COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

CONSTITUTIONAL DIVISION
2011/VBI/213/9/2011

IN THE MATTER of an Application pursuant to Articles 17, 19, 20, 25 and 28 of the Constitution of the Commonwealth of The Bahamas

B E T W E E N

SERIOZHA MCKENZIE

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:	**The Hon. Madam Justice W. Renae McKay**
Appearances:	**Mr. Jomo Campbell for the First Applicant** **Ms. Eleanor Albury for the Third Applicant** **Ms. Cassie Bethel and Mr. Donard Brown for the Respondent**
Hearing Dates:	**3rd June A.D. 2021, 22nd July A.D. 2021, 12th August A.D. 2021**
Ruling Date:	**4th November A.D. 2021**

RULING

1. The Applicants, Mr. Seriozha Mckenzie **(the "First Applicant")** and Mr. Terry Butler, **(the "Third Applicant") (collectively referred to as the "Applicants")** seek declarations that their Constitutional rights as protected by Articles 17 (1), 19 (1) (d), 20 (1) (e) and 25 (1) (3) of the Constitution of The Bahamas, were breached by the Respondent, the Director of Public Prosecutions **(the "Respondent")**.

2. They also seek an order that the proceedings be deemed void ab initio, permanently stayed and for damages. The Applicants' allegations stem from the Respondent's failure to commence their trial within a reasonable time.

Background Facts

3. The Applicants were charged with Murder and Conspiracy to Murder. they were discharged on the 8th August 2011After a preliminary inquiry was held by Magistrate Derence Rolle-Davis. they were discharged on the 8th August 2011. Upon being discharged and exiting the court, they were immediately re-arrested for the same charges.

4. Thereafter, on the 9th August, 2011, they were brought before the Court and their matter was adjourned to the 31st August 2011 for the service of their Voluntary Bill of Indictment **("VBI")**. The First Applicant was not served with his VBI dated 16th September 2011 until sometime in 2012 and although a trial date of the 28th October 2013 was set, the trial never commenced.

5. Consequently, the Applicants claim that the present charges against them are an abuse of the process of the Court, void ab initio, an abuse of their rights not to be subjected to torture or to inhuman or degrading treatment or punishment, an abuse of their personal liberty and freedom of movement, presumptively prejudicial, unexplainable as there was no reasonable explanation for the delay given and prejudicial to their defence.

Submissions

The Applicant's Submissions

6. The First Applicant submitted that the timing and manner in which he was re-arrested was a blatant abuse of power based on the fact that the Magistrate's findings on the evidence would not change. He acknowledged that while he could have been re-arrested pursuant to Section 125 of the Criminal Procedure Code **("CPC")**, it did not provide for the exact charges to be re-instituted against him. Section 125 of the CPC states,

> **"125. If, at the close of the case for the prosecution, or after hearing any evidence in defence, the magistrate considers that the evidence against the accused person is not sufficient to put him on his trial, the court shall forthwith order him to be discharged as to the particular charge under inquiry; but such discharge shall not be a bar to any subsequent charge in respect of the same facts:**
> **Provided that nothing contained in this section shall prevent the court from proceeding either forthwith, or after such adjournment of the inquiry as may seem expedient in the interests of justice, to investigate any other charge upon which the accused person may have been summoned or otherwise brought before it, or which, from the evidence given in the course of the hearing of the charge so dismissed as aforesaid, it may appear that the accused person has committed."**

7. The First Applicant noted that while the Attorney General had the power to file a voluntary bill of indictment in the Supreme Court against a person charged before a Magistrate Court with an indictable offence pursuant to Section 258 of the CPC; that power could only be invoked if there was a valid charge before the Court. Based on the

provisions of Section 125 above there was no valid charge. Section 258 of the CPC states,

> **"(1) Notwithstanding any rule of practice or anything to the contrary in this or any other written law, the Attorney-General may file a voluntary bill of indictment in the Supreme Court against a person who is charged before a magistrate's court with an indictable offence whether before or after the coming into operation of this section, in the manner provided in this section.**
> **(4) Where a voluntary bill is filed against a person who is before a magistrate's court charged with an offence triable on information, the prosecutor shall, within a reasonable time after the filing of the voluntary bill, produce to the magistrate and to the person charged, respectively, a copy of the voluntary bill and of the relevant summons issued by the Registrar under subsection (3)."**

8. The First Applicant submitted that the only redress the Respondent had was to appeal the Magistrate's decision to the Supreme Court.

9. Resultantly, his remand after his re-arrest was a clear violation of Article 17 (1) and Article 19 (1) (d) as there could be no reasonable suspicion of his having committed or being about to commit an offence, based on the fact that the Magistrate had just delivered a detailed ruling, discharging him of the charges. He also contended that it was a clear violation of Article 25.

10. The First Applicant also contended that even when he was granted bail, he remained in the custody of the Court. Therefore, it could not be said that he enjoyed his full liberty or had full control over his movements which was a deprivation of one's personal liberty which was protected by Articles 19 (1) and 25 (1) and (3).

11. Moreover, that there has been a ten year delay; the starting point being from 2010 when he was arrested which was a violation of Article 20 (1). He added that the delay caused much mental and financial hardship to him and that no amount of compensation would be able to return to him the time lost; which he contended would have been a productive time. Also, that they delay would be prejudicial to his evidence that he wished to be given by alibi witness.

12. The First Applicant contended that his re-arrest was a deliberate, malicious attack on him in order to remove his freedom of liberty. Because of this, he has been left feeling degraded and prejudiced. He maintained that the re-initiating of the proceedings against him was an abuse of the Court's process and that the Magistrate should have exercised his discretion with respect to Section 125 of the CPC and disallow the arraignment that took place on the 9th August 2011.

The Third Applicant's Submissions

13. The Third Applicant contended that while he did not invoke the Court's inherent jurisdiction to hear constitutional arguments on his behalf pursuant to Article 28 of the Constitution he should be heard in that regard and adopted the Respondent's submissions herein.

14. He relied on **Barker v Wingo_407 US 514 (1072), US Supreme Court** which set out the factors to be taken into consideration when determining whether an individual's constitutional right had been breached. He focused on the delay factor, specifically, that the prosecution was dilatory in providing the transcripts and the judge's notes to the Applicant. They were repeatedly requested but not provided from the prosecution for years which led to the matter not being disposed of within a reasonable time.

15. The Third Applicant relied on **R v Etienne Jasmyr, Case No. 166/07/2013** where in that case it took 4 years to arraign the accused due to the fact that the depositions were not available by the Crown. The court stayed the proceedings and awarded a fixed amount of costs, noting that there was delay on the part of the Respondent/Prosecution. In granting the stay the court found:

> **"In this case the only reason proffered or the failure of the State to try Mr. Jasmyr timeously was that the depositions were not transmitted from the committing court. That is not an adequate excuse. The Office of the Attorney General (hereinafter referred to as "the OAG") oversees all criminal prosecutions in The Bahamas. Indeed, the police prosecutors in the magistrates' courts prosecute under the authority of the Attorney General who by virtue of Article 73 of the Constitution has an absolute discretion in the preferment of criminal charges. Thus, it behooves the Attorney-General to be aware of the status of all criminal matters before the courts of The Bahamas.**
> **Even if I am wrong in my view, the state is responsible for ensuring the depositions are sent on quickly and for providing the resources to ensure this happens. Although the magistrates may have failed to act without delay, she is an agent of the State for whom the State is ultimately responsible, and so the State cannot avoid being held responsible for the delay." (Emphasis added)"**

16. The Third Applicant contended that the delay of the Respondent constituted the abuse of process and that the failure to supply the transcript of the preliminary inquiry and judge's notes constituted an egregious delay. Additionally, that there was no comfort or relief in the arguments of the prosecution by stating in a cavalier manner that the transcripts have now been provided to the Applicant as the same was requested some 9-10 years ago.

17. Further, that while Section 125 of the CPC empowers the prosecution to re-arrest an accused person discharged, the manner in which the re-arrest was done was malicious and thereby an abuse of the process of the court. It was not the intention of the framers of section 125 nor was it in the spirit of the section itself

to allow the prosecution to repeatedly bring a defendant back who was been discharged.

18. The Third Applicant invited the Court to invoke its discretionary power to stay the proceedings in consideration of the raft of cases that provide for it to do so. He cited **Director of Public Proseuctions v Humphreys (1977) A.C. 1 26** where Viscount Dilhorne warned that the power to stop a prosecution should only be used in the most exceptional circumstances,

> **"'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 if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the 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 which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service...The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution...."** ***(Director of pp and others v. Jaikaran Tokai and Others (Trinidad and Tobago) (1996), p.7)"***

19. The Third Applicant contended that the key issue is that while the prosecution was empowered to re-arrest and recharge a defendant who has been discharged, the court was urged to seek from the prosecution whether there was any additional or fresh evidence from that which was adduced to the court in the year 2009. If the facts were the same and there was no additional evidence being adduced, then the court would be mandated to permanently stay the proceedings involving all defendants on the ground that the action against them was abusive.

20. The Third Applicant also cited **Elijah Anton Askov, et al v. Her Majesty the Queen March 23, 1990** where Cory J found that there was a no more corrosive element upon the edifice of justice than the perception that those persons who may have committed serious crimes against members of the society are not held responsible for their actions. He said also that, ***"justice so delayed is an affront to the individual, to the community and to the very administration of justice"***

21. The Third Applicant prayed that the court exercise its discretion to declare and order a permanent stay of the proceedings and award individual fixed costs to all of the defendants named. The Third Applicant contended that all the defendants' rights to have a trial within a reasonable period of time were infringed contrary to Article 20 (1) (f) of The Constitution. Further, that the VBI in respect of the remaining Defendants be quashed, and added that a third defendant had become deceased during the time.

The Respondent's Submissions

22. The Respondent submitted that the trial date set for the Applicant was the 1st September 2014 however, for various reasons, the trial had not commenced. They further submitted that it was trite law that a discharge in a preliminary inquiry was not an acquittal as there was no final adjudication at the committal stage. Therefore, no appeal could lie to the Court of Appeal.

23. The Respondent also submitted that Section 125 of the CPC, explicitly provided for the re-institution of the exact same charge on the same facts, contrary to the Applicant's contention that it did not. The Respondent added that such re-institution could be either by way of a preliminary inquiry or a voluntary bill of indictment.

24. They relied on **Re Mosko, John George (BS 1990 SC 115)** where the Applicant, being charged with Murder, was discharged after a preliminary inquiry was held and the Attorney General sought to bring fresh proceedings against him on the same charge for which he had been discharged.

25. The Applicant in **Re Mosko** argued that his discharge prevented the prosecution from re-instituting another preliminary inquiry, without more evidence and that it would permit the prosecution to take advantage of the technicality of his ability to plead autrefois acquit.

26. Georges C.J., in interpreting section 125 of the CPC (formerly section 122) stated,

> **"Made it abundantly clear that the principle of autrefois acquit did not apply to discharge a preliminary inquiry and held that the law in The Bahamas was no different from the law in England.**

27. He went on to say,

> **".....the inference that counsel asked the court to draw from the distinction that Parliament intended to preclude fresh proceedings unless there was additional evidence to that led at the preliminary inquiry....if indeed that were Parliaments intention, there seems to be effective concealment of it in the words used."**

28. Additionally, in relation to **Article 78 (4) of the Constitution** Georges C.J. stated,

> **"In the exercise of the powers conferred on him by this article, the Attorney General shall not be subject to the direction or control of**

any other person or authority.....this obviously means that, so far as the institution of criminal proceedings against any person is rued, the Attorney General is given complete independence.....After the decision is taken to prosecute and the case is brought to court, the case then, as distinct from the decision to prosecute it, falls under ordinary jurisdiction of the courts...."

29. Accordingly, the Respondent submitted that the re-arrest of the Applicant and the subsequent re-institution of proceedings against him was not an abuse of process that would have resulted in an infringement of his rights.

30. In relation to the allegation of unreasonable delay, the Respondent contended that they were in fact required to explain the delay which required the determination of the relevant period. They cited **A.G. Reference No. 2 of 2001** where it was held that the relevant period commences when the defendant is charged or served with a summons as a result of an information being laid.

31. Based on that finding, the Respondent contended that the relevant total period of delay was nine to ten years. They added that since receiving notice of the application and the existence of the COVID-19 pandemic, the Applicant's trial was delayed even further.

32. The Respondent cited **Bell v. The DPP [1985] AC 937**, which endorsed Powell J's finding in **Barker v. Wingo, 407 US 514 (1072), US Supreme Court** of the four factors the court should assess in determining whether a particular defendant was deprived of his constitutional right. The factors are the length of delay, the reasons given by the Prosecution to justify the delay, the responsibility of the accused for asserting his rights and the prejudiced to the accused.

33. With respect to the length of the delay, the Respondent contended that the court should consider whether the delay is presumptively prejudicial and that in the instant case the delay may be considered presumptively prejudicial. They added that regard should also be had however, to the difficulties of having all of the defendants and their respective counsel present.

34. In relation to the reason given by the Prosecution, the Respondent contended that having regard to the relevant period of delay, there was no fault by the Prosecution as after arraignment on the 5th July 2017, the matter was adjourned for fixture to the 18th September 2017, when notice of the application was presented.

35. In respect of the prejudice to the accused, the Respondent contended that the delay is only prejudicial to the extent that witnesses would be more reluctant to participate in delayed trials or that they may not be able to be located or recall

events. They added that the crux of the evidence against the Applicant was based on a confession.

36. During the Applicant's initial interview, he confessed to being in an argument and making a phone call to his co-defendants for them to come to his residence. Also, that the Applicant had the option to inform investigators of witnesses who could assist with the alibi that he was now seeking to rely on.

37. The Respondent contended that because the Applicant was released on bail, within months of being charged and within two days of his re-arrest, there was no attack on the Applicant's freedom and liberty, considering the provisions of Article 19. They added that staying the matter was not the appropriate remedy and that it is one that should only be employed in exceptional circumstances.

38. The Respondent contended that the power to stop a prosecution only arises when it is an abuse of the Court. Moreover, that even where it was found that there was a constitutional breach, the Court could still find that the Applicant could have a fair trial. They relied on **Hall v. The Attorney General [2001] 3 BHS J. No. 110** in that regard and **Johnson v. The Attorney General [2016] 2 BHS J. No. 153**. In the latter case, Lord Bingham stated that even though there was a breach of Article 6 (1) of the Convention, the appropriate remedy would not necessarily be a stay but would depend on all the circumstances of the case.

39. In that regard, the Respondent contended that the appropriate remedies would include a public acknowledgement of the breach, action to expedite the hearing and to release the defendant to bail if he was in custody. They claimed that there was no danger that the Applicant would not receive a fair trial, as the powers of the Court and of the trial process itself would provide ample protection for the fairness of the proceedings.

Discussion and Ruling

40. There are two issues to be determined. The first is whether there was a violation of the Applicants' right to a fair trial within a reasonable time and if so whether the remedy for a violation of the Applicants' rights warrants a stay of the proceedings.

41. The facts as I accept them are that on the 8th August 2011, the Applicants were discharged by the Magistrate after he found that insufficient evidence had been proffered against them during a preliminary inquiry which had commenced from 2nd February, 2011. That same day they were re-arrested. With respect to the First Applicant, his VBI was filed 16th September 2011 but it was not served on him until sometime in 2012.

42. On 21st October 2011, the Applicants were arraigned along with their co-accused's and were remanded to prison. The First Applicant and his Counsel were present and the Third Applicant was present pro se. The trial was set for the 16th July 2012 and on that date while both the First Applicant and his Counsel were present, another of the co-accused was not present and the Third Applicant was present but did not have Counsel.

43. A firm trial date was set for 28th October 2013 but for reasons unknown the date was vacated. On the 25th November 2013, another firm trial date was set for 24th March 2014. Prior to, the Third Applicant was admitted to the Eloise Penn Ward of the Sandilands Rehabilitation Centre **("Sandilands")** on the 27th February, 2014 but was prepared for discharge on the 10th March, 2014 and was deemed fit to appear before Court.

44. On the 24th March 2014, the Applicants and their counsel were present but the trial did not commence. Another trial date was set for 1st September 2014 however several issues arose on that date. None of the defendants were present, the First Applicant's Counsel was not present, Counsel for one of the co-accused informed the Court that he had not received the Prison Doctor's Record and a number of prosecution witnesses were not available.

45. Again, another trial date of 10th April 2017. However, before that date, Mr. Forbes, one of the co-accused, was killed on the 28th May, 2015. The trial date of the 10th April 2017 was again adjourned. By record of 11th April 2017, the reasons for the trial not being able to commence were set out. It was stated that the previous trial date was vacated as there was no jury panel.

46. While there was now a jury panel, Counsel one of the co-accused's was in another trial that was set to conclude days later and he had no further availability until the following year. The Third Applicant had again failed to appear although his Counsel was present. The First Applicant's Counsel also indicated that he would have been unable to proceed with the month long trial because he had another trial that was set to continue on the 24th April 2017 which had commenced from 2014 and involved international individuals. It was indicated that the Crown had difficulties with the matter prior, but those difficulties were not stated on the record.

47. Thereafter, the matter was transferred to two other courts, no trial dates were set, but during the numerous case management notes it was noted that the Third Applicant was continuously not present. Based on a Patient Discharge Summary form from Sandilands, the Third Applicant was again a patient with them between the 21st June 2018 and the 26th July 2018.

48. On the 5th December 2019, the matter was transferred to this Court for mention. On the 18th January 2020 when the Third Applicant was again not present and Counsel made the Court aware of the extant Constitutional motion he intended

to move for the Applicant and the matter was adjourned to the 29th January 2020.

49. Article 20 (1) of the Constitution provides that a person charged with a criminal offence, shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. In **Ernesto Penn v The Director of Public Prosecutions 2018/CRI/CON.0016**, I considered several cases where it was determined that it was a breach of Article 20 (1) if a criminal case was not heard and completed within a reasonable time, whether or not the defendant was prejudiced by the delay.

50. In **Kingsley Adderley v The Director of Public Prosecutions SCCrApp No. 212 of 2018**, the Court held,

> **"When considering the issue of whether the right to a trial within a reasonable time has been breached the court considers the following factors: length of the delay, the reasons for the delay, the accused's assertion of his rights and any prejudice to the accused as a result of the delay. The issue of prejudice is the most serious. In considering the effect of prejudice the judge ought to have regard to the impact of the delay on the fairness of the trial.**
>
> **A court may stay proceedings where the delay is exceptional and the defendant can demonstrate that "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." Permanent stays should be the exception rather than the rule.**
> **It does not follow that a permanent stay is the remedy for breach of the right to be tried within a reasonable time. The breach of right is established by the delay and is not concerned with the prospective trial. Nevertheless, the appropriate relief where such a breach has been established is within the sole discretion of the trial judge and an appellate court will not interfere with that discretion unless it can be demonstrated that it is unreasonable in the Wednesbury sense."**

51. Isaacs JA also discussed the importance of making the existence of an alibi witness known,

> **"One of the purposes of providing the details relating to possible alibi witnesses to the magistrate's court during a preliminary inquiry or at his arraignment in the Supreme Court is that it provides the police with an opportunity to investigate the veracity of the alibi by locating, and obtaining statements from the witnesses. If the information about the witnesses is given and the police fail to act on it, a court may make comments about such failure adverse to the Prosecution's case during the trial.**

Notwithstanding, a suspect's right to silence, in my view, if he has an alibi and witnesses who can support his presence elsewhere at the material time, it behooves him to provide such information to the police at the earliest opportunity; but certainly, at the time he is required to do so by statute.

.....

If a person is able, by the provision of witnesses, to demonstrate that he could not possibly have committed a crime, prudence and good sense dictates that that should take place at the earliest opportunity. It may forestall a prosecution for the offence and save the individual the time, expense and inconvenience of undergoing a trial. Further, should a trial ensue nonetheless, the Prosecution would not be able to claim that the alibi is a recent fabrication; possibly undermining the strength of the alibi in the eyes of the jurors."

52. It follows that the established factors for consideration are the length of the delay, the reasons for the delay, the responsibility of the accused for asserting their rights and whether there was any prejudice to the accused's.

53. As to the length of the delay, the Applicants were re-arraigned from the 8th August 2011. A period of ten years passed and their trial was not commenced. By the Bail (Amendment) Act, 2014, a reasonable time to be tried has been defined as three years.

54. The reasons for the delay are attributed to both the Applicants and the Prosecution. Throughout the ten year period there were five trial dates. On numerous occasions, the First Applicant's co-accused did not appear for trial. On a separate occasion, the First Applicant's Counsel would have been unable to defend him because he was set to appear in another trial.

55. The Third Applicant was unable to appear for trial on several occasions because he was locked up in the Sandilands Rehabilitation Centre. On other occasions he was not represented by Counsel. There were also several items that needed to be provided by the prosecution.

56. In relation to the responsibility of the accused for asserting his rights, the First Applicant was present for three out of the five dates set for trial. He was also present during the numerous case management hearings. The Third Applicant however, was in and out of Sandilands and was not always able to be present nor have the benefit of counsel.

57. Lastly, as for the prejudice to the accuseds the First Applicant has been out on bail for the past ten years. He provided a Notice of Alibi which was not produced during the preliminary inquiry. It was important for any evidence that could have supported the First Applicant not being charged to have been provided as soon as it was available to him.

58. The Third Applicant was also out on bail until it was cancelled in 2018. There was also a delay on the part of the prosecution to provide the transcript of the preliminary inquiry proceedings in addition to numerous other documents. While there was mention of severing the VBI for various reasons it was not done.

59. In relation to whether or not a stay would be appropriate it would not be appropriate to stay or quash an indictment unless it is evident that there could no longer be a fair hearing or it would otherwise be unfair to try the defendants.

60. In considering all of the evidence and submissions before me, I am satisfied that the Applicants right to be tried within a reasonable time was contravened. There was a delay after they reinstituted the charges against them. Accordingly, I make the following findings.

61. I accede to the Applicants' prayer and issue a declaration that Article 20 (1) of the Constitution of The Bahamas, which affords them the right to be tried within a reasonable time, has been infringed.

62. Additionally, having considered the evidence and the law I accede to the Applicants' prayer and I grant a stay and further order that the VBI herein is quashed. I make no order as to costs.

Dated this 4th day of November, A.D. 2021

Hon. Madam Justice W. Renae Mckay