

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

**AND**

**IN THE MATTER of an application by TELSON FRANCOIS**

*Applicant*

**AND**

**ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS**

*Respondent*

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**RULING**

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**Before:** The Honorable Madam Justice Guillimina Archer-Minns

**Appearances:** Mr. Michael Hanna for the Applicant  
Mr. Patrick Sweeting for the Respondent

**Hearing Date:** 14<sup>th</sup> October, 2021

## Introduction

1. This matter concerns an incident allegedly committed by the Applicant on 29 March 2012 wherein the Applicant was charged with two (2) counts of **Armed Robbery** and two (2) counts of **Possession of a Firearm With Intent to Prevent Lawful Arrest**. The Applicant was charged on 19 April 2012. He subsequently received bail in 2013. His trial would not have proceeded to date for various reasons.
2. On 14 October 2021, Counsel for the Applicant made an application to this Court based on a Notice of Motion and an Affidavit both filed on 20 August 2021 for this matter to be permanently stayed on the ground that the Applicant's right to a fair hearing within a reasonable time by an independent tribunal established by law has been infringed. The Respondent in this matter has opposed this application; their position being that a trial in relation to this matter will not infringe the Applicant's constitutional right to a fair hearing and that the delay in this matter will not preclude a fair hearing occurring. Further to this, the Respondent's case is that the Applicant in this matter contributed to most of the occasioned delay in this matter.
3. The Originating notice filed on 20 August 2021 by the Applicant seeks the following relief:
  1. *Declaration that Article 20(1) of The Bahamas Constitution which affords the Applicant the right to a fair hearing within reasonable time by an independent tribunal established by law has been infringed.*
  2. *That the proceedings be (permanently) stayed.*

*AND FURTHER TAKE NOTICE that the grounds of the application are;-*

  - (a) *That the present information is an abuse of the process of the Court.*
  - (b) *That no reasonable explanation has been given for the delay.*
  - (c) *That the Applicant has been severely prejudiced in his defense by reason of such delay."*

## Issue

4. The issues for this Court to determine are as follows:
  - (a) Has the Applicant's Article 20(1) rights been infringed?
  - (b) If they have, in the circumstances what is the appropriate remedy?

The Affidavit of the Applicant

5. An Affidavit in support of Originating Notice of Motion was filed herein on 20 August 2021. It provided inter alia:

*"I am TELSON FRANCOIS of Brougham Street New Providence one of the Islands of The Commonwealth of The Bahamas make oath and say as follows;*

- 1. That I am the applicant herein and depose from my personal knowledge;*
- 2. That on the 29th March A.D. 2012 the deponent was arrested and detained at Bahamas Department of Corrections on allegations of ARMED ROBBERY;*
- 3. That the deponent was charged before a learned Stipendiary and Circuit Magistrate Roger Gomez on 19th April A.D. 2012 with the following offences:-*

FIRST COUNT

*ARMED ROBBERY contrary to Section 339(2) of the Penal Code chapter 84;*

SECOND COUNT

*Armed Robbery contrary to Section 337 (2) of the Penal Code Chapter 84;*

THIRD COUNT

*Possession of a Firearm with intent to prevent lawful arrest contrary to Section 34 (1) of the Firearm Act Chapter 213;*

*That the deponent pleaded NOT GUILTY to the above charges;*

- 5. the deponent was arraigned before the Supreme Court on a Voluntary Bill of Indictment on December 12' A.D.2012; before Justice Roy Jones;*
- 6. the deponent was not represented by counsel until June 14 A.D.2019 when Counsel Michael Hanna was appointed brief;*
- 7. at all material times the deponent was available for trial;*
- 8. at no time did the Crown suggest a trial date for this matter.*
- 9. during the 252 months awaiting trial the deponent has suffered much anxiety, stress and memory loss;*
- 10. the mental anguish of this delay has brought the deponent to the breaking point; to the point that it has sapped the deponent of his will;*
- 11. the deponent is finding it difficult to find meaningful employment except for brief menial period in Harbour Island and Bimini at great sacrifice to his children and family.*

12. during the pandemic (Covid 19), the Deponent always comply to court proceedings during video links.
13. any further prosecution of this matter by the office of Public Prosecution is prejudicial and an abuse of the process of the court;
14. the office of the Registrar of the Supreme Court does not cover costs for filing of this application or the legal costs for marshalling this application before the court. In consequence, I am humbly requesting Your Ladyship's assistance in the costs of my application.
15. the information contained herein is correct and true to the best of my knowledge information and belief;"

#### The Affidavit of the Respondent

6. The affidavit of Inspector Durie Smith filed on 13 October 2021 was relied upon by the Respondent states as follows:

*"I, INSP. DURIE SMITH of the Eastern District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath and says as follows:*

1. *That I am a Police Officer of the Royal Bahamas Police Force and I am duly authorized to make this Affidavit.*
2. *That I make this Affidavit in opposition to the Applicant's Affidavit in support of a Constitutional Motion filed on 20th August 2021.*
3. *That the Respondent is opposed to the granting of a permanent stay in this matter due to the following:*
  - a. *The Applicant along with another was charged on 19th April 2012 with; Armed Robbery (2 counts), contrary to section 339 (2) of the Penal Code, Chapter 84, and Possession of a Firearm with Intent to Prevent Lawful Arrest, contrary to section 34 (1) of the Firearms Act, Chapter 213. The offences are alleged to have occurred Thursday, 29 March 2012.*
  - b. *That the Applicant was charged before the Magistrate's Court and subsequently served with his Voluntary Bill of Indictment documents.*
  - c. *That following the relevant procedures, the Applicant was committed to stand trial before the Supreme Court for the mentioned offence.*
  - d. *That the Applicant was arraigned before the Supreme Court and the matter was initially fixed for trial before Justice Roy Jones (as he then was) for 13 April 2015, however notwithstanding that this was a substantive trial date, this matter could not proceed, as the Court was engaged in another ongoing trial.*



- e. That again the on **25 April 2016** before Justice Archer-Minns, the matter was unable to proceed because of an ongoing trial before the Court, therefore new dates were fixed by the Court as follows: Back-up trial: 17 July, 2017 and substantive trial: 22 October, 2018.
- f. That on **17 July 2017**, (Back-up Trial) the Applicant **did not** appear at Court, his co-accused was brought to Court on a Warrant of Arrest. The attorney for the accused men was also absent. A warrant of Arrest was issued for the Applicant and the matter was further adjourned.
- g. That on **19 January 2018**, counsel for the Applicant was absent. Both the Applicant and his co-accused confirmed to the Court that Mr. Anthony Newbold still represents them. The matter was further adjourned.
- h. That on **13 April, 2018** the Applicant who was then in custody was absent. Also absent was his counsel, Mr. Anthony Newbold. The matter was further adjourned.
- i. That on **19 October 2018** the Applicant appeared before the Court and, requested time to retain counsel.
- j. That on **22 October 2018** (2nd fixed Substantive Trial date), the Applicant was still without counsel representation and the matter was again adjourned for fixture of new trial date.
- k. That subsequently new trial dates were again fixed by the Court; Back-up Trial: 21 October 2019 and Substantive Trial 21 September 2020.
- l. That on **24 May 2019** The Applicant appeared before the Court and informed the Court that he could not secure legal representation and asked for the Court's assistance.
- m. That on **30 August 2019** Mr. Michael Hanna appeared for the Applicant and requested several items which was subsequently handed over to him.
- n. That on **6 September 2019**, counsel for the Applicant raised the issue of Constitutional Motion Hearing, however the Court advised counsel that he had not yet move the Court with an application. On several subsequent adjourned dates defence counsel did not appear.
- o. That on **21 October 2019** (Back-up Trial date) while the Applicant's counsel was present, Counsel for co-accused was out of the jurisdiction, therefore trial could not proceed.
- p. That on **30 September 2020**, Counsel for the Applicant was not present, a trial was fixed for 5 October 2020.
- q. That on **28 October 2020** Mr. Michael Hanna advised the Court that he was unable to contact his client. On subsequent adjourned dates, counsel for the Applicant appeared sporadically before the Court.

r. That on **21 June 2021** (another Substantive trial date), the Applicant was absent. Counsel for the Applicant on the mentioned date advised the Court that he has no further interest in representing the Applicant (Telson Francois).

4. That the contents of this Affidavit are true and correct to the best of my knowledge, information and belief."

## **Applicable Law**

### **Constitution**

7. The Applicant in these constitutional proceedings advances that his right under Article 20(1) of the Constitution of the Bahamas has been infringed. The section states 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."**

8. The Applicant further asserts that his right under Article 20(2)(c) has been infringed, which states:

"20 (2) every person who is charged with a criminal offence -

(a)

(b)

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

9. This Court is satisfied that it has the jurisdiction to grant a permanent stay in the event that it is necessary in accordance with the Court of Appeal in the judgment of **Attorney General v Jermaine Samuel Seymour Appeal No 29 of 2006** which confirmed that the Supreme Court had the power to stay prosecutions which amounted to an abuse of the process of the courts. However, ***"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."***

10. The Court will base its decision on the principles in the following precedents already set. The case of Stephen Ronel Stubbbs and The Attorney General SCCrApp No. 153 of 2013 admonishes court that *“Any adjudicating body, considering as a remedy for an alleged breach of Article 20(1) of the Constitution the grant of a permanent stay, must consider, in addition to the existence of exceptional circumstances, the following: 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 caused by the defendant and 4. the manner in which the case has been handled by the prosecuting, administrative and judicial authorities. It must always be remembered that permanent stays imposed on the ground of delay should only be employed in exceptional circumstances.”* This principle fits squarely with the issue at hand to be determined.
11. Secondly, the principle in the case of Barker v Wingo 407 US 514 has also been widely used in this jurisdiction for determining whether one's rights of receiving a trial in a reasonable amount of time has been infringed. Contrary to the view of Attorney Hanna who believes that the Court should not use this principle, the Court respectfully disagrees and sees much logic and value in using the same. The four considerations which make up the principle are: *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.* These principles will be utilized as part of the court's consideration.

## Discussion and Analysis

### Length

12. Both cases (*Barker* and *Stephen*) outline the considerations for the length of the delay. In 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 Powel J said: *“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.”*



13. The delay in this matter from arrest to application is nine (9) years and six (6) months and sixteen (16) days (29 March 2012 – 14 October 2021) (the “**Operative period**”). The offences in this matter are serious and the Court takes that factor into account in considering the extended Operative period.

#### Complexity

14. R v *Stephen*. The evidence to be determined in a case can help to ascertain the complexity of a case. R v *Stephen*. The Court considers it prudent to do the same. The Respondent alleges that the Applicant along with another, while armed with an unlicensed firearm, robbed Lashanna Simmons and Tasheia Pinder of an undetermined amount of cash which was the property of John Chea and Son Food Store. The Applicant was also alleged to have evaded police and concealed an unlicensed firearm. There are nine (9) witnesses listed in the VBI for this matter. There are three (3) eye witnesses who are civilians and six (6) police witnesses. The evidence from all of the witnesses are very straight forward and it is the view of the Court that a trial in this matter should not last longer than two weeks. The Court believes that the matter before it is not a complex one. This notwithstanding, the matter concerned is very serious and cases of this type should be prosecuted in the public’s interests.

#### Reasons for the delay

15. Both principles state that reasons for delay should be considered; even though differently. **Barker** says that any delay should be considered while **Stephen** says the court should consider the delay contributed by the defendant. The court in **Stephen** further went on to state that the conduct of the matter by “**prosecuting, administrative and judicial authorities**” should also be considered. In the case of **Barker**, Powel J. states 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.”***



## Delay Occasioned by Applicant

16. The record of the Court further shows that there was a Bench Warrant issued for the Applicant's arrest on 7 November 2014 meaning that the Applicant would not have appeared before the Court on that occasion. The Warrant of Arrest was cancelled on 15 December 2014.
17. On 25 April 2016, which was the fixed trial date, the Court could not proceed with this trial because of an ongoing trial. Therefore, a fixed trial date was set for 22 October 2018, a back-up date was set for 17 July 2017 and a mention date was set for 24 June 2017. The delay occasioned on the part of the Court could not be helped in these circumstances and can be viewed as understandable in our Bahamian Court system. In the case of **Tapper v Director of Public Prosecutions [2012] 1.W.L.R** Lord Bingham "***suggested on the basis that, in a straightforward case, the unexplained passage of seven years without any contact with the defendant, made it unfair to even embark on trial.***" Conclusively, this is not a matter where the Respondent can be said to have contributed to the delay. There is no alleged delay on the part of the Respondent, nor any that this Court can ascertain. The Respondent has made constant checks on the Applicant throughout this operative period. There are various entries on the record of the Court where the defendant was summoned to Court and the Prosecution was present. Further, on many of those entries, the Respondent stated that they were ready for trial. Further, the Respondent averred that on 17 July 2017, the Applicant did not appear to court for his back up trial date; and that a Warrant of Arrest was issued for him. The record of the court reflects the same.
18. On 19 October 2018 the Applicant requested time to retain counsel but failed to retain one for his trial date of 22 October 2018. He then requested legal representation on 24 May 2019 and was subsequently granted the same. The non-action on the part of the Applicant to find legal counsel contributed to the long delay which is the epicenter of this matter.
19. Notwithstanding the above Counsel for the Applicant advanced that the Applicant was at all materials times available for trial. It must also be noted that the subsequent Fixed Trial Date of 5 October 2020 was set during the period when an Emergency Order was in effect resulting in the suspension of criminal trials.

On 7 October 2020, the Applicant's Constitutional Motion was withdrawn and the Respondents indicated that the criminal matter was under review by the Director of Public Prosecution. The matter was thereafter adjourned to the 28 October 2020 for fixture. On that date the matter was fixed for 15 March 2021.

On 15 March 2021 due to Covid related issues the office of the Department of Public Prosecution was closed resulting in the suspension of criminal trials at that time. On 24 March 2021 a new trial date was fixed for 21 June 2021.

On 21 June 2021, the Applicant did not appear for trial citing his financial inability to return to New Providence from the Family Island. Additionally, the court was in trial with respect to another matter. The matter was adjourned to 21 July 2021 for fixture.

On 21 July 2021 Counsel for the Applicant made application to have the Constitutional Motion reinstated. The Respondent had no objection and the matter was fixed for hearing on 23 September 2021. The trial matter was adjourned to 8 November 2021.

On 23 September 2021 the Applicant was unable to attend court due to Covid related issues. The Constitutional Motion was further adjourned to 14 October 2021 for hearing.

#### Efforts made by Defendant

20. Powel J. in **Barker** said: "**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.**"

There is no evidence before the Court that the Applicant made any special effort to advance his trial herein. Although counsel for the Applicant contended that the Applicant experienced mental anguish and difficulty with finding a job, this constitutional motion would be the first instance where the Applicant could be said to have asserted his rights. The Court does take into consideration however, that the operative period is a very long time to wait on a trial and can obviously cause much anxiety.

## Prejudice

21. This leads to the consideration of whether the Applicant will be prejudiced because of the delay experienced. In relation to prejudice, Powell, J 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.”**

There is no evidence before the Court that any witnesses are missing, or dead. There is a possibility of memory loss because of the long Operative period, however the Court is satisfied that in these circumstances, this being a relatively simple case (based on the facts in issue), witnesses can have their memories refreshed by their statements if need be. Counsel for the Applicant has invited the Court to permanently stay this matter while Counsel for the Respondent contended saying that there is no prejudice to the Applicant. In Attorney General's Reference (No 2 of 2001) [2003] UKHL 68, [2004] 2 AC 72 Lord Bingham said, inter alia, at paragraph 22 that ***“the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed”***.

## Remedy and Conclusion

22. 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 an inordinate length of time is. It is the Court's view that the Operative period is an inordinate period of time, therefore, the constitutional rights of the Applicant have indeed been breached.

23. However, a fair trial can be had even though a breach has transpired. A breach of an Applicant's constitutional rights under Article 20 (1) of the Constitution does not 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.

24. 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."* This was not advanced by the Applicant nor any evidence otherwise to indicate a fair hearing could not be achieved.

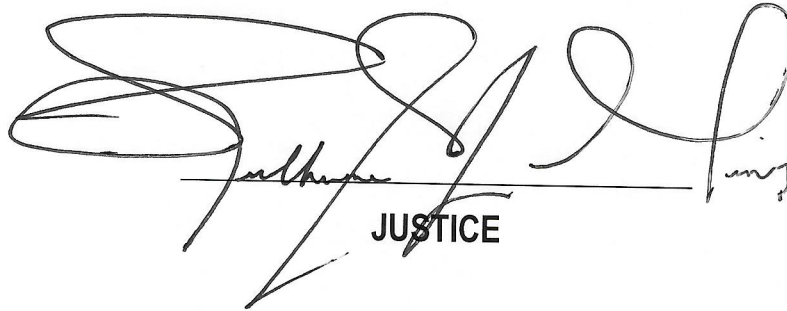
25. There are other remedies that the Court can consider in these circumstances. In **Prakash Boolell v The State Privy Counsel Appeal No. 39 of 2005**, Lord Bingham said in part where delay is established:

*"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..."*

26. The Court acknowledges that there has been a breach of the Applicant's article 20(1) rights; this notwithstanding a fair trial can still ensue. In all the circumstances considered, this Court cannot see any prejudice that would be attributed to the Applicant if this matter is to go to trial. The court is cognizant that since the hearing of this Motion, the Applicant had a trial date for 8 November 2021. The Applicant nor his Co-accused appeared to court for varying reasons. The matter was adjourned to 10 December 2021 for fixture; the very day this Constitutional Ruling was being delivered. All factors considered if this trial does not proceed to trial on or before 30 March 2022 this matter stands as being permanently stayed in relation to the Applicant.

Costs of this Application awarded to be taxed if not agreed.

Dated the 10<sup>th</sup> day of December 2021



A handwritten signature in black ink, consisting of several large, overlapping loops and a long horizontal stroke. The signature is written over a horizontal line. Below the line, the word "JUSTICE" is printed in a bold, sans-serif font.

JUSTICE