

COMMONWEALTH OF THE BAHAMAS

In The Supreme Court

Criminal Division

No. CRI/CON/64/7/2010

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

AND

**IN THE MATTER OF an application by Rueben Johnson & Timothy Cole for redress pursuant to
Articles 2, 17, 20(1) and 28(1) of The Constitution of The Bahamas**

BETWEEN

RUEBEN JOHNSON & TIMOTHY COLE

APPLICANTS

AND

THE ATTORNEY GENERAL

RESPONDENT

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

Appearances: Mr. Shaka Serville for Applicant Reuben Johnson
Mr. Lessiah Rolle for Applicant Timothy Gooding Cole
Mr. Basil Cumberbatch for the Respondent

Hearing Date: 21 January 2019

DECISION

Archer-Minns J

- (1) Timothy Cole one of two Defendants before the court submitted a Constitutional Motion seeking relief principally pursuant to Articles 28(1) and 20(1) of The Constitution of The Bahamas, asserting that the Applicant's right to a fair trial within a reasonable time has been breached and in consequence thereof, the matter herein be stayed. The second Defendant, Rueben Johnson enjoined the relief sought and are hereinafter referred to as the Applicants,

- (2) Background Facts:

The Applicants were charged with eight counts of Armed Robbery and one count of Conspiracy to Commit Armed Robbery and appeared in the Magistrate Court No. 10 on or about the 26 October 2009. On 7 September 2010, the Applicants were committed to the Supreme Court by a Voluntary Bill of Indictment on three counts. On 1 October 2010, the Applicants were arraigned in the Supreme Court before then Senior Justice Jon Isaacs and pled Not Guilty on all counts.

- (3) The matter was initially set for trial for 7 March 2011 before Isaacs J but did not proceed to trial for legal aide to be secured for the Applicants. The matter after several adjournments during the month of March was further adjourned to 8 August 2011 as a back up trial and on 26 November 2012 given a fixed trial date for 23 September 2013.

- (4) On 23 September 2013, the matter was again adjourned to 5 October 2015 due to an ongoing trial.

- (5) On 5 October 2015, bench warrants were issued for the Applicant, Timothy Cole and a third Defendant in the matter, Johnny Guerrier. An adjourned date of 4 December 2015 was given.

- (6) On 4 December 2015, the court was informed of the death of the Defendant, Johnny Guerrier. The matter was further adjourned to 7 August 2017 as a back up trial and 17 September 2018 as the substantive matter for trial.
- (7) On 8 August 2017, a warrant of arrest remained outstanding for the Applicant, Rueben Johnson. The warrant of arrest was cancelled on 16 August 2017 and the matter adjourned to 2 February 2018 for report with respect to the Prosecution's review of the matter for continued prosecution.
- (8) The Crown on 4 May 2018, advised that the matter would proceed to trial on 17 September 2018.
- (9) The fixed trial date of 17 September 2018 was vacated on 10 September 2018 due to the court's impending leave of absence. A new trial date of 21 January 2019 was fixed.
- (10) On 18 January 2019 at the pre-trial hearing, Counsel for the Applicant, Timothy Cole advised of a Constitutional Motion filed on even date. The matter was adjourned to the fixed trial date of 21 January 2019.
- (11) The Crown on 21 January 2019 indicated to the court its readiness to proceed with the matter. The Applicants nevertheless insisted on the Constitutional Motion being heard.
- (12) The Applicant Cole advanced principally that a VBI was filed on 31 August 2010; the trial was to proceed on 21 January 2019, some eight (8) years and four (4) months would have lapsed since the filing of the VBI resulting in undue delay in the prosecution of the matter - nine (9) years, four (4) months from date of arrest. Pursuant to Article 20(1) of the Constitution, he did not have a trial within a reasonable time resulting in undue delay therefore, the matter ought to be stayed – the

Applicant in no way was at fault for the delay. Moreover, two of his witnesses whom he intended to rely upon have since died – Carolyn Pinder and Johnny Guerrier – Co-Defendant.

- (13) The Crown has failed to bring the matter for hearing within a reasonable time. And, a fair trial could no longer be heard because the Applicant's witnesses are now deceased. Reliance was placed in ***Sooriamurthy Darmalingum and HM Advocates and another v. R*** in which charges were dismissed after eight and a half (8½) and six (6) years respectively of the delay occurring.
- (14) Counsel further contended that having regard to Section 3(2)(a) of The Bail Act, three years is a reasonable time in which to bring a matter for trial. Anything over three years is unreasonable which could be caught by Article 20(1) of the Constitution. Not only Parliament but also the courts are of the view that three years would be a reasonable time in which to bring a matter on for trial.
- (15) Counsel for the Applicant, Johnson for the most part adopted the submissions of Counsel for the Applicant, Cole adding only that the Applicant due to the delay had a difficulty making contact with witnesses and; that the Co-Defendant Johnny Guerrier on whom he intended to also rely upon was deceased. His evidence directly related to the police brutality suffered by the Applicant which goes to the root of the purported statement the Prosecution alleges was voluntarily given. A prejudice, the Applicant would suffer but which would be an advantage gained by the Prosecution regarding the burden it must discharge as to the voluntariness of the statement.
- (16) Unreasonable delay resulting in prejudice on its own to the Applicant together with the prejudice which will manifest at trial will put the Prosecution at an unfair advantage.
- (17) The Crown contended principally, that the application brought by the Applicants ought to have been brought a long time ago. Further, the application itself further delays the matter. The delay f

or the most part was due to the issue surrounding obtaining counsel for the Applicants coupled with the fact that one of the Defence Counsel in the matter was ill. Issues pertaining to the Applicants caused the delay and therefore, the Applicants ought not be allowed to rely on the delay. There is no prejudice to the Applicants since there has been no mention of witnesses nor any alibi given by either of the Applicants. The Applicants or their counsel either caused or contributed to the delay.

(18) The case of *Darmalingum* ought to be distinguished from this present case – its facts differ from those of this case. Each case turns on its own merits.

The issues of bail and the issues of trial are different and therefore require different considerations.

(19) Article 20(1) states as follows:-

(i) "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."

(20) Article 28(1) provides:-

"If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of the Constitution has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

(2) The Supreme Court shall have original jurisdiction

(a) to hear and determine any application made by any person in pursuance of paragraph (1) of The Article and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article.

Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the persons concerned under any other law."

- (21) I am satisfied that there are no other adequate means of redress which is or has been otherwise available to the Applicants to protect the right(s) advanced as having been or threatened to be infringed.
- (22) In *Elijah Anton Askov et als v. Her Majesty The Queen* (March 23 1990) referenced in the judgment of *Cancino Lightbourne v. The Attorney General of The Bahamas* Cri/JudRes/0011/2008 Curry J stated, "there is no more corrosive elements upon the edifice of justice than the perception that those persons whom may have committed serious crimes against members of the society are not held responsible for their actions."
- He stated further, "justice so delayed is an affront to the individual, to the community and to the very admission of justice." It is therefore axiomatic that a person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court."
- (23) The Applicants were charged with offences in 2009 and committed to the Supreme Court in 2010. Since that time and notwithstanding the several back up and fixed trial dates, the matter has not proceeded to trial – The Crown did on 21 January 2019 indicate its readiness to proceed to trial with intended witnesses present when counsel for the Applicant Cole advanced a Constitutional Motion on the basis of undue delay in the prosecution of the matter. He was joined by counsel for the Applicant, Johnson.
- (24) The Applicants asserted essentially that the nine plus years between the date of being charged and the Constitutional Motion is presumptively prejudicial.

- (25) In the case of the Applicant Cole, specific reference was made to intended witnesses, Carol Pinder and the co-accused, Johnny Guerrier who are said to be deceased. The court noted that there was confirmation by the Crown as to the death of Johnny Guerrier however, there was no confirmation for Carol Pinder. Further, there was no indication by the Applicant as to the nature of the evidence that was to be given by these persons. Without more, the court is unable to reasonably infer what if any prejudice is likely to be suffered by the Applicant.
- (26) With respect to the Applicant Johnson, his difficulty is making contact with witnesses as well as the death of the co-defendant Johnny Guerrier. The evidence of these witnesses it was advanced goes to the root of his defence as it pertains to the voluntariness of the statement allegedly given by him to the police. A statement which he says, was coerced from him due to police brutality. As for the witnesses other than Johnny Guerrier there was no indication of any efforts employed to locate them. The court is mindful of its own powers to secure the attendance of a witness should the Applicant seek to invoke the court so to do.
- (27) In the Privy Council decision of *Culpepper v. The States of Trinidad and Tobago* (2000) U.K. Page 5 at paragraph 11 - "It was submitted that the lapse of six years from the arrest of the Appellant to his trial was such a period as gravely to prejudice the defence of the Appellant. This lapse of time would, it was agreed have provided ground for an application to stay the proceedings as an abuse of the process of the court. It was accepted that such an application might not have succeeded but if the trial judge had rejected it he would have warn the jury in his summing up that the passage of time was potentially prejudicial to the Appellant and that the jury should take full account of this while considering their verdict. As it was, no such direction was given and the omission rendered the conviction unsafe."
- (28) That submission on behalf of the Appellant was rejected by the Privy Council and it continued, "The Board cannot accept the submission. It is well established that a trial court can stay proceedings on the ground of delay but the circumstances must be exceptional and the Defendant

must show on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held, in other words that the continuance of the prosecution amounts to a misuse of the process of the court.”

- (29) The position of the Board in *Culpepper* was further supported by Lord Lane in Attorney General's Reference No. 1 of 1990 wherein he stated, “stays imposed on the ground of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust.”
- (30) He further stated, “In principle therefore even when the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule.”
- (31) In *Stubbs v. The Attorney General* (2013), the Court of Appeal of The Bahamas expounded on the issue stating, “any adjudicating body, considering the grant of a permanent stay as a remedy for an alleged breach of Article 20(1) of The Bahamas Constitution must take into consideration (i) the period of time which has elapsed in the matter (ii) the complexity of the case (iii) the nature and extent of any delay instituted by the defendant and (iv) the manner in which the case has been handled by the prosecuting, administrative and judicial authorities.

These factors considered with the existence of any exceptional circumstances will determine whether the grant of a permanent stay is appropriate in the circumstances of a case,”

The court held, “it cannot be in the interest of justice that stays be granted whenever there is a constitutional breach. A permanent stay must only be granted in very exceptional circumstances.”

- (32) It therefore means, that a breach of an Applicants constitutional right under Article 20(1) of The Constitution does not automatically result in the staying of the trial. **Kenneth Anthony Miller v. H. M. Advocates et als** 2002 J CJ No. 81. Further Article 28 of The Constitution provides that this court may inter alia, make such orders, give such directions 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."
- (33) In **Attorney General v. Jermaine Samuel Seymour** Appeal No. 29 of 2006, the Court of Appeal confirmed that whilst the Supreme Court has the power to stay prosecutions which amounted to an abuse of the process of the courts, "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 Borthwick 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."
- (34) The court is cognizant of the remedy, the Applicants herein seek a stay of the proceedings, an ultimate remedy but, 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.
- (35) I have considered the submissions of Counsel for the Applicants as well as those of the Respondent together with the authorities cited and the relevant provisions of the Constitution. I am of the view that there has been delay in the prosecution of this matter. The delay for the most part was due to issues related to the Applicants with the prosecution and the court making some contribution to it as well. This notwithstanding, the court is of the view that the Applicants have not established on a balance of probability that owing to such delay, each would suffer serious prejudice so much so that he is unable to receive a fair trial.

- (36) There are any number of safe guards embodied within the trial process which will ensure that the Applicants receive a fair trial. Mere delay in and of itself is not sufficient for the court to invoke the ultimate remedy. Moreover, there was no exceptional circumstance advanced before the court sufficient to cause the court to grant a permanent stay of the proceedings.
- (37) With respect to the witnesses whom the Applicant Johnson are desirous of locating, efforts ought to be undertaken immediately to seek out their whereabouts. Should these efforts prove futile, and the assistance of the court is required, the court stands ready so to do.
- (38) The Prosecution having given an indication that it was ready to proceed to trial on 21 January 2019 and to allow efforts to be undertaken to secure the attendance of the witnesses for the Applicant; the court hereby orders that the matter is brought on for trial on or before the end of June 2019 otherwise, the court will give further consideration to the matter being stayed.

Dated this 8 day of March 2019

Justice

