

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
CONSTITUTIONAL LAW DIVISION
BEWTEEN**

2021/PUB/const/FP/00006

**IN THE MATTER OF Articles 17(1), 19(1), 20(1) and 28 of the
Constitution of the Commonwealth of the Bahamas**

LARRY AMONTE ARTILUS

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: His Lordship Mr. Justice Andrew Forbes

Appearances: Mr. Osman Johnson, Counsel for the Applicant

**Mrs. Ashely Carroll with Mrs. Erica Curry-
Culmer, Counsels for the Respondent**

Dates: 11th February 2022 & 15th February 2022

DECISION

**Criminal Trial-Constitutional Application- Articles 17(1), 19(1) & 20(1) of
the Constitution-Right to trial within a reasonable time-Stay of
proceedings**

Introduction

1. The Court heard legal arguments offered by Counsel for the Applicant and Respondent and indicated that it would provide a written decision and do so now.
2. The Applicant filed a Notice of Motion on the 2nd December 2021 alleging that his rights pursuant to Articles 17(1), 19(1) & 20(1) of the Constitution of The Bahamas were violated.

In support of the Application, the Affidavit of Vandria Hepburn was filed on 2nd December, 2021. The Applicant also relies on his Skeleton Arguments undated and laid over to the Court on 15th February, 2022.

3. The Respondent opposes the application and relies on the Affidavits of Sergeant 2169 Prescott Pinder filed on 9th February and 11th February, 2022 respectively.

The Respondent also relies on its Submissions filed on 9th February, 2022 and laid over to the Court on 15th February, 2022.

The Notice of Motion

4. The Applicant seeks:-
 - a. A declaration that his fundamental rights against inhumane or degrading treatment or punishment (Article 17(1)) has been infringed by the Respondent's acts and/or omissions resulting in being held in custody in condition not fit for human habitation at the Bahamas Department of Corrections Services ("BDOCS");

- b. A declaration that the conditions at BDOCS including prisoners lack of access to adequate food, water, medical and dental care, cell ventilation, rehabilitative programs, adequate housing, sanitary toilet and cell conditions along with other matters constitute inhumane and/or degrading treatment and/or punishment under meaning pursuant to Article 17(1);
- c. A declaration that his fundamental rights against unlawful deprivation of his liberty (Article 19(1)) has been and is threatened by the commencement of criminal proceedings between Larry Amonte Artilus and Commissioner of Police, #1/15/053327;
- d. A declaration that his right to a fair trial within a reasonable time (Article 20(1)) has been and is threatened by the commencement of criminal proceedings between Larry Amonte Artilus and Commissioner of Police, #1/15/053327;
- e. A declaration that his right to a fair trial within a reasonable time (Article 20(1)) has been and is threatened by the present decision of the Respondent to recommence the prosecution of criminal proceedings between Larry Amonte Artilus and Commissioner of Police, #1/15/053327 and despite an inordinate delay of over six years due to Respondent's failure and/or refusal to prosecute the matter in a reasonable time period;
- f. An Order for the dismissal of the criminal proceedings between Larry Amonte Artilus and Commissioner of Police, #1/15/053327 on the basis of breach of his rights under Article 20(1);
- g. A declaration that his right to a fair trial within a reasonable time (Article 20(1)) has been and is infringed by Respondent's failure to prosecute the matter before expiry of six years following initial proceedings commenced July 2015 and unnecessary delay in excess of six years;

- h. An Order to be released in recognizance of the inherent illegality of the present criminal proceedings commencing after an inordinate delay of over six years and further breach of his Article 17(1) rights if his tenure in custody on remand at BDOCS continues
 - i. Damages/compensation including exemplary and vindictory damages;
 - j. Such further and other relief the Court deems just;
 - k. Costs
5. The Applicant sets out a total of twelve grounds on which he seeks the above mentioned relief. These can be summarized as follows:-
- a. That during his time in custody at BDOCS the conditions are unfit for human habitation and pose an inherent risk to his health and safety;
 - b. The Respondent failed and/or refused to provide him with a physical environment free from inherent risks to health and safety; provide him access to sufficient food, water and/or nutritional sustenance while in custody;
 - c. The Respondent failed and/or refused to provide him with adequate access to medical and/or dental care while in custody;
 - d. The Respondent has failed and/or refused to take steps to improve the said conditions and failed and/or refused to maintain his food and nutritional intake and/or access to medical and dental care at an adequate level;
 - e. That a period in excess of six years has expired since the alleged incidents occurred in the criminal proceedings between Larry

Amonte Artilus and Commissioner of Police, #1/15/053327 and due to the passage of time witnesses' memories have become unreliable on important issues and make it impossible to have a fair trial within a reasonable time;

- f. The Respondent's conduct and delay prejudiced his rights and further impairs a fair hearing and/or trial within a reasonable time;
 - g. The Respondent's decision to recommence the prosecution of the criminal proceedings between Larry Amonte Artilus and Commissioner of Police, #1/15/053327 despite an inordinate and unconstitutional delay of over six years due to their misconduct and/or inaction;
 - h. That the Court orders the dismissal of the criminal proceedings between Larry Amonte Artilus and Commissioner of Police, #1/15/053327 pursuant to Article 28 and be discharged from custody.
6. The Affidavit in support of the application was filed on 2 December, 2021 and sworn by Vandria Hepburn. The Court reproduces the Affidavit in its entirety below:-

"I, VANDRIA HEPBURN, of Freeport, Grand Bahama, one of the Islands of the Commonwealth of the Bahamas, make oath and say as follows:-

- 1. THAT, I am employed as a Legal Assistant with the law firm of Ayse Rengin Dengizer Johnson & Co., Counsel and Attorneys for the Applicant in the above listed matter and I have full authority to execute this Affidavit in support.
- 2. THAT, the statements of fact and matters set out by me in this Affidavit are from my own information and from the documents

and other sources referred to herein and are therefore true or are known to me from the sources stated which I believe to be true and correct

3. THAT, this Affidavit is submitted in support of the Constitutional Motion of the Applicant, Larry Amonte Artilus. I am advised by the Attorneys and verily believe that the Applicant was originally charged with the offence of Murder on or about July 8th 2015, and in complaint number #1/15/053327 between Larry Amonte Artilus and Commissioner of Police. There is now produced and shown to me, the copy of the Applicant's charge sheet, exhibited to this Affidavit and marked, "V.H.1".

4. THAT, I am advised by the Attorneys and verily believe that after being initially charged in July 2015, the Applicant was held on remand from on or about July 8th 2015 until he was granted bail by the Supreme Court on or about August of 2017, and therefore remained in custody at the Bahamas Department of Correctional Services for a period in excess of two (2) years.

5. THAT, I am advised by the Attorneys and verily believe that the Applicant has been held in custody by the Respondent, in conditions which can be considered as inhumane or degrading treatment or punishment and that this is a violation of the Applicant's Constitutional rights against such treatment for which he is entitled to relief. As evidence of the allegations raised herein, there is now produced and shown to me, the copies of Human Rights reports on the Bahamas for the years 2019 and 2020, prepared by or on behalf of the United States government, exhibited to this Affidavit and marked, "V.H.2".

6. THAT, I am advised by the Attorneys and verily believe that the above conditions as cited in the reports exhibited to this Affidavit are not fit for human habitation and the Respondent, their servants, agents and/or representatives have shown no regard for the detrimental effect upon the Applicant's health, and his physical and mental wellbeing, by keeping him detained in such unsanitary, unhealthy and hazardous conditions for extended periods of time.
7. THAT, I am advised by the Attorneys and verily believe that the above cited conditions under which the Applicant has been held by the Respondent in custody, constitutes cruel and inhumane treatment and/or punishment under the Bahamas Constitution and the Applicant is entitled to relief in the form of a discharge and dismissal of the present complaint in consequence thereof.
8. THAT, further to the preceding points, I am advised by the Attorneys and verily believe that the Respondent has failed and/or refused to prosecute the present criminal proceedings as against the Applicant in a reasonable time period and their acts and/or omissions have contributed to an unjustified and inordinate delay of over six (6) years since the Applicant was first arraigned on July 8th 2015.
9. THAT, I am advised by the Attorneys and verily believe that in consequence of the said delay, caused and/or contributed to by the Respondent, their servants, agents and/or representatives, the Applicant's Constitutional right to a fair trial in a reasonable time period has been and continues to be infringed and he is entitled to relief in the form of a discharge and dismissal of the present complaint in consequence thereof.

10. THAT, the contents of this Affidavit are to the best of my knowledge, information and belief true and correct.”

7. The parties appeared before the Court firstly on the 11th February, 2022, however, the Applicant was not present and the matter was adjourned. His non-attendance was a result of him being remand at BDOCS for other criminal matters, which are alleged to have occurred sometime in or around 2020 and 2021.

The Applicant subsequently appeared by way of the polycam system on the adjourned hearing date.

8. Counsel for the Applicant and the Respondent have both provided the Court with very fulsome submissions. However, the Court intends to summarize only those submissions that deal with the relevant issues.

The Affidavit Evidence

9. The Applicant has come to the Court alleging that his Constitutional rights have been violated and/or breached as a result of the actions and/or inactions of the Respondent and that he has suffered loss and damages.

10. The Affidavit in support of the application as set out in the paragraphs above were sworn by Vandria Hepburn, the legal assistant of Ayse Rengin Dengizer Johnson & Co., the firm acting on behalf of the Applicant.

She avers that the statements of fact and matters set out are from “my own information and from the documents and other sources referred to herein and are therefore true or are known to me from the sources stated which I believe to be true and correct.”

Additionally, throughout the Affidavit she provides that the information she avers to was by way of advisement by the Attorneys of the Applicant.

11. Order 41, Rule 5 of Rules of the Supreme Court (“the RSC”) provides:

“5. (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.”

12. Any person coming to the Court especially pursuant to an application asserting that his/her individual rights conferred under the Constitution of the Bahamas have been and/or is threatened as a result of an action and/or inaction of another, has the burden of proof to prove that such act or inaction occurred and as a result has suffered some loss and/or damage.

Sections 82 to 84 of the Evidence Act are helpful in that those sections provide the requisite burden of proof required by a person seeking some remedy before the Court.

Those sections are outlined below:-

“82. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, the burden of proof shall lie on that person.

83. The burden of proof in any proceeding at the commencement thereof lies on that person who would fail if no evidence at all were given on either side, regard being had to the pleadings and other documents filed therein; but at any time in the course of any proceeding, the burden of proof may be shifted to the person who would fail, if no further evidence were given on either side.

84. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”(emphasis mine)

13. The Court is being asked to accept as evidence information that would have been communicated from the Applicant to his Attorney and then the same information communicated from the Attorney to the Attorney’s Legal Assistant.

Counsel for the Applicant has not provided the Court with any reason as to why the Applicant himself has not provided any sworn Affidavit evidence, which the Court can consider on such an application.

What evidence is the Court to consider to either accept or reject the Applicant’s assertion that his individual rights have been violated?

14. The Court therefore finds that the Applicant has not adduced any evidence either by Affidavit or viva voce as to the alleged acts he asserts occurred as a result of the Respondent's actions and/or inactions, the loss and damage allegedly suffered and the remedy he seeks and as such has not discharged his burden of proof.
15. However, for completeness, the Court will consider the arguments of the parties.

Issues

16. The issues to be determined in this case are simply:
 - a. whether there is or has been a violation of the Applicant's rights not to be subjected to inhumane or degrading treatment or punishment while in custody at BDOCS;
 - b. whether there is or has been a violation of the Applicant's rights to a fair trial within a reasonable time;
 - c. whether a trial at this time would amount to a violation of the Applicant's right to a fair trial under Article 20(1);
 - d. whether the Applicant can under the circumstances currently existing receive a fair trial; and
 - e. whether the remedy in this case should be to dismiss and/or stay the proceedings.

Submissions

17. Counsel for both parties have provided the Court with full submissions and numerous authorities. However, the Court will only

summarize and refer to those submissions and authorities that are relevant to the issues before it.

18. Counsel for the Applicant, Mr. Osman Johnson in the Applicant's Skeleton Arguments asserts that Article 15 (a) of the Constitution should apply on the application and provides the Court with numerous authorities in support. **See Re Oskar [1988] Lexis Citation 2029; Alleyne and others v The Attorney General of Trinidad and Tobago [2015] UKPC 3; Sewell v Attorney General of the Bahamas and others [2015] 3 BHS J. No. 32.**

19. Mr. Johnson's primary submission on this point is that Article 15(a) of the Constitution provides that the Applicant is and was at all material times entitled to the protection to the law in the Bahamas and such protection of the law does not provide for the violation of strict statutory provisions under the Constitution by the Respondent; criminal proceedings before the Supreme Court and the time limits set for the trial process to be conducted.

20. Article 15 of the Constitution provides:-

"Whereas every person in The Bahamas is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, color, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely —

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and
(c) protection for the privacy of his home and other property and from deprivation of property without compensation, the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

21. The basis upon which the Applicant brought this application before the Court is found on its pleading. This application was brought pursuant to Article 28 of the Constitution which allows any aggrieved person whose rights under Articles 16 to 27 of the Constitution to bring an action in the Supreme Court as a result of any violation and/or intended violation of those rights. There is no mention of Article 15 of the Constitution under Article 28.
22. The Court refers to the Judgment of the Board in **Gordon Newbold et. al, Privy Council Appeal Nos 0034, 0035, 0036, 0037 and 0059 of 2011, [2014] UKPC 12**. In that case, the Appellants were the subjects of extradition requests by the United States on the suspicion of drug trafficking. During the course of the proceedings the Respondents sought to adduce the telephone conversations (intercepted by the Bahamian police) between the parties as evidence. The Appellants appealed the decision of the Court of Appeal whereby they challenged the legality and constitutionality of the interception and

asked the Board to consider new issues relating to Article 15 and 30(3) of the Constitution and relied on Articles 15, 21 and 23 of the Constitution. The Board at paragraphs 32 and 33 stated:-

“32. The Board does not consider that these three authorities assist the appellants in the present case.

They are emphatically not authority for any proposition that article 15 of the Bahamian Constitution operates as and provides a general source of protection of human rights, overlapping with the substance of all the rights provided by the subsequent specific articles. They address a completely different subject-matter to the present, and at best support the view that the concept of “protection of the law” can extend to matters outside the scope of article 18 of the 1973 Constitution.

In the present case, the relevant substantive rights are to be found in articles 21 and/or 23 or not at all. Article 15 is in this respect no more than a preamble, as the Board held it to be in *Campbell-Rodrigues*. There is a distinction between on the one hand constitutions in the form adopted in The Bahamas, Jamaica and Malta, in which the equivalent of article 15 is wholly or predominantly a preamble, and on the other hand constitutions in the form adopted in Trinidad and Tobago and Mauritius, which contain instead an enacting provision.

The distinction was recognized by the Board in *Societe United Docks v Government of Mauritius* [1985] 1 AC 585, 600D-G as well as in *Campbell-Rodrigues*, paras 9 to 12. In *re Fitzroy Forbes* (no 498 of 1990), Hall J was in the Board’s view wrong to conclude that that distinction did not, or did not any longer, exist, and wrong to treat the *Société United Docks* case as an authority applicable on its facts to article 15 of the Bahamian Constitution. 33. In short, Mr. Fitzgerald’s submission does not only run counter to the natural meaning of article 15. It also ignores the

word “Whereas” and the recital in article 15 that it is “the subsequent provisions of this Chapter” which “shall have effect for the purpose of affording protection of the aforesaid rights”.

Finally, it ignores the clear implication of the restriction of the right of redress under article 28, and the restriction of the saving of existing laws from challenge to cases of alleged contravention of articles 16 to 27.

If article 15 had been understood as an independent enacting provision, the constitutional right of redress would have been extended to it. Similarly, to read article 15 as an enacting provision would undermine and make pointless article 30(1), the clear aim of which was that fundamental rights, otherwise provided by the Constitution should not prevail over any contrarily expressed “existing law”. The Board therefore considers that article 15 has no relevance or application in this case, save as a preamble and introduction to the subsequently conferred rights.”

23. Therefore, the Court forms the view that Article 15 of the Constitution is not applicable on this application.

Article 17

24. The Applicant has asserted that his rights under Article 17 of the Constitution has been infringed and/or violated.

25. Article 17 of the Constitution provides:-

“17. (1) No person shall be subjected to torture or to inhuman or degrading treatment or punishment.”

26. The Affidavit of Vandria Hepburn sets out the alleged acts of the Respondent which the Applicant believes amounts to tortious, inhumane and/or degrading treatment or punishment and the alleged loss and damage he has suffered as a result.

The Applicant also set out as the grounds in his Notice of Motion, the alleged acts of the Respondent, which he believes amounts tortious, inhumane and/or degrading treatment or punishment. The Court summarized the same in the above paragraphs.

27. Counsel for the Applicant made the following submissions and assertions in support:-

- a. That the Applicant was held in custody by the Respondents at BDOCS for a total of twenty-five months;
- b. That the Applicant's Affidavit entails a reference to the conditions of his custody between July 2015 and August 2017;
- c. The Affidavit exhibited two United States Department of State Human Rights Reports on the Bahamas from 2019 and 2020, which outlined numerous examples of the inadequacy of food provided to inmate, lack of proper medical care, unclean drinking water, lack of adequate toilet facilities and other factors that demonstrate the facility not being fit for human habitation and any time in custody can be considered inhumane or degrading treatment.

28. Mr. Johnson submitted that the Applicant has provided more than sufficient detail to establish the conditions of his time in custody and referred to paragraph 20 of Lord Wilson's Judgment in **Jamal Cleare v Attorney General and other [2017] UKPC** where he stated that

while the Appellant was an extremely unimpressive witness, sometimes unimpressive witnesses speak the truth. The Board however in that case dismissed the Appellant's claim relating to the alleged breach of his Article 17(1) rights but awarded him additional damages for his unlawful detention.

29. Counsel for the Respondent, Mrs. Ashley Carroll in part made the following submissions and assertions in response:-

- a. That the Applicant has failed to prove to the Court the requisite standard that he was subjected to torture, inhumane or degrading treatment or punishment as the Affidavit in support is sworn by Vandria Hepburn, the legal assistant of the firm acting on behalf of the Applicant;
- b. That the reports relied on by the Applicant compiled by the United States Department of State refer to the periods of 2019 and 2020 however, the Applicant was remanded to BDOCS from 2015 to 2017 and no report exhibited speaks to that period;
- c. That there is no direct evidence from the Applicant detailing the alleged inhumane, degrading or tortious treatment allegedly experienced and no evidence that the Applicant's mental health or physical wellbeing was jeopardized or affected. That the evidence presented is unsupported assertions.

30. As discussed in the above paragraphs, the Affidavit in support of the application was not sworn by the Applicant nor was the "facts" contained in the Affidavit "facts" that came from the Applicant. The

Court finds that the legal assistant cannot speak to the conditions experienced by the Applicant, only he can.

The Court finds that the legal assistant cannot speak to the state of mind or the physical state of the Applicant while the Applicant was in custody as a means to substantiate any alleged breach of his individual right.

The Applicant has also asserted that these conditions and/or treatment were during his time in custody between 2015 and 2017.

Mrs. Carroll however, submits and the Court accepts that the reports exhibited to the said Affidavit only speak to the periods of 2019 and 2020 and thus fails to identify any other time period.

31. On the consideration of the “facts” before it and the submissions of Counsel, and the findings of this Court in paragraph 14 above, the Applicant has not provided any evidence and/or direct evidence to satisfy this Court, that while in custody between 2015 and 2017 there was a breach and/or violation of his rights under Article 17 of the Constitution.

Article 19

32. The Applicant in his Notice of Motion alleged that his rights under Article 19 has and/or is threatened.

33. Article 19(1) provides:-

“(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases...”

34. The Applicant has not adduced any evidence to support this allegation nor provided any submissions in support.

Article 20

35. The Applicant also asserts that his rights under Article 20 of the Constitution have been infringed and/or violated.

36. Article 20 provides:-

“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”.

37. Mr. Johnson makes the following submissions and assertions in support:-

- a. That the facts are that a period of six years has elapsed since the alleged incidents occurred in July 2015 and the various court hearings to present;
- b. That the period of time included the investigation and gathering of information in complaint number #1/15/053327 between Larry Amonte Artilus and Commissioner of Police; a subsequent pre-trial review scheduled on 12th July, 2016, original trial dates set for 31st October to 4th November, 2016 which did not proceed,

due to unspecified reasons, multiple bail applications of the Applicant where he was granted bail in August 2017; three inconclusive hearings before the Supreme Court on 8th May, 2021, 19th November, 2021 and 6th December, 2021, where the Respondent admitted on the record it was not ready and/or not in a position to proceed with the prosecution of the Applicant;

- c. That the passage of time is highly excessive and well beyond what is necessary and a direct consequence is that a fair trial at this stage is impossible;
- d. That the provisions of Section 4(2A) of the Bail Act gives a succinct definition of what is considered a “reasonable time” in criminal proceedings in the Bahamas although the said Act does not directly relate to Article 20 of the Constitution and that the six year period from the Applicant’s arraignment in July 2015 is well beyond what can be construed as “reasonable” for the purposes of criminal proceedings;
- e. That any breach of the Applicant’s rights under Article 20 can and acts as a definite legal bar to any prosecution taking place;
- f. That Article 2 of the Constitution establishes that the Applicant’s rights under the Constitution are guaranteed and unassailable;
- g. That the keys terms of Article 20(1) places a mandatory obligation on the Respondent to advance with the underlying complaint and all proceedings that stem from the said complaint up to and including the Applicant’s trial process fairly and within a timely fashion;
- h. That as at February 2022 the Applicant has yet to receive a trial date and suggests the Respondent has not met the standard set by Article 20(1);

- i. That the position at common law as to what constitutes as a “reasonable time” is trite law and that there is no statutory or common law basis that provides for the prosecution of any matter, application and/or proceedings and processes that stem from them after the expiry of more than six years.

38. In support of his submissions, he relies on the following authorities. **See Austin Knowles and Others v Superintendent of HM Prison Fox Hill and Others (Bahamas) [2005] UKPC 17; Republic of South Africa v Robert John Headrick [2005] ScotSC 76; Stephen Stubbs v Regina SCCrApp. No. 203 of 2013; Barker v Wingo 407 U.S. 514 [1972]; Attorney General’s Reference No. 2 of 2001; Ali v CPS [2007] EWCA Crim 691.**

39. Mrs. Carroll makes the following submissions and assertions in response:-

- a. That the Court must consider four main factors when determining a breach under Article 20(1) and these include the length of the delay, the reasons given by the prosecution to justify the delay, the responsibility of the accused for asserting his rights and prejudice to the accused;
- b. That the length of the delay has been six years and five months from the Applicant’s arraignment before the Magistrate Court to the date of the filing of the application;
- c. That the reasons for the delay are that the island experienced Hurricane Matthew in or around the first scheduled trial date and the Respondent’s office was devastated, there were ongoing trials in the Supreme Court during the time when the trial dates were rescheduled, on another occasion the matter could not proceed because of the ongoing Covid-19 pandemic that forced

the closure of the courts, that all of these are legitimate reasons and circumstances beyond the Respondent's control;

- d. That the Applicant has failed to provide any evidence that he has or is likely to be prejudiced by the delay and that the Applicant's concerning the memory loss of witnesses can be dealt with by the use of memory refreshing documents.
 - e. That the Applicant has not proved on a balance of probability that such a stay is warranted and that a permanent stay is not in the interest of justice or fairness as this is not an exceptional case of delay resulting in serious prejudice to the Applicant.
40. In support of her submissions, she relies on the following authorities. **See Bell v Director of Public Prosecutions of Jamaica and another [1985] 2 All ER 585; Attorney General's Reference No 1 of 1990 [1992] 3 All ER 169; Kingsley Adderley v The Director of Public Prosecutions SCCrApp No. 2012 of 2018.**
41. Counsel for both parties helpfully referred the Court to the cases of **Barker v Wingo (supra)**, **Bell v DPP (supra)** and **Kingsley Adderley v The Director of Public Prosecutions (supra)** which identified the considerations the Court must have in mind when determining if an individual's rights for a trial within a reasonable time have been breached. Justice Issacs, JA in **Kingsley Adderley v The Director of Public Prosecutions (supra)** at paragraph 22 to 26 sets out these considerations and how the Court should deal with prejudice to the accused.

"22. That would be in accord with the authorities extending from Barker v Wingo (1972) 407 US 514 where Powell, J formulated

a useful tool for determining what constitutes a "reasonable time". He identified four factors to which a court must give heed in deciding whether or not the right to a speedy trial has been breached: 1. the length of the delay; 2. the reasons for the delay;

3. the responsibility of the accused for asserting his rights; and

4. any prejudice to the accused.

23. These factors have been used numerous times since in constitutional cases; and continue to be of assistance to courts considering the issue of delay. See, inter alia, Duke Knowles v. The Attorney-General Criminal Case No. 348 of 1996 (unreported); R. v. Craig Nigel Higgs et. al. Criminal Case No. 119R/10/1988; Kevin Stevenson Hanna v. The Attorney-General, Criminal Case No. 430 of 1989; R. v. Ricardo Farrington Criminal Case No. 33/1/96; Sean Saunders et. al. v. The Attorney-General, Criminal Case No. 41/1/96; Albert Barr a.k.a. Albert Hanna v. The Attorney-General, Criminal Case No. 33/1/96; the Privy Council's judgment in Boolell v The State [2007] 2 LRC 483 and Dwyer v Watson [2004] LRC 577.

24. It must be noted that the fourth factor is prejudice to the accused. The Judge did acknowledge that the appellant's witnesses may have a difficulty recalling events which took place thirteen years ago. That would be a telling point in the appellant's favour on a consideration whether he could yet receive a fair trial. It matters not whether the fault was the appellant's or not. The important consideration is the fairness of the prospective trial.

25. At page 532 of Barker appears the following:

"...Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration;

(ii) to minimize anxiety and concern of the accused: and (iii) to limit the possibility that the defence 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 defence 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..."

26. In assessing the effect of the delay, for example, possible loss of memory of the appellant's witnesses, the Judge ought to focus on the impact of delay on the fairness of the mechanisms constituting a criminal trial and not on who is at fault.

This exercise would involve an evaluation of the complexity of the offence, whether there are reams of documents involved or numerous witnesses who may be testifying about matters that require a descent into minutiae and so would test the memories of mere mortals."

42. The Respondent's evidence is in the Affidavit and Supplemental Affidavit of Sergeant 2169 Prescott Pinder. His Supplemental Affidavit exhibits the transcripts of hearings on the 6th September, 2016, 31st October, 2016 and 4th April, 2018. His evidence in part is that:-
- a. The Applicant was arraigned before Stipendiary and Circuit Magistrate Rengin Johnson of Court #3 on 8th July, 2015 for the offence of Murder;
 - b. That he was served with a Voluntary Bill of Indictment and arraigned before Senior Justice Estelle Gray Evans on 7th

December, 2015 for the offense of Murder and plead not guilty, the trial date was set for 31st October, 2016;

- c. That on 31st October, 2016 the Applicant had not been transported from Nassau to Freeport for the matter and the Crown indicated that due to the damage to its office as a result of Hurricane Matthew it could not proceed;
- d. That on 4th November, 2016 the matter was called with the Defendant present and a trial date was set for 2nd April, 2018 with a backup trial date for 29th May, 2017;
- e. That on the backup date, 29th May, 2017 another trial was being heard by the Court and the matter could not proceed;
- f. That on the 9th August, 2017 (Supplemental Affidavit provides correct date as 10th November, 2017) the Applicant was granted bail by Justice Petra Hanna-Adderley;
- g. That on the 4th April, 2018 the matter could not proceed as another trial was ongoing before the Supreme Court and the matter was adjourned to the 27th April, 2020 for trial;
- h. That due to the Covid-19 pandemic the matter could not proceed on the adjourned date as there was a suspension of criminal trials globally;
- i. That on 3rd March, 2021 the Applicant appeared before Senior Justice Turner and set the trial of his matter for 6th December, 2021 and 28th November, 2022;
- j. That the matter was called on the 6th December, 2021, however the Court was in the middle of another trial at that time.
- k. Counsel subsequently filed the Constitutional Motion.

43. The Court has had an opportunity to review its file and sets out the events that have transpired based on the Court's notes and transcripts as it relates to the Court appearances relating to these criminal proceedings.

- a. That on the 8th July, 2015 the Applicant was arraigned by then Magistrate Rengin Johnson for the offense of Murder;
- b. That on the 7th December, 2015 the Applicant was arraigned before then Justice Estelle Gray-Evans on the offense of Murder and plead not guilty and a proposed trial date was set for the 31st October, 2016;
- c. That there was a Pre-Trial Review on the 12th July, 2016 whereby Counsel of Record at that time was given leave to withdraw as Counsel;
- d. That another Pre-Trial Review was conducted on the 6th September, 2016 whereby the accused was present, however, his Counsel of record was not present and the trial was set for the 31st October, 2016;
- e. That on the 31st October, 2016 neither the Applicant (was not brought down by the prison) nor his Counsel appeared and that Counsel for the Respondent advised the Court of their inability to proceed with the trial as a result of damage to their office from Hurricane Matthew, the matter was adjourned to the 1st November, 2016;
- f. That on the 1st November, 2016 the Applicant nor his Counsel appeared and the matter was adjourned to the 4th November, 2016 for a further Pre-Trial Review;

- g. That on the 4th November, 2016 the Court fixed the trial for the 2nd to the 13th April, 2018 and set a backup trial date as the 29th May, 2017;
 - h. That on the 4th April, 2018 the trial of the Applicant was to begin, however the Respondent advised that they could not proceed as another criminal trial was before the Court and suggested an adjourned date, Counsel for the Applicant was also absent during that hearing, the trial was set for the 27th April to 8th May, 2020;
 - i. That on the 8th October, 2020 the parties appeared before the Court and indicated that the April and May 2020 trial dates had passed and fixed the trial dates for the 3rd to 14th May, 2021;
 - j. That on the 3rd May, 2021 the parties appeared before Senior Justice Bernard Turner (via live link/zoom) for the trial however, a new trial date was set for the 6th December, 2021 and a backup trial date for the 26th November, 2021.
 - k. That the parties appeared on the 6th December, 2021 however due to another matter before the same Court, the Respondent could not proceed with the trial at that date, however a backup trial date for the 28th November, 2022 still remains.
44. In addition to the above, the Court recognizes and accepts that there have been several intervening events that have affected the criminal proceedings from continuing in a timely manner. In or around October 2016 Hurricane Matthew made landfall in Grand Bahama and the Respondent's office was damaged, there was non-attendance by Counsel for the Applicant on several occasions, that in or around September 2019, Grand Bahama was left devastated from the passage of Hurricane Dorian, the Covid-19 global pandemic in or

around March 2020 and continuing resulted in the closure of the courts for an extended period of time, the criminal Judge who had carriage of the matter was set to begin her pre-retirement leave in or around January 2021, there was no criminal Judge to hear matters until June 2021 and the fact that there is only one criminal Supreme Court Judge sitting in Grand Bahama.

Length of Delay

45. On the submissions by both parties, it is accepted that there has been a delay of six years and five months from the date on which the Applicant was arraigned before the Magistrate and the filing of this application.

Reasons for Delay

46. The Applicant has submitted that the delay was incurred by the actions of the Respondent and that it has breached the Applicant's rights as a result. The Respondent as submitted above has provided reasons for the delay.

47. The Court's purpose for providing a timeline of the criminal proceedings based on the notes and transcripts on the Court file was done to show that while the Respondent who has the burden of moving the case forward, was not the only party which contributed to the delay.

The Court's records reflect that on several occasions the Applicant was not present and his Counsel was not present. Moreover, there is no evidence before the Court on behalf of the Applicant which shows that

he took proactive steps in moving his matter forward such as sending letters to the Respondent inquiring as to the state of his matter.

48. Therefore, the Court takes into account the actions of both parties and the intervening factors which further aggravated the loss of Court time which led to the trial of this matter commencing.

Applicant Asserted His Rights

49. While both parties have not provided any submissions on this consideration, the Court takes notice that the Applicant's application before the Court is hereby acknowledged as him asserting his rights.

Prejudice to the Applicant

50. The Court in its consideration of whether the Applicant has suffered prejudice refers to Powell, J in **Barker v Wingo (supra)**:-

"...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, because the inability of a defendant to 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."

51. The Respondent has submitted that the Applicant has failed to provide any evidence that he has or is likely to be prejudiced by the delay and that his assertions in his Notice of Motion and in his Skeleton Arguments is that the witnesses' memories may have fade due to the passage of time.

The authorities relied on by the Respondent on this issue [**A.G. Reference No. 1 of 1999 (supra) and Bell v D.P.P (supra)**] provide that the burden is on the Applicant to advance any circumstances as a result of the delay which might prejudice his defence, if he were to be tried.

The Court in the above paragraphs have found that the Applicant has not adduced any evidence for the Court to consider as the Affidavit of Vandria Hepburn purports to adduce "facts" as the "evidence" of the allegations on behalf of the Applicant.

Therefore, the Court accepts the submissions of the Respondent finds that the Applicant in his "evidence" has failed to identify any prejudice which he may suffer as a result of any delay.

Remedies

Article 28

52. The Applicant seeks for the criminal complaint to be dismissed on the basis that any prosecution of the Applicant at this stage as a result of the passage of time would make the fairness of the criminal proceedings an impossibility.

Further Counsel for the Applicant has submitted that Article 28 of the Constitution should not act as a bar to the relief sought by the Applicant and refers to the decisions in **Antoine Justin Russell v The Attorney General et al SCCivApp No. 186 of 2017**; **Barrington Robinson v The Attorney General SCCrApp No. 207 of 2013**; **Harrikisson v Attorney General of Trinidad and Tobago [1980] AC 265** in support.

53. In response the Respondent has submitted that Article 28(2) of the Constitution provides that the Supreme Court should not exercise its powers if it satisfied that adequate means of redress are or have been available to the person concerned.

Further, Counsel for the Respondent submitted that where an adequate remedy is available otherwise or outside of the Court's constitutional jurisdiction it is an abuse of process to continue to maintain a constitution claim and relies on **Jaroo v Attorney General of Trinidad and Tobago [2002] UKPC 5** at paragraphs 29 to 32 and 38 to 40 in support.

Additionally, Counsel for the Respondent contended that due swiftness or due haste in bringing a claim that a constitutional right(s) is infringed is mandatory (**See McEwan v Bahamas (Prime Minister) [2022] BHS J. No. 24**), that the Applicant filed this application in December 2021, but was released on bail for these criminal proceedings, November 2017, therefore he had other means of redress available to him which he did not appropriately act upon.

54. Article 28 of the Constitution provides that the Court may do one of several things if a breach of a right contained in Articles 16 to 27 is disclosed. What relief the Court grants is dependent upon what it thinks the justice of the particular case requires.

It is in this decision making process that the Court must weigh in the balance the right of an applicant to a trial within a reasonable time against the right of the society in seeing that those who may have committed serious offences against members of the society are called to account for their actions.

Through this exercise, the Court concludes what is the best way of vindicating an applicant's rights, but at the same time bearing in mind the societal concerns.

Should Proceedings Be Dismissed/Stayed?

55. The Applicant has submitted that the facts of the current proceedings show that a period in excess of six years has expired since the alleged complaint to the present day.

That the passage of time has been an inordinately long period of time

That the passage of time is highly excessive with the direct consequence being that the fair trial of the Applicant at this stage has become impossible as allowing the same would be contrary to his rights to a fair trial within a reasonable time.

Counsel for the Applicant recognized that the provisions of the Bail Act (Section 4(2A)) do not directly relate to Article 20(1) of the Constitution, he submitted however, that that provision identifies a reasonable period of time as three years from the date of the arrest or detention of the person charged.

Therefore, he has submitted that by the interpretation of the relevant statute, the proceedings against the Applicant must be dismissed for want of prosecution as any continuation would be unlawful and an egregious violation of his rights.

56. The Respondent has submitted that the reasons given by the Applicant that a stay should be granted are frivolous as he has not proven on a balance of probabilities that such a stay is warranted.

It was also submitted that a permanent stay is not in the interest of justice or fairness as this is not an exceptional case of delay resulting in serious prejudice to the Applicant. Counsel for the Respondent has referred the Court to the cases of **Attorney General's Reference No. 1 of 1990 [1992] 3 All ER 169** and **Kingsley Adderley v The Director of Public Prosecutions (supra)** in support.

Analysis

57. Counsel for the Applicant referred the Court to **Attorney General's Reference (No. 2 of 2001)** where the Court had to consider the effect of a breach of the requirement of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms that in the determination of a criminal charge against him everyone is entitled to a hearing "***within a reasonable time***".

It was argued on behalf of the defendant that once a reasonable time had expired, article 6 required that a prosecution should not be pursued.

The House, by a majority, rejected this submission. Lord Bingham of Cornhill held, at para 24:

"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."

58. Counsel for both parties have referred to several cases in support and the Court cites the relevant considerations of each below.

59. 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 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.”*

60. Further, in the case of **A.G. Reference No. 1 of 1990**(*supra*) at page 631 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 complainant 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.”*

61. The Court has considered the numerous factors which have impeded the prosecution of the criminal charges laid in this matter against the Applicant.

The Respondent by its submissions has accepted that the delay has been some six years and five months from the Applicant’s arraignment to the filing of the said motion.

The Applicant has also asserted that this time period from the Applicant’s arraignment to the present date is in excess of six years.

While the provisions of the Bail Act in essence guide the Court as to the considerations, it must take into account when an individual seeks bail, it does provide some insight as to some guidance as to what Parliament considers as a reasonable time.

The Court in its findings above, has accepted that there have been several intervening factors which have delayed the prosecution of the Applicant on the criminal complaint inclusive of the conduct of both parties and the continuing extenuating circumstances (i.e. Hurricane Dorian, Covid-19 Pandemic and courts closures, no sitting criminal judge) which cannot be laid at the feet of the Applicant or the Respondent.

62. The Court also recognizes that the Applicant was charged with the offence of murder in the criminal proceedings, however the Court is not of the view that such criminal proceedings and/or the trial will be duly complex.


As the Respondent has accepted that there has been some delay and taking the above factors into consideration, the Court is of the view that this period is not unreasonable in light of these circumstances and that the Applicant can receive a fair trial.

63. Additionally, the Applicant has not in the Court's view adduced evidence that there are exceptional circumstances that would justify a stay and/or dismissal of the criminal proceedings.

Disposition

64. Therefore, the Court provides its findings below:-
- a. The Applicant has failed to adduced any evidence to the Court that his rights under Article 17 have been breached and his claim under Article 17 is hereby dismissed;
 - b. The Applicant has failed to adduce any evidence to the Court that his rights under Article 19 have been breached and his claim under Article 19 is hereby dismissed;
 - c. That while there has been some delay the time period between the Applicant's arraignment to the filing of the present application is not unreasonable in light of the circumstances identified;
 - d. That the Applicant has failed to adduce any evidence that he has suffered any prejudice as a result of the delay;
 - e. That the Applicant can receive a fair trial as the Applicant's trial is set for the 28th November, 2022 before Justice Andrew Forbes;
 - f. That the Applicant has failed to adduce any evidence that there are exceptional circumstances that would warrant the grant of a stay and/or dismissal of the criminal proceedings;
 - g. That in the circumstances the Applicant's claims are all hereby dismissed;
 - h. That the Court makes no orders as to costs.

Dated this 18th day of November, 2022



Justice Andrew Forbes