4 April 1994, a Bahamian citizen who was seventeen (17) years old when arrested and charged for these offences;

iii. The case was set for Preliminary Inquiry in the Magistrate Court #9 on the 15th August, 2011. The Preliminary Inquiry was adjourned and the Applicant was re-arraigned before the Learned Chief Magistrate and not required to enter a plea- no election was put to him;

iv. Summoned to appear before His Lordship the then Senior Justice Jon Isaacs by this indictment on the 4th May, 2012- he pleaded Not Guilty at the arraignment;

v. The Voluntary Bill of Indictment was served on the 17th January, 2012 and filed the day before;

vi. The Applicant was arraigned in the Supreme Court.

vii. The trial date was set for the 23 March, 2015 but did not proceed as another matter was ongoing;

viii. 31 March, 2015 the matter was transferred to my Court;

ix. On the 13 April, 2015, trial was set by this Honourable Court for 1 June, 2015. Counsel for the Applicant advised that date was not convenient and proposed the 4 May, 2015 in the alternative;

x. 15 October, 2015, then again on the 21 March 2016 was set as the new trial date. However, the Applicant's Counsel advised he was unavailable the week of the 28 March, 2016 and also on the 16/17 March 2016; and

xi. A new trial date was set for the 21 August, 2017. However, on this occasion the trial could not proceed as the Court was sitting relative to another matter at that time.

WHAT IS A REASONABLE TIME

6. Although the Constitution does not stipulate what constitutes **'a reasonable time'**, the **Bail (Amendment) Act 2011, Section (2)(a) and (b),** provides a guidance as to what Parliament considered to be a reasonable time as provided therein , a period of three (3) years was deemed reasonable. The Applicant avers that the delay was not caused by anything done by him, but rather by the failure of the prosecution to prosecute the matter within a reasonable time as guaranteed by Article 20 (1) of the Constitution. The Appellant submitted that this period of delay has resulted in severe prejudice to him, and him having a fair trial. The Prosecution countered and submitted that the majority of the pre-trial delay can be laid at the feet of the Applicant and that he has woefully failed to assert his rights to a fair trial in a reasonable time. A statement with which I agree.

7. In **Mervin Smith v Attorney General** the Court at paragraph 7 on the issue of delay, referenced **Barker v Wingo**:

> ***"…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 a 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."

PREJUDICE/PERSONAL CIRCUMSTANCES/FAMILY/WORK/INCARCERATION

8. The breach of the Applicant's Article 20(1) rights has prejudiced him he claimed in the ways as averred in his Affidavit:

The Applicant relies on the fourth factor identified in **Baker v Wingo**:

"…Prejudice, of course, should be assessed in the light of the interests of defendants whom 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, because the inability of a defendant adequately to prepare his case shows the fairness of the entire system. 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 Applicant asserts that he was most prejudicially lost the opportunity to have intended witnesses for his defence in the trial because they nor he, nor his mom can any longer accurately recall the abuse leading to the confession, he was very young and his mom was elderly. The prejudice is obvious, serious and denies the Appellant his fundamental right of a fair trial; the cornerstone of justice in a criminal trial.

9. In reaching a decision on the Applicant's constitutional motion, the Court must balance the fundamental right of the individual to a fair trial within 'a reasonable time' against the public interest in the attainment of justice. In **Mervin Smith v Attorney General, paragraph 21**, the Court referred to the dicta of Thorne, J in **R v Craig Nigel Higgs and Everett Russell** in considering a delay of some four years:

> ***"…I am satisfied that the delay in this case was longer than can be justified, particularly in light of the causes of the delay…and in referencing the Askov's case therein further stated,***
>
> ***"…lengthy and avoidable delay caused entirely by the Crown's sloppiness or inattention or by unjustified delays in the legal system will frequently entitle an accused to the benefit of Section 11 (b)…"***
>
> ***There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity***

of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time."

10. Justice in the case demands that this Honourable Court balance the right of the Applicant to a fair trial within a reasonable time against the right of society to ensure that those who may have committed offences are called to account for their actions. The operative period of delay in bringing the case to trial has been long, but affected by a number of matters. The charge is serious although I accept this is not a complex case involving a large number of witnesses and evidential issues; the Crown has provided some explanation and justification for the delay. However, I am concerned that the delay complained of by the Applicant may have caused him some prejudice. He was young and may not have been able to adequately instruct Counsel. The accused has not provided medical evidence to support his claims. However, I take judicial note of his age at the time of arrest and the protections that ought to be afforded to him.

11. ISSUES TO BE TRIED

i. Whether a trial of the Applicant, at this time, would amount to a violation of his right to a fair trial within a reasonable time, pursuant to Article 20(1) of the Constitution of The Bahamas is the issue here. In my view the Article 20 rights have been breached to the extent that the length of time he has awaited trial in my view is not reasonable.

ii. Was he afforded the relevant protections as a young offender;

iii. Were the charges correctly framed; and

iv. Has he been prejudiced by the delay?

GENERAL SUBMISSIONS OF THE APPLICANT

12. The Applicant respectfully submitted that the constitutional issue seeks a Declaration that by reason of delay the Respondent has violated their right to hearing within a reasonable time- a right guaranteed by Article 20(1) of the Constitution which holds:

> ***"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."***

13. As a result of paragraph 1 above, the prosecution of this trial should be stayed. This redress stems from the breach of the Applicant's constitutional right under Article 28 (1) of the Constitution which holds:

> ***"If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is been of 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."

THE CASE FOR THE RESPONDENT

14. Where the Applicant alleges that there has been unreasonable delay in the prosecution of his case, the prosecution is required to explain the reason for the delay. In determining this factor, the commencement of the period to be taken into account must be determined.

15. In the case of ***A.G. Reference (No. 2 of 2001) [2004] 2 AC, pp 90-91, paragraph 26 [TAB]*** it highlighted the Court's judgment in the case of **Eckle v Federal Republic of Germany 5 EHRR I, 27 paragraph 73** that the relevant period commences, *"as soon as person is charged; this may occur on a date prior to the case coming before the trial Court, such as the date of arrest, or the date when the person concerned was officially notified that he would be prosecuted (served with a summons as a result of an information being laid)."* The Respondent claimed the Applicant was principally responsible for the trial delay. Prior to that the delay was the fault of neither party but rather can be credited to the extingencies of the system.

16. The Crown submitted the Applicant should take reasonable steps to locate his plethora of unnamed witnesses. That the Applicant should substantiate the memory loss claims with medical evidence, and should he need to he can adequately and properly refresh his memory from the recorded evidence of the incident contained in the served VBI Bundle to assist him in his trial preparation. In **Carlton Bedminster and Careem Bedminster v DPP and AG, No. ANUHCV 2007/0423**

Eastern Caribbean (Antigua and Bermuda) Harns J said this, *"Although the Applicant in their affidavit allege prejudice, no evidence of specific prejudice was lead. I accept that where the prejudice alleged is that of "fading memories" and by virtue of that type of prejudice alleged, one would hardly be able to recall matters out of the reach of "fading memories."* However, although there is no evidence of whose memory might have faded, what type of evidence might have been lost and how has not been led, it does not rule out the possibility of prejudice to the claimants. Moreover, in the circumstances of this case I find that I am unable to infer nor does the law require me to impute any prejudice resulting merely from the length of time passing between the commission of the offence and trial.

17. The Respondent is holding that although the length of the delay was long, it was not an inordinate delay. The Applicant since his committal has been released on bail. In assessing the totality of the progress of this matter it was submitted that the period was not unreasonable in this jurisdiction in light of the number of matters before the Courts to be dealt with.

18. HAS ACCUSED ASSERTED HIS RIGHTS

The responsibility of the accused for asserting his rights: Powell J considered in the case of ***Baker v Wingo***, at page 531 that:

> ***"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.***

> ***The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."***

The Respondent claims they have not asserted their rights hence they were not responsible for a lot of the delay.

19. Prejudice to the Accused: The Respondent insists that notwithstanding that the Applicant avers that the delay is prejudicial to him; he has not put before the Court how the delay is prejudicial to him. In the case of ***A.G. Reference No. 1 of 1999 [1992] QB 630[TAB 4],*** the Court held that the Applicant must show on a balance of probabilities that owing to the delay he will suffer some prejudice. This was further noted in the case of ***Bell v D.P.P, page 942***, that it is for the Applicant to advance any circumstances as a result of the delay which might prejudice his defence if he were to be tried.

20. The Applicant avers that he was in fact prejudiced because his unnamed witnesses are no longer available, or may not recall or he may not recall them. Therefore, he cannot have a fair trial. The Respondent contends that the Applicant can have a fair trial despite the alleged loss of his witnesses. The Applicant never gave notice to the Respondent at his arraignment or any case management hearings of his intention to call these or any other witnesses on his behalf. It was submitted. I am concerned why the Applicant did not at the first opportunity, state he had these relevant witnesses.

21. It was submitted that should the Court find that the ten (10) year period waiting trial amounts to an inordinate delay, staying the matter, if this is remedy that the Applicant is seeking, would not be the appropriate remedy. According, to Justice John, JA in the Bahamas Court of Appeal decision of **Stephen Ronel Stubbs and The Attorney General SCCrApp No. 153 of 2013**, page 24, paragraph 38[TAB5], he noted that a Court in considering the grant of a permanent stay as a remedy for an alleged breach of the Article 20(1) of The Bahamas Constitution, must consider:

> ***"(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."***

22. However, it was agreed by Lord Carswell in the case of **Prakash v Boolell PC App. No. 39 of 2005) page 12-13 paragraph 31[TAB6]** by Lord Bingham in the case of A.G's reference No. 2 of 2001 [2003] UKHL 68 that even where there was a breach of an Applicant's rights under the Constitution, the appropriate remedy would not be to stay the proceedings as this arises in only exceptional circumstances. In fact it followed the positions that even where there is an extreme delay, which in itself would not justify the remedy. Such a remedy should only be considered where the delay might cause a substantive prejudice. This position was upheld Court of Appeal case of **Stephen Stubbs v The Attorney General**. I agree with this position by the Crown. I also note that no notice of the proposed witnesses was given to them. However, these are not alibi witnesses where notice is required in law but rather these are defense witnesses. As it currently stands in our criminal law the DPP must disclose his witnesses but there is no similar

requirement on the defense. But it was never raised in previous hearings before now.

23. This position was upheld in the case of ***A.G. Reference No. 1 of 1990[1992] QB 630, page 631*** where it was stated that:

> ***"where even delay could be said to be unjustifiable, the imposition of a permanent stay was to the exception rather than the rule; and that even more rarely could a stay properly be imposed in the absence of fault on the part of the complaint or the prosecution and never where the delay was due to merely the complexity of the case or contributed to by the defendant's actions."***

It was submitted that there was no danger of the trial of the Applicant being unfair. It must always be remembered that permanent stays imposed on the ground of delay should only be employed in exceptional circumstances. However, in my view the Applicant has provided the Court with exceptional circumstances to justify a permanent stay. Therefore, I will allow his application. He was a juvenile. He would not have been aware of a lot of these rights and protection as well as his elderly relatives to sit in or the interview. He cannot be held responsible for what I find to be a failure of his Counsel to seek to set to keep dates for his trial. He is a different man now than he was then.

24. Having regard to the Privy Council decision on The Attorney General v Hall, Privy Council Appeal No. 0033 of 2016, the Respondent contends that, given the date of offence (namely 7 August, 2011), the charge in relation to the offence of Possession of a Firearm by means thereof to endanger life, contrary to Section 33 of the Firearms Act, Chapter 213, was proper. Further, the Respondent also

contends that the third count of Damage, contrary to Section 328(1) of the Penal Code, Chapter 84, is also properly laid before this Honourable Court.

25. Conversely, given the wording of Section 5(a) of the Firearms Act, the Respondent concedes that this count falls within the range of offences affected by the aforementioned decision of the Privy Council in Hall and, as such, is a nullity. Accordingly, having regard to the said decision, particularly at paragraph 30 of the said judgment, it is the submission of the Respondent that, with a defective committal order in respect of the second count, the proper procedure would be for this Honourble Court, who has the jurisdiction not to hear the count on the indictment itself, but certainly to make the determination as to what happens to the said count on the indictment. In this respect, it was submitted that where the said count is deemed a nullity or defective, the proper procedure is to send it back to where it originated; namely to the Magistrate's Court. As it stands, the Respondent's position is that the logical conclusion, based on the law is to have it placed before where it remains. If the indictment itself is considered a nullity, insofar as the second count, which, respectfully, is submitted to be the case in this instance, and the said count is currently a matter that is before the Magistrate's Court.

26. Therefore, pursuant to Section 126 of Criminal Procedure Code, Chapter 91 is for the Magistrate's Court then, to make the determination based on what the Prosecution may ask, or of his own free will, make a determination as to how this matter is to be tried. Consequently, it is the Respondent's submission that the second count is properly before the Magistrates Court, based on the recent decision from the Privy Council, and the said count ought to be remitted. The Respondent also relies on the decision of His Lordship, the Honourable Justice Bernard Turner in the case of **The Queen v Brian Miller Jr., VBI No. 157/7/2015**, where the

matter was remitted, given that the accused was charged with the offence of Possession of a Firearm with intent to put another in Fear, contrary to Section 34(1) of the Firearms Act, Chapter 213, the wording of which resembles that of the offence with which the Applicant is presently charged; namely Possession of an Unlicensed Firearm, contrary to Section 5(1)(a) of the Firearms Act, Chapter 213 and Damage, contrary to Section 328 (1) of the Penal Code, Chapter 84. I agree in law and in principle, but I will not so disadvantage the Applicant at this late stage.

CONSTITUTIONAL UNDERPINNINGS

27. Article 28 of the Constitution provides redress when an Applicant alleged a breach of a fundamental right. Article 28 states, inter alia:

> ***"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.

28. I must be satisfied however that no adequate means of redress is or has been available to such persons before I can act pursuant to Article 28 because of the provision contained in Article 28(2).

29. I am satisfied that a means of redress is available to the Applicant in this case as demonstrated by the authorities dealing with the issue of delay in this and other jurisdictions. ***See for example DPP v Tokai [1996] A.C. 856 and Attorney General's Reference (No. 2 of 2001).***

30. The relief is the trial judge's ability to ameliorate the effects of the delay both by his summing up to the jury; and in his sentencing of the Applicant should the Applicant be convicted. However, is that an **"adequate"** relief under the Constitution when the facts of this case are considered? I think not.

31. The Applicant's complaint is grounded in Article 20 of the Constitution. That Article states, inter alia:

"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."

32. The right to a trial within a reasonable time is amorphous but efforts have been made to crystallize it. In **Barker v Wingo (1972) 407 US 514 Powell, J** provided a

useful formula for making a determination as to what constitutes a **"reasonable time"** that has afforded much guidance for subsequent courts to follow both in this jurisdiction and in others. Powell, J identified four factors to which the Court must give heed in deciding whether or not the right to a speedy trial has been breached. This matter has taken some time to come on for trial – the offence was allegedly committed on 6th March, 2009.

33. In addressing the matter of the Sixth Amendment of the Constitution of the United States he observed that it provides that: '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 page 522) that:-

> **"*…the right to speedy trial is a vaguer 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 a defendant who may be guilty of a serious crime will go free, without having been tried."***

DECISION

34. My decision is that:

I. this Honourable Court does have the jurisdiction to hear a portion of the indictment the remander has to be remitted to the Magistrate Court after the passage of ten (10) years;

II. Notwithstanding that there has been a breach of the relevant constitutional provisions for trial within a reasonable period of time, in my view the Applicant cannot now still have a fair trial and in the result the prosecution will be stayed. Notwithstanding, the delay cannot be laid at the feet of the prosecution. I did find reasonable explanations provided having regard to the exigencies of the criminal justice system of The Bahamas

III. the VBI discloses a material defect; and

IV. the delay such as does exist appears to have been contributed to by both parties in that the Applicant too had matters before other Courts and periods where there was a conflict in Defense Counsel diary. However, having regard to the public interest I am of the view that the prejudice in the indictment cannot be cured by appropriate directions at trial, especially having regard to the age of the Applicant at the time the charges were laid- whilst the delay and the reasons would ordinarily have caused me to order the trial to continue the fault that a portion of the trial- indictment requires remission to the Magistrate's Court at this late stage is the fault of the prosecution. I will not allow

the prosecution to continue. In the result, I order this matter stayed.

Dated this 26 day of February A.D., 2021

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The Honourable Mrs. Justice Cheryl Grant-Thompson