

COMMONWEALTH OF THE BAHAMAS
In The Supreme Court
Criminal Division
No. CRI/CON/0006/2020

IN THE MATTER OF THE Constitution of The Commonwealth of The Bahamas

AND

IN THE MATTER OF an application pursuant to Articles 20(1) and 20(2)(c) of The Constitution of The Bahamas

BETWEEN

GENEAR MCKENZIE

APPLICANT

AND

THE ATTORNEY GENERAL

RESPONDENT

Before: Her Ladyship, The Honourable
Madam Justice Guillimina Archer-Minns

Appearances: Ms. Christina Galanos for Applicant
Mrs. Erica Duncombe-Ingraham for the Respondent

Hearing Date: 13 August, 2020

RULING

Archer-Minns J

1. On 20 September 2009, Lionel McQueen was allegedly shot and succumbed to his injuries. Additionally, there was an alleged attempt to murder Montez Saunders. Genear McKenzie, the Applicant, was arrested in connection with Abetment to murder, Abetment to attempted murder, Conspiracy to Commit Armed Robbery and Armed Robbery in September 2009.
2. The Applicant was released from custody on or about 22 August 2012. Following a multiplicity of adjournments, for varying reasons, the trial in this matter is now set for 23 November 2020; over eleven years after the Applicant was arrested in connection with the offences.
3. The Applicant now stands charged in VBI No. 163/7/2015 with **Murder, Attempted Murder and Conspiracy to Commit Armed Robbery**. The Constitutional Motion herein claims that her constitutional rights have been breached, the right to a fair hearing within a reasonable time by an independent tribunal and failure to have been provided adequate time and facilities for the preparation of her defence.
4. The Applicant filed an Originating Notice of Motion praying that these proceedings be permanently stayed.

Background Facts

5. In September 2009, the Applicant was arrested. On 18 February 2011, the Applicant was committed to stand trial in the Supreme Court for abetment to murder, abetment to attempted murder, conspiracy to commit armed robbery and armed robbery. On 22 September 2011 the Applicant was granted bail but was not released until August 2012 and therefore spent 2 years and 11 months in prison.

6. In July of 2015 the Applicant was served with a Voluntary Bill of Indictment which required her to appear before Mr. Justice Turner for arraignment on VBI No. 163/7/2015. The Applicant pled not guilty to charges of murder, attempted murder and conspiracy to commit armed robbery.
7. A backup trial date for 24 April, 2017 and a substantive trial date for 9 July, 2018 were scheduled on 4 December 2015. On 24 April 2017 the matter was unable to proceed, as the Court was in an ongoing trial. On 26 April 2017, the Court granted a bail variation for the removal of the Applicant's electronic monitoring device. On 1 May 2017, a trial date was set for 8 May 2017 which was adjourned to 15 May and then 18 May 2017 for fixture. The Applicant was not present on 8 May 2017 as she was reported to not be well. A sicknote for 5 May – 19 May 2017 was produced.
8. On 18 May 2017, Counsel for the Respondent indicated to the Court that they were not ready to proceed, as one of their key witnesses took ill and was scheduled to deliver a baby in August of 2017. A back-up trial date of 13 November, 2017 and the substantive trial date of 9 July, 2018 were confirmed.
9. The back-up date of 13 November 2013 was vacated due to an ongoing trial. The Court on this occasion enquired of counsel as to whether they wanted the matter to be heard before another Court, to which they all responded "yes". The matter was then transferred to Mr. Justice Evans (as he then was), but was transferred back to this Court because of a family conflict of interest with the Judge and an accused.
10. The trial of the matter was set for 26 February 2018 but Counsel for the Respondent indicated that it was proceeding with another matter and as such, the substantive trial date for 9 July, 2018 was again confirmed. Additionally, the matter could not proceed in any event because Ms. Eleanor Albury, Counsel for one of the Applicant's co-accused was in trial before Madam Justice McKay.

11. On 9 July 2018, the trial did not commence and another trial date for 22 October, 2018 was scheduled as the Court was involved in a murder trial at that time. The matter was given another backup trial date for 25 November 2019 and a substantive trial date for 23 November 2020. The trial did not commence on the back up trial date, as the Court did not sit on this day.

12. An Originating Notice of Motion was filed on behalf of the Applicant 17 June, 2020 praying for:
 - a declaration that Article 20(1) of the Constitution of The Bahamas, which affords the Applicant the right to a fair hearing within a reasonable time by an independent tribunal established by law has been infringed;
 - a declaration that Article (20)(2)(c) of the Constitution of The Bahamas, which affords the Applicant adequate time and facilities for the preparation of her defence has been infringed;
 - an order that the proceedings against the Applicant be stayed;
 - an order that the Applicant's passport be returned to her in any event;
 - costs;
 - further or other relief as the Court deems fit.

13. The grounds of this Motion are as follows:
 - (a) the present information is an abuse of the process of the Court;
 - (b) the delay is presumptively prejudicial;
 - (c) no reasonable explanation has been given for the delay;
 - (d) the Crown has not produced the Applicant's detention record, which is important in this case, as the Crown's case against the Applicant is based solely on statements, which she allegedly gave to the police and which the Applicant intends to challenge on the ground that she was oppressed;

- (e) the Crown has not produced any evidence that tends to show that the Applicant committed or was in any way involved in committing the offences for which she is to stand trial.

Applicable Law

Constitution

14. The Applicant herein asserts that her rights pursuant to Articles 20(1) and 20(2)(c) of The Constitution of the Bahamas have been infringed. These sections provide as follows:

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.”

15. “20(2) Every person who is charged with a criminal offence-

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

Issues

16. The issues for the Court to determine are as follows:

- (a) has the Applicant’s article 20(1) right been infringed?
- (b) has the Applicant’s article 20(2)(c) right been infringed?
- (c) if these rights have been infringed, can the Applicant still have a fair trial?

Discussion

Article 20(1) Rights - Unreasonable Delay

17. Cory, J in Elijah Anton Askov, et. al. v. Her Majesty the Queen (March 23 1990), opined that **"[t]here is 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 further stated: **"Justice so delayed is an affront to the individual, to the community and to the very administration of justice."**
18. The principles in the case of Barker v Wingo 407 US 514 have been widely referenced in this jurisdiction for determining whether one's right of receiving a trial in a reasonable amount of time has been infringed which shall be adopted by this court. Both Counsel have also lent their minds to the consideration of the four principles as follows:
- the length of the delay;
 - the reason given by the prosecution to justify the delay;
 - the efforts made by the applicant to assert his rights; and
 - the prejudice to the accused.

Length

19. Counsel for the Applicant relied on the case of Taylor v. Attorney General of the Commonwealth of The Bahamas [2013] 1 BHS J.No. 218 wherein the case of Barker v Wingo (1972) 407 US 514 was referenced and in which Powell J stated:
- "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 impression of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."**
20. Counsel submitted that the operative period of the delay in these circumstances is 11 years and 2 months. She added that the COVID - 19 pandemic that exists makes it unlikely that the Applicant's

case will be heard on the scheduled November date. It was further contended that in any event the delay is inordinate particularly since the matter is not a complex one.

Whilst Counsel for the Respondent acknowledged the delay it was advanced that it was not considered to be inordinate. It was further submitted that the period is not unreasonable in this jurisdiction having regard to the number of matters before the Courts to be dealt with coupled with the consequential effects of the Covid 19 pandemic.

Reasons for the delay

21. In connection with the issue of delay, in *Barker*, Powel J. stated as follows:

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

Counsel for the Applicant contended that other than on one occasion, Counsel for the Respondent did not give any reasons for the delay experienced in bringing this case to trial. The case had laid dormant for four years and five months and no explanation was given (the Applicant was committed to stand trial in the Supreme Court on 18 February, 2011 but she was not served with a Voluntary Bill of Indictment and summoned before the Supreme Court until July of 2015)

22. Counsel for the Respondent countered that the delay was not due to any deliberate act by the Respondent to hamper the defence or progress of the trial but due to ongoing attempts by the courts to properly and effectively deal with a backlog of cases. Moreover, on some occasions, Defence Counsel was not in place, whilst Counsel for the Respondent was always present and willing to work with the Court to have the matter heard at its earliest convenience.

23. Counsel for the Respondent further advanced that the delay was in part due to (i) the unavailability of a key prosecution witness; (ii) Counsel for the Respondent and Co-accused were before another court; and (iii) the Court was involved in on-going trials which were all justifiable reasons. In the circumstances there is no evidence before this Court to indicate an intentional delay on the part of the Prosecution. Further on occasions, the Applicant nor her Attorney appeared for trial. Therefore the mere fact that the trial did not proceed in a timely manner cannot be attributable to any one particular party.

Responsibility of the Applicant to assert her rights

24. Powel J. in *Barker* opined:

“Whether, and how, a defendant asserts his rights is closely related to the other factors we have mentioned. The strengths 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.”

Counsel for the Applicant submitted that the Applicant asserted her rights on various occasions, inclusive of applying for bail together with variations of the terms of bail which were all granted.

25. Counsel for the Respondent asserted that the Applicant did not exercise her rights in a timely manner as there was no constitutional motion filed until 17 June 2020. And, prior thereto, the Applicant never claimed that her right to trial in a reasonable time had been infringed.
26. Though the Applicant would have applied for variations of bail, this current motion would have been the first time in which the Applicant would have asserted her Article 20(1) rights. Counsel for the Respondent adopted the sentiments as expressed in *R v Brown [2002] BHS J. No. 40* wherein the learned judge stated:

“The Applicant suggested that by requesting his passport and inquiring of the police as to the possible date of hearing for his trial he has crossed the threshold required for asserting his right to a trial within a reasonable time. I cannot agree with such a proposition. The prosecution of the Applicant's case was the responsibility of the Attorney-General hence it is to him the assertions for a speedy trial must be made. No representation was made to the Attorney-General and I do not find that the Applicant has demonstrated any effort in asserting his rights. Notwithstanding this failure, the Applicant's cause is not necessarily lost.”

No such sentiments were expressed by the Applicant or the Applicant's Counsel to the Respondent.

Prejudice

27. Powell, J in Barker further opined that:

“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 the 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.”

Counsel for the Applicant submitted that the Applicant has been severely prejudiced by the delay. It was highlighted that the Applicant (i) spent 2 years and 11 months on remand, (ii) was unable to apply for a spousal permit for her husband, who is here in The Bahamas on a work permit, (iii) has had hardships finding a job or starting her own business as she was required to surrender her passport in keeping with the bail requirements, (iv) unable to travel to meet her husband's family in Trinidad or go on routine family trips with her sisters, (v) is in a constant state of uncertainty and (vi) has bouts of sadness and depression given the current state of affairs.

28. It was further advanced by Counsel that the Applicant's defence would be impaired, in contravention of Article 20(2)(c) since Counsel for the Respondent cannot locate the Applicant's detention record which is important as the Respondent's case is based on an alleged confession statement. The movements and the circumstances, which the Applicant faced whilst in custody ought to be made known and are crucial to the defence. Reliance was placed on Shavargo McPhee v The Queen [2016] UKPC 29. The movements and whereabouts of the Applicant need to be known in establishing the case for the Applicant.
29. Counsel for the Respondent countered that the Applicant had not put before the Court how the delay is prejudicial or would hinder a fair trial. Reliance was placed on A.G. Reference No. 1 of 1990 [1992] QB 630 wherein the Court held that the Applicant must show on a balance of probabilities that owing to the delay she will suffer some prejudice. Further, the Applicant has not been remanded for the entire time she has been awaiting trial and has had multiple bail variations.
30. In relation to the Applicant's passport, any concerns or requests regarding the same could have been made through the proper channels by applying for a bail variation as had previously been done. Regarding the issue of the missing detention record, the unavailability of the same will not hamper the Applicant's defence in any way as this evidence can be garnered by other means.
31. Undoubtedly, the Applicant has experienced some challenges due to the inordinate delay in the prosecution of her trial which spans over some 11 years. Counsel for the Respondent has contended that this is a normal time line in this jurisdiction however, the Court do not accept that this is the standard that the system should hold itself to.
32. In Shavargo McPhee relied on by Counsel for the Applicant is one in which the detention record of the accused was used to determine that a confession was given under oppressive circumstances. This case can be distinguished from the present case as in Shavargo McPhee, the Applicant claimed *inter alia* that he was being starved which the detention record, was quite capable of

proving. In these circumstances, the Applicant alleges that she was beaten, which can otherwise be proven by medical or *viva voce* evidence of those in whose custody she had been placed.

33. It is customary that when a confession statement is disputed in a trial, a Voir Dire is conducted to determine whether that evidence should be admitted in the trial. The 'trial within a trial' will consist of the evidence of police officers who were involved in the detention of the Accused, the evidence of the Accused herself and also documents such as the medical records of the Accused at the time in which she was detained either from the hospital or The Bahamas Department of Corrections. The detention record, although it can be helpful to the Court in determining what transpired, is not an absolute necessity.

The Evidence

34. It is vital that this Court give consideration to the evidence upon which the prosecution intend to rely on concerning the Accused. A statement was purportedly given on 22 September 2009 wherein the accused admitted that she was aware that her Co-accused would possibly perform a robbery and she was possibly complicit in the same. The Co- Accused in their statements indicated that the Applicant knew there was a gun and agreed to be a part of a robbery. However, it is trite law that a statement implicating a co-accused cannot be used against another co-accused if made in the absence of that co-accused.
35. Though the Applicant claims that her statement was given under oppressive circumstances, this Court is of the view, that in the interests of justice, this evidence should be tested at trial. The Court does note however that the evidence which possibly implicates the Applicant relative to Conspiracy to commit Robbery may otherwise be tenuous in relation to the other charges.

Outcome of Barker

36. In *R v Brown [2002] BHS J. No. 40*, over 11 years had elapsed since the applicant was arrested and it was held that the delay was inordinate and the rights of the applicant in those proceedings had been breached. In *Culpepper v The State (Trinidad and Tobago) [2000] UKPC 51*, 6 years was considered a breach of our equivalent Article 20(1) rights. The circumstances dictate what is an inordinate length of time. In these circumstances, it is the Court's view that eleven plus years having elapsed without a trial being had is an inordinate amount of time, therefore, the constitutional rights of the Applicant have indeed been breached.

Appropriate Remedy

37. A breach of the Applicant's Constitutional rights having been established, it is necessary that the Court determine the appropriate remedy. Both Counsel have given assistance in this regard. Counsel for the Applicant advanced the case of *Stephen Ronel Stubbs v Attorney General SCCr App No 153 of 2013* recommending that it be used as a yardstick, particularly since the circumstances of this case are more egregious. The Applicant was never tried in over ten years and there was actually a period of four years in which this matter laid dormant. Additionally, the delay is so excessive that a presumption of prejudice arises, and in such circumstances it is for Counsel for the Respondent to rebut that presumption. Moreover, the Applicant has shown that:
- (i) this case is definitely an exceptional one in which the appropriate remedy ought to be a stay;
 - (ii) that she has been and will experience prejudice in the preparation of her defence by the delay on the part of the prosecution which is unjustifiable; and also
 - (iii) further proceedings in this matter would be an abuse of process.
38. Counsel for the Respondent maintained, that staying the proceedings would not be an appropriate remedy in these circumstances, that this is not a complex matter and it can be tried fairly. It was confirmed that the prosecution witnesses are ready and available for the trial of this matter. A

stay is only granted in exceptional circumstances (A.G. Reference No. 1 of 1990 [1992] QB 630, page 631).

39. In Stubbs, at paragraph 25 the Court of Appeal referenced Lord Lane in Attorney General's Reference (No. 1 of 1990) as follows:

"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 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, for, as Lord Diplock said in R v Sang [1980] AC 402 at page 437: "the fairness of a trial ... is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as those about whose guilt there is any reasonable doubt should be acquitted."

40. The Court of Appeal in the judgment of Attorney General v Jermaine Samuel Seymour Appeal No 29 of 2006 confirmed that whilst the Supreme Court had the power to stay prosecutions which amounted to an abuse of the process of the courts, it was incumbent that,

"it must be borne in mind however that there are at least two sides to justice in every criminal case-- the side of the alleged victim (the prosecution) and the side of the accused (the defence) and as noted by Lord Morris of Borthy-Gest in Connelly's case.....generally speaking, a prosecutor has much right to demand a verdict of the

jury in an outstanding indictment and where either demand a verdict a judge has no jurisdiction to stand in the way of it."

41. A fair trial can be had even though a breach has occurred. A breach of an Applicant's constitutional rights under Article 20 (1) of the Constitution does not however automatically result in the staying of the trial viz *Kenneth Anthony Patton Mills v H.M Advocates et al 2002 JCJ No 81*. Article 28 of the Constitution provides that the court may inter alia, make such orders, give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Articles 16 to 27 inclusive to the protection of which the person concerned is entitled whilst bearing in mind, public interest in the attainment of justice.

42. The Court further notes in *Stephen Ronel Stubbs v Attorney General SCCr App No 153 of 2013*:

"A permanent stay is not the normal remedy when delay has resulted in a breach of an individual's constitutional right. Where an applicant seeks a permanent stay the onus is on him to establish, on a balance of probabilities, that as a result of the excessive delay he cannot receive a fair hearing."

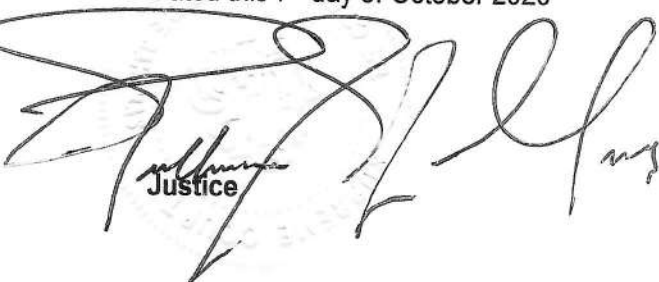
43. There are other remedies that the Court can consider in these circumstances. In *Prakash Boolell v The State Privy Counsel Appeal No. 39 of 2005*, Lord Bingham said in part where delay is established:

" the appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established... if the breach is before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable..."

Conclusion

44. The Court so finds in these circumstances, there has been a breach of the Applicant's constitutional right to receive a trial within a reasonable time. The Court is cognizant that the Applicant herein is seeking, a stay of the proceedings, an ultimate remedy. However, the Applicant has not proved on a balance of probabilities that the breach of her constitutional right in this regard would result in her not receiving a fair trial, which is a prerequisite of granting a stay. In all of the circumstances, the Court finds that a fair trial can be had as there are no exceptional circumstances advanced before the Court to impress upon the Court to exercise its discretion to grant a permanent stay of the proceedings.
45. The Court notes that there are any number of other remedies as outlined in the case of The Attorney General's Reference No.2 of 2001 available to an applicant whose rights may well have been contravened pursuant to the Constitution of The Bahamas. The appropriate remedy depends on the nature of the breach which in this case, is one of delay in the prosecution of the matter.
46. There are any number of safeguards embodied within the trial process which will ensure that the Applicant receives a fair trial. Mere delay in and of itself is not sufficient for the Court to invoke the ultimate remedy. The Court is further of the view that this case is not complex in nature and the Respondent has advised that the matter is ready for trial.
47. In all of the circumstances of this case, the Court hereby orders that the matter is brought on for trial on its Fixed Trial Date of 23 November 2020 subject to the resumption of jury trials otherwise, no later than one month thereafter. Should the matter not proceed to trial within the time specified herein the matter is thereafter considered stayed in relation to the Applicant only.

Dated this 7th day of October 2020



Justice