COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

CRIMINAL DIVISION

No. 233/10/2017

IN THE MATTER OF Articles 20(1), 20(2) (c) and 28 of the Constitution of the Commonwealth of The Bahamas (hereinafter "the Constitution")

BETWEEN

THE QUEEN

AND

DAVID SHANE GIBSON

Applicant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Edward Fitzgerald QC with him Mr. Anthony McKinney QC and Mr. Owen Wells for the Applicant
Mr. James Guthrie QC with him Mr. Terry Archer and Ms. Destiny McKinney for the Respondent

Hearing Dates: 27, 28, 29 November, 17, 18 December 2018
Further submissions by the Applicant dated 18 January 2019 and by the Respondent (undated) but received on 25 January 2019

Criminal law – Voluntary Bill of Indictment – Stay of criminal proceedings – Application to quash indictment – Abuse of process - Allegations of gross prosecutorial misconduct – Principles to be applied - Whether complaints to be raised before jury – Whether fair trial possible

Constitutional Motion – Abuse of process – Scope of Applicant's rights under Article 20(1) and 20(2)(c) of the Constitution of The Bahamas – Whether Applicant's rights threatened – Effect of the proviso to Article 28 of the Constitution

The Applicant, a former Minister of Government, was charged with 15 counts of bribery and corruption while holding public office. He was to stand trial on 25 February 2019 which date has expired principally because of the present application to permanently stay his criminal proceedings on the ground of gross prosecutorial misconduct. He further alleged that his constitutional rights to a fair trial and to be given adequate time and facilities under Article 20(1) and 20(2) (c) of the Constitution of The Bahamas were being contravened.

HELD: (i) refusing to quash the Voluntary Bill of Indictment and to stay the proceedings and (ii) finding that the Constitutional Motion is an abuse of the process of the Court;

1. The Applicant had failed to establish that what took place amounts to 'gross prosecutorial misconduct'. Therefore, the Voluntary Bill of Indictment would not be quashed nor a stay ordered. The two categories of case in which the court might exercise its jurisdiction to stay proceedings for abuse of process are: (i) where it would be impossible to give the accused a fair trial and (ii) where it was necessary to protect the integrity of the criminal justice system. In determining whether to stay criminal proceedings on the ground of gross prosecutorial misconduct, the court would take into account the particular circumstances of each case and, exercising a broad discretion, would strike a balance between the public interest in ensuring that those accused of serious crime were prosecuted and the competing public interest in ensuring that the misconduct did not undermine public confidence in the criminal justice system and bring it into disrepute. See Lord Dyson at para [13] of **R. v Maxwell** [2010] UKSC 48; **Warren v Attorney General for Jersey** [2011] UKPC 10 per Lord Dyson at para [22]; **R v Horseferry Road Magistrates' Court, Ex p Bennett** [1994] 1 A.C. 42 at p. 74.

2. As a general rule, any discussions as to what evidence is going to be given by prosecution witnesses should never take place and it was wrong for ASP Thompson to hold the joint witness session on 25 September 2017. See: **R v Momodou and another** (2005) EWCA Crim 177; **R v Skinner** (1994) 99 Cr. App. R. 212; **R v Shaw** [2002] EWCA 3004 and **R v Richardson** (1971) 55 Cr. App. R, 244 applied.

3. The prosecution is under a duty to disclose as soon as is reasonably practicable all relevant material: **Keane** (1994) 99 Cr. App. R. 1. The duty to disclose is a continuing one: **Maguire** (1992) 94 Cr. App. R. 133 at 146. The obligation on the prosecution to make disclosure does not include details of every twist and turn of the investigation: **The Attorney General v Sean Cartwright and others** Criminal/Constitutional Appeal No. 8 of 2004; **Clarke v Commissioner of Police** [2003] BHS J. No. 43; **The State v Paul (Michael) et al** (1999) 57 WIR 48 applied.

4. The Applicant's constitutional rights were not threatened and his complaints were such as could be properly addressed in the ordinary process of a criminal trial: the proviso to Article 28 of the Constitution therefore applies: **Boodram v A-G of Trinidad & Tobago** [1996] A.C. 842 at pp 853 – 855; **Independent Publishing Co. v A-G of Trinidad & Tobago** [2005] 1 A.C. 190 at paras [83] to [94]; **Thakur Persad Jaroo v A-G of Trinidad & Tobago** [2002] UKPC 5 considered. **Stephen R. Stubbs v The Attorney General** (SCCivApp No. 153 of 2013) distinguished.

5. It is well established that the right to apply to the Supreme Court pursuant to Article 28 of the Constitution should be exercised only in exceptional cases where there is a parallel remedy. See: **Jaroo**; **Harrikissoon v Attorney General of Trinidad and Tobago** [1980] AC 265; **Chokolingo v Attorney General of Trinidad and Tobago [**1981] 1 WLR 106 at pp. 111-112 and **Hinds v The Attorney General** [2001] UKPC 56.

JUDGMENT

Charles J:

Introduction

[1] Mr. David Shane Gibson ("the Applicant") a former Minister of Government, was arrested on 2 August 2017. On 3 August 2017, he was charged with a number of bribery and corruption offences. Since then, a number of charges have been withdrawn and he is now facing 15 counts of bribery. The 15 counts of bribery are particularized in an Voluntary Bill of Indictment ("VBI") which was amended at a directions hearing on 11 May 2018 before the late Chief Justice (Ag) (as he then was), Mr. Stephen Isaacs. Upon his untimely demise, the matter was assigned to me. I have since fixed two trial dates: one to commence on Monday 25 February 2019 which has now expired and a new trial date of Monday 23 September 2019. This trial has not taken place principally because of this extant Originating Notice of Motion ("Notice of Motion") filed by the Applicant on 24 July 2018 seeking, in the main, a quashing of the VBI and a stay of the criminal proceedings on the grounds of abuse in that there has been gross prosecutorial misconduct which undermines public confidence in the criminal justice system and conduct which renders a fair trial impossible. The Applicant also seeks redress under Articles 20(1), 20(2)(c) and 28 of the Constitution of The Bahamas ("the Constitution"). The Applicant's Notice of Motion was supported by the affidavits of Ryszard Humes sworn to on 16 August 2017 ("Humes 1") and 17 August 2018 ("Humes 2") respectively.

[2] On 10 September 2018, the Director of Public Prosecutions ("the Respondent in these proceedings") filed a Summons supported by an affidavit of Mrs. Cephia Pinder-Moss filed on the same day to strike out the Notice of Motion pursuant to RSC Order 18 rule 19 (a), (b) and (c) and under the inherent jurisdiction of the Court on the grounds that: (a) it discloses no reasonable cause of action; (b) it is

scandalous, frivolous or vexatious; and (c) it may prejudice, embarrass or delay the fair trial of the Applicant.

Background facts and chronology

[3] In order to have a better understanding of this matter, it is helpful to set out some undisputed background facts in a chronological fashion. To the extent that these facts are not agreed, then what is stated must be taken as positive findings of facts made by me.

[4] The Applicant was a Cabinet Minister and a Member of Parliament in the former Progressive Liberal Party ("PLP") Government. Besides his ministerial responsibilities for Labour and National Insurance, he spearheaded the Government's nationwide relief and cleanup efforts following the ravages of Hurricane Matthew in early October 2016.

[5] On 10 May 2017, general elections were held. The Free National Movement ("FNM") was victorious and they now are the government in power. It appears that their mandate is to stamp out corruption, particularly among public officials. This is manifest from speeches made by the Honourable Prime Minister during the budget debate in June 2017, the Honourable Attorney General in an article appearing in the Tribune Newspaper on 23 June 2017 and the then Commissioner of Police, Ellison Greenslade on 27 June 2017. In a press conference on 27 June 2017, Commissioner Greenslade confirmed that a corruption unit within the Royal Bahamas Police Force ("RBPF") termed the "anti-corruption branch" was fully operational.

[6] About the same time, Jonathan Ash ("Mr. Ash"), a businessman and President of Ash Enterprise Ltd and Deborah Bastian ("Ms. Bastian) then Consultant, National Health Insurance Secretariat were interrogated by the police.

[7] On 27 June 2017, ASP Thompson met with Mr. Ash and his attorney, Alicia Bowe: paragraph 5 of ASP Thompson's affidavit and diary entries 6, 7 and 8. After that meeting, ASP Thompson made preparatory notes with a view to writing up a

statement in due course. It is true that these preparatory notes would not normally have been disclosed in a criminal trial but have been disclosed to the Applicant. On this day, Mr. Ash was also granted immunity by the Attorney General.

[8] On 29 June 2017, Mr. Ash gave a detailed statement which was recorded and transcribed. Mr. Ash signed the typed statement on 30 June 2018.

[9] On 1 July 2017, Ms. Bastian was seen at her home by the police. She agreed to attend the Criminal Detective Unit ("CDU"). While at the CDU, she was taken into police custody. A discussion took place followed by an interview under caution. She was subsequently released from police custody. The Record of Interview has been disclosed to the Applicant on 18 July 2018.

[10] On 4 July 2017, as a result of further information, ASP Thompson along with Detective Sergeant Rolle ("Sgt. Rolle") recorded a caution statement from Ms. Bastian. This statement has also been disclosed to the Applicant on 18 July 2018.

[11] On that same day, Ms. Bastian signed an Immunity Agreement. To date, it has not been signed by the Attorney General.

[12] On 6 July 2017, Sgt. Rolle attempted to contact Ms. Bastian in order 'to clear up ambiguity' in her caution statement. He was unsuccessful as she was away.

[13] From 11 to 23 July 2017, ASP Thompson proceeded on vacation leave. During that time Inspector McCartney ("Insp. McCartney") continued investigations in this matter.

[14] On 18 and 19 July 2017, further interviews took place between Insp. McCartney, Sgt. Rolle and Ms. Bastian: diary entries 46 and 47. On the latter date, Ms. Bastian gave a statement which begins: "On 4 July 2017, while at the Central Detective Unit, I gave certain information to the police."

[15] On 19 July 2017 at about 6.10 p.m., Ms. Bastian took officers to various locations where she alleged that she had handed money over from Mr. Ash to the Applicant.

Her attorney Mr. Raymond Rolle ("Mr. Rolle") accompanied her: paragraph 11 of ASP Thompson's affidavit and diary entry 48.

[16] Sometime before 23 July 2017, Ms. Bastian's status changed from suspect to prosecution witness: paragraphs 10 -12 of ASP Thompson's affidavit. No details have been disclosed as to precisely when and what circumstances led to that changed status.

[17] On 25 July 2017, Ms. Bastian gave a further comprehensive statement which begins: "I am presently a consultant with National Health Insurance Secretariat": diary entries 51 and 52. At paragraph 13, ASP Thompson explained to Ms. Bastian that because her status had changed from a suspect to a prosecution witness, she needed to convert her caution statement to a witness statement and that she would use the date of the caution statement which was 25 July 2017. Hence, the retention of the date of 25 July 2017. This statement was not signed until 5 August 2017 when ASP Thompson met with Ms. Bastian and her attorney, Mr. Rolle. Ms. Bastian read the converted statement and signed it: paragraph 16 of ASP Thompson's affidavit.

[18] In the intervening period, on 1 August 2017, the Applicant was approached by ASP Thompson outside his residence and was advised to attend the offices of the CDU at 9.30 a.m. the following day. Acting in accordance with that directive, the Applicant attended the CDU on 2 August 2017 with his attorneys Mr. Anthony McKinney QC and Mr. Owen Wells. He was placed under arrest.

[19] On 3 August 2017, the Applicant was charged with a number of bribery offences.

[20] On 4 August 2017, acting on advice from the Office of the Director of Public Prosecutions ("ODPP"), ASP Thompson along with Sgt. Rolle met with Ms. Bastian and her attorney, Mr. Rolle to go over the conversation she had with the Applicant in the meeting and after the meeting with Mr. Ash. The Applicant insists that the fact of this meeting was never disclosed to the Applicant. I agree with the Respondent that there is no obligation to disclose the fact of this meeting. ASP

Thompson, whom I found to be credible, said that these points were summarized and placed in the converted statement.

[21] On 25 September 2017, ASP Thompson met with Mr. Ash and his attorney, Alecia Bowe ("Ms. Bowe") and Ms. Bastian and her attorney, Mr. Rolle at her office at CDU. She said that this meeting was held to "clear up" what was discussed between the two of them prior to them meeting with Minister Shane Gibson; whether they had agreed to pay him the money before they met with him; who proposed the money in the meeting with Minister Shane Gibson and whether the amount of $200,000.00 or $250,000.00 was given to Ms. Bastian by Mr. Ash. This is what the Applicant termed the "unlawful joint witness session". ASP Thompson was not aware that Ms. Bastian had audio recorded the joint witness session.

[22] On 27 September 2017, ASP Thompson met with Ms. Bastian and her lawyer, Mr. Rolle. ASP Thompson was unaware that Ms. Bastian had audio recorded this session also. She said that the purpose of this meeting was for Ms. Bastian to sign her statement which was done in the presence of her lawyer. The Applicant complains that the fact of this meeting was never disclosed. There is a notation in the diary at entry 77 which states: "ASP Thompson met with Deborah Bastian and Attorney Rolle at CDU". In this meeting, there is talk of her signing off: page 127. Then, there is a conversation about the statement being backdated to make it look like it was signed on 25 July 2017. This conversation took place when ASP Thompson was not present. She had left the room saying "I'll be right back." In that exchange, her lawyer Mr. Rolle told her that it would not be necessary to backdate the statement as "they can gather information after they charge him."

[23] On 30 September 2017, a further meeting took place between ASP Thompson and Ms. Bastian. This meeting was also secretively audio recorded by Ms. Bastian. There was further discussion about what should be said in her evidence and how to avoid an allegation of entrapment. The alterations made after this meeting was explained by ASP Thompson at paragraph 29 of her affidavit. The suggestions came from Ms. Bastian who reviewed the hurricane Matthew spreadsheet that she

had prepared to be sent to the Applicant which she had received from the Financial Secretary Simon Wilson. Ms. Bastian showed ASP Thompson Mr. Ash's payment amounts. ASP Thompson said that the words "*forego one of his payments of $250,000*" were added to her statement. Additionally, she says that hearsay and where Ms. Bastian sought to draw inferences as to Mr. Gibson's character were removed from the statement.

[24] Stripped to its bare essentials, the complaints by the Applicant are these. First, the improper conduct of the joint witness session conducted by ASP Thompson on 25 September 2017. Secondly, the deliberate editing out of the statement of certain passages and facts which the witnesses were encouraged not to raise or disclose. Thirdly, the provision of false dates for the witness statements. The 25 July 2017 statement of Ms. Bastian was not signed on that date but later, on 27 September 2017 after the joint witness session which was held on 25 September 2017. Likewise, the statement of Mr. Ash taken on 28 June 2017 was not signed until 28 September 2017. Fourthly, the failure to make disclosure of the fact of the joint witness session and the statements made which would have been of assistance to the defence. Fifthly, the harassing and pressuring of Ms. Bastian to make further statements against the Applicant in the context of her not being treated fairly by not being granted immunity.

[25] Against this brief backdrop, the Applicant seeks to have his VBI quashed and a permanent stay of the criminal proceedings. Additionally, he seeks relief under various articles of the Constitution.

The evidence

[26] At the request of the Applicant, ASP Thompson and Ms. Bastian were called to testify at this hearing. The latter was subpoenaed by the Court.

[27] I had the advantage of seeing, hearing and observing the demeanour of these two witnesses. To be succinct, I found ASP Thompson to be a credible witness. She was prepared to accept many of the matters put to her even when they were to her

disadvantage. No doubt, it was unwise to hold the joint witness session on 25 September 2017 and worse yet, to cause the two principal witnesses for the prosecution to be together with their lawyers to “clear up some ambiguity”. In her oral testimony to this Court, she stated that she did not think, at the time, that she was doing anything wrong. She said that the alterations to the statements were to remove hearsay, speculations, irrelevant information and inadmissible information: paragraph 22 of her affidavit. I believe her.

[28] Unkind as it may be, ASP Thompson struck me as an officer with very little investigative skills despite her impressive rank in the RBPF. I say this because every single police officer from the rank of constable ought to know that two prosecution witnesses should not be brought together to discuss their evidence, exchange their account and decide as to what to say and what they should omit to say in their statements and evidence.

[29] In fact, I am amazed that the lawyers, Mr. Rolle and Ms. Bowe, who were present, did not raise their objection with ASP Thompson and for that, criticism ought to be levied at them much more than ASP Thompson (who is not a lawyer). That said, I am of the firm view that ASP Thompson’s actions were not deliberate but imprudent and certainly a mistake. She admitted that, with hindsight, she would have done things differently.

[30] On the issue of immunity, I preferred ASP Thompson’s evidence to that of Ms. Bastian. I believed ASP Thompson that she thought that Ms. Bastian had gotten her immunity (this was true on 25 September and until 27 September 2017): page 127 of the transcript and pages 28-30 and 160-165 of the Transcript of Court Proceedings. I do not believe that she was holding the immunity over Ms. Bastian’s head to extract a statement from her that coordinated with Mr. Ash’s statement. On the other hand, I got the impression that she did not believe that Ms. Bastian had told the full story.

[31] That being said, mistaken and unwise though her actions were, I still found her to be a credible witness and I accepted her evidence.

[32] I am also reminded that it is not the function of the criminal courts to discipline the police. That is the job of the Commissioner of Police. In the Privy Council case of **Warren v Attorney General for Jersey** [2011] UKPC 10, [2011] 2 All ER 513, after stating in para [36] that the decision in **R v Grant** [2006] QB 60 was wrong, Lord Dyson went on the state at para [37]:

> **"The Court of Appeal in Grant recognised at para 55 that it is "not in general the function of criminal courts to discipline the police". That was a reflection of the words of Lord Lowry in Bennett at p 74H: "the discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct....'pour encourager les autres'". It may not always be easy to distinguish between (impermissibly) granting a stay "in order to express the court's disapproval of official conduct pour encourager les autres" and (permissibly) granting a stay because it offends the court's sense of justice and propriety. But it is difficult to avoid the conclusion that in Grant the proceedings were stayed in order to express the court's disapproval of the police misconduct and to discipline the police**. [Emphasis added]

[33] Now, to Ms. Bastian's testimony. Ms. Bastian also gave sworn testimony. I found her to be a very intelligent woman. I also found her to be calculating. She told me that she audio recorded the three sessions in September 2017 because she was afraid of the police. In my view, it takes a very brazen person to arm oneself with about five or six cell-phones (which she showed to me during her testimony in this Court) and to audio record police proceedings at the CDU. No ordinary person would do that. To my mind, she had an ulterior motive: perhaps to use them at the opportune time if it suits her. Notably, she hid that fact from her own lawyer, Mr. Rolle who was present with her at all times and during the joint witness session. Instead, she went to Mr. Phillip "Brave" Davis whom it appears, she confided in and evidently, trusts more than her own lawyer.

[34] As I dissect the transcript which she audio recorded, it appears to me that Ms. Bastian and not ASP Thompson, as Mr. Fitzgerald QC suggests, was in the driver's

seat. Fully cognizant that every word was being recorded, she knew exactly what to say and what not to say, when to intervene and when not to.

[35] At the end of the day, I found Ms. Bastian to be an untrustworthy witness, not candid and forthright to this Court, for a litany of reasons namely:

a. The question of campaign contributions was never mentioned before she gave her evidence in this Court. In her oral testimony, she said that she told the police that the money was for political contributions but they did not record it. If that were the case, why did she not bring up that during the joint witness session or any other sessions that she audio-recorded? Why did she not tell her lawyer or Mr. Davis whom, evidently, she reposed much trust and confidence in?

b. Her reaction to questions about the interview under caution – Tab 4 of Agreed Bundle (when she was told that she was under suspicion of bribery).

c. Her reaction to cross-examination about the statement that she gave to Insp. McCartney on 25 July 2017: Tab. 7. During cross-examination by Mr. Fitzgerald QC, she said that these were not her words and that at some point she was told by Sgt. Rolle that this was ‘her last shot’, and that she thought her immunity depended upon telling the police what they wished to hear. However, when she was given the opportunity to read her statement in this Court, she was unable to identify anything in it that was untrue.

d. Her evidence about taping the three sessions as to which she refused to answer questions. I did not accept that she was scared and, out of fear, she audio recorded these sessions (and possibly others). As she stated, she gave about 13 witness statements to the police. I do not believe that she was truthful.

e. Her evidence about telephone bugging and her being followed by the police including during the last few weeks to which she made no complaints to her lawyer or Mr. Davis.

The issues

[36] The issues which arise for consideration are as follows:

1. Whether what occurred particularly on 25 September 2017 by the police in holding a joint witness session with the two leading prosecution witnesses and their lawyers might properly be described as gross prosecutorial misconduct capable of undermining public confidence in the criminal justice system?

2. Whether anything occurred that has rendered a fair trial impossible?

3. Whether the Constitutional Motion filed by the Applicant seeking relief pursuant to Articles 20(1), 20(2) (c) and 28 is an abuse of the Court's process and ought to be struck out?

The law: abuse of process at common law

[37] The law in relation to abuse of process has been recently considered by the House of Lords in **R v Maxwell** [2010] UKSC 48 and by the Privy Council in **Warren v Attorney General for Jersey** [2011] UKPC 10, [2011] 2 All ER 513. The general approach was set out by Lord Dyson at para [13] of **Maxwell.**

> **"It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety' (per Lord Lowry in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74 g) or will 'undermine public**

confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in *R v Latif* [1996] 1 WLR 104, 112 f)."

[38] At para. 23 of **Warren**, Lord Dyson said:

> **"In Latif, at p 112G, Lord Steyn said that the law in relation to the second category of case was "settled". As he put it, at pp 112G-113B:**
>
> > **"The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42. Ex p Bennett was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in Ex p Bennett conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."**

[39] In **Maxwell**, Lord Brown adopted the summary of the approach of the courts of England and Wales to the second category of cases put forward by Professor Choo in *Abuse of Process and Judicial Stays of Criminal Proceedings* 2nd edition (2008):

> **"The courts would appear to have left the matter at a general level, requiring a determination to be made in particular cases of whether the continuation of the proceedings would compromise the moral integrity of the criminal justice system to an unacceptable degree. Implicitly at least, this determination involves performing a 'balancing' test that takes into account such factors as the seriousness of any violation of the defendant's (or even a third party's) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged."**

[40] That summary was also approved in **Warren**.

[41] It is common ground that the tests in **Warren** are the proper tests to be applied in the present case.

Submissions by Counsel - Issues 1 and 2

[42] These two issues are inter-related and will be subsumed under this heading. Learned Queen's Counsel Mr. Fitzgerald appearing for the Applicant submits that a stay of proceedings on the ground of abuse is justified on both limbs of the court's abuse jurisdiction as described in **Warren** in the sense that there has been both executive misconduct which undermines public confidence in the criminal justice system and conduct which renders a fair trial impossible. Mr. Fitzgerald QC correctly stated 'grave prosecutorial misconduct' can include 'police misconduct' as is stated in **Warren** at paragraph 45.

Complaints of grave prosecutorial misconduct

[43] Mr. Fitzgerald QC submits that the Applicant relies on a number of key points to establish 'grave prosecutorial misconduct'.

[44] Mr. Fitzgerald QC forcefully argues that firstly, there have been a number of improper and wholly undisclosed meetings held by ASP Thompson: page 79 of Humes' affidavit between the police and the two key witnesses for the prosecution namely Mr. Ash and Ms. Bastian. In particular, **there has been a joint witness session on 25 September 2017** in which Mr. Ash and Ms. Bastian were summoned by ASP Thompson and in the presence of Sgt. Rolle and the witnesses' lawyers, they were deliberately encouraged to compare and coordinate their evidence and were given guidance and directions as to what to say – both by the police and by their respective lawyers. Such joint session was wholly improper and legally wrong in itself. Mr. Fitzgerald QC asserts that the said process has resulted in the contamination of both witnesses' evidence such that it would not be possible for them to give spontaneous and independent evidence free of the process of contamination. Mr. Fitzgerald QC further submits that the whole process offends the well-known principle that "discussions between witnesses should not take

place and the statements and proofs of one witness should not be disclosed to any other witness." This principle is well-established in a number of cases and clearly enunciated in the leading case of **R. v Momodou and another** (2005) EWCA Crim 177. The Applicant also relies on **R. v Richardson** (1971) 55 Cr. App. R. 244; **R. v Skinner** (1994) 99 Cr. App. R. 212 and **R. v. Shaw** [2002] EWCA 3004. He argues that what was done in the present case was not just "unwise" as the prosecution puts it, but wholly improper and unlawful.

[45] Mr. Fitzgerald QC next submits that, at the joint witness session on 25 September 2017, Mr. Ash and Ms. Bastian were invited to give their accounts. ASP Thompson frequently intervened to seek modification of the sums involved (pages 98-99 of transcript). Ms. Bowe gave advice in the presence of ASP Thompson and Sgt. Rolle to both witnesses as to what evidence should be given, and how it should be given in order to avoid the impression that the witnesses had "entrapped the minister": pages 107-109 of transcript. She also advised Ms. Bastian as to what matters should be omitted from her witness statement: pages 109 – 110. Towards the end of the meeting, Mr. Ash talked about signing a statement: page 115. But no statement which he signed on that date was ever disclosed. **The only statement disclosed was the one dated 28 June 2017**.

[46] Learned Queen's Counsel states that there were then two **further undisclosed meetings between the police and Ms. Bastian on 27 September 2017 and 30 September 2017** respectively. The fact that these meetings took place was never disclosed by the prosecution until confronted with the transcript. Even then, no frank admission has been made as to the fact that they took place and no explanation has been given as to why the fact of these meetings has not been disclosed.

[47] At the meeting of 27 September 2017, Ms. Bastian said "we were here on 4 August to sign but she (ASP Thompson) said she needed it to be done before he got charged". She then agreed with her lawyer, Mr. Rolle that that was why the earlier date of 25 July 2017 had been put on her statement – because the Applicant was

charged on 3 August 2017 and that made it look as if the statement had been signed before he was charged: page 128. Mr. Fitzgerald QC submits that from a bare reading of the transcript it is obvious that Ms. Bastian met with the police on multiple occasions and other statements must exist that have not been disclosed to the defence.

[48] He next submits that **at the meeting of 30 September 2017** between Ms. Bastian and ASP Thompson, the contents of her evidence was further discussed and ASP Thompson again gave suggestions as to what should be said. ASP Thompson prompted Ms. Bastian to say things that chimed with the evidence of Mr. Ash and stated: “so I need you and him to be in sync with what happened here”: page 140.

[49] Secondly, says Mr. Fitzgerald QC, there was the deliberate editing out of the statement of certain passages and facts which the witnesses were encouraged not to raise or disclose (for example by the transcript at pages 106 -108 and pages 122 -125).

The edits

a) The key passages edited out can be shown by setting out the texts of the statement signed on 5 August 2017. All the text that is *printed in bold* was edited out and deliberately kept from the defence as a result of the joint witness session on 25 September 2017 and subsequent discussion between Ms. Bastian and her lawyer, Mr. Rolle on 27 September 2017.

The passages edited out (printed in bold)

> “Once he agreed to meet with Minister Gibson, he and I spoke about what he should tell Gibson, **and I starting coaching him, I told him the main challenge is the amount of his billings and what he is going to say.** I told him you have to say how much people you had working, how much equipment you used and what your response will be. **Ash and I met almost every day and I would coach him on what his response to each question would be.** I told Ash to tell Minister Gibson how much people he had employed and the cost of operation. **In one of me and Ash meetings,**

we agreed that he should offer Mr. Gibson money so that he could approve his bill. When we first started talking about it, we didn't put a figure on it until sometime later. We both came up with a figure of $250,000 to offer Minister Gibson. I do not remember exactly when it was but I did approach Minister Gibson about having a meeting with Mr. Ash, I also explained to him who Ash was, that he was one of the contractors working on the dumpsite and that he wanted to meet with him. **I did not mention anything about payments.** The meeting was scheduled to be held at Minister Gibson office at the Ministry of Public Service **at 12 p.m. I don't remember what day it was but I do know it was on a day that we were having NHI meeting with Prime Minister so I was about 15-20 minutes late for the meeting. When I got to the meeting, I had to go through the receptionist and Minister Gibson secretary. The records would reflect who was there and what time they got there. When I got in the meeting, I met Ash and Minister Gibson in his conference room, that is when Minister Gibson jokingly said to me "you just reached and the meeting over", and I said "the meeting can't be over as I just got here. When I got in the meeting, Ash and Gibson were sitting side by side and I sat across from them."**

[50] Thirdly, Mr. Fitzgerald QC submits that ASP Thompson provided false dates on the witness statements to give the appearance that they were signed before the Applicant was charged: see pages 127 – 129 of the transcript. The 25 July 2017 statement of Ms. Bastian was not signed on that date but later, on 27 September 2017 after the joint witness session which was held on 25 September 2017. Likewise, the statement of Mr. Ash taken on 28 June was not signed until 28 September 2017.

[51] Fourthly, says Mr. Fitzgerald QC, the prosecution has failed to make disclosure of the fact of the September joint witness session and the statements made during that session which would have been of assistance to the defence. ASP Thompson admitted that she told both the Commissioner of Police and the DPP of the fact of

this joint witness session. According to learned Queen's Counsel, neither saw it fit to disclose to the defence nor the Court that it had taken place until after they were confronted with the audio recording and transcript. This, says Mr. Fitzgerald QC, is contrary to the duty of the police and prosecution to disclose all relevant evidence which weakens their case or strengthens that of the defence. That principle is well-established in **R v H** (2004) 2 AC 134 at page 147 and in the passage from **R v Ward** (1993) 1 W.L.R. 619 cited in **R v H** at page 674.

[52] Fifthly, the alleged harassing and pressuring of Ms. Bastian to make further statements against the Applicant and the obtaining of her signature to unfairly edited statements by the postponement of the grant of immunity. This complaint by Ms. Bastian that the grant of immunity was being postponed until she made a statement satisfactory to the prosecution (and not inconsistent with Mr. Ash's statement) is something implicitly accepted by ASP Thompson at pages 126 and 139 because she links the grant of immunity by the DPP to the provision of a further statement. This reveals the true situation which involved oppression and unjust pressure. At page 126, Ms. Bastian is told by ASP Thompson she doesn't have immunity because the DPP keeps saying "it ain't enough".

[53] Learned Queen's Counsel Mr. Fitzgerald vociferously argues that the cumulative effect of all these matters is certainly grave enough to pass the high threshold laid down in **Warren** and to constitute serious prosecutorial misconduct justifying a stay on the basis that it undermines public confidence in the criminal justice system. Mr. Fitzgerald QC submits that even the first four key points alone would be sufficient to justify a stay.

[54] On the immunity issue, Mr. Fitzgerald QC maintains that the unjustified postponement of the grant of immunity operated to exert pressure on Ms. Bastian to cooperate in providing the further and revised statement which suppressed her own actual version of what had happened. Even if ASP Thompson was not aware of the fact that immunity had not been granted until towards the end of the session on 27 September 2017, she then herself linked the likely grant of immunity to the

provision of an acceptable statement: pages 126 and 139. Moreover, Ms. Bastian was clearly made to feel that she had to keep providing more and more by the refusal of immunity. The DPP clearly linked the provision of a satisfactory statement to the grant of immunity. This, according to Mr. Fitzgerald QC, is improper and unfair.

[55] Mr. Fitzgerald QC contends that the improper and unlawful conduct by the police is sufficiently serious to meet the threshold test in **Warren** of 'grave prosecutorial misconduct' which undermines public confidence in the criminal justice system and makes it wrong for the trial to take place at all.

Did anything occur that has prevented a fair trial?

[56] Learned Queen's Counsel Mr. Fitzgerald next submits that a fair trial has been rendered impossible for the following reasons:

(i) The process engaged in of discussing, influencing, synchronizing and tailoring evidence has produced a situation where a fair trial is not possible. Once contamination takes place there is a very real risk that the damage cannot be undone. The extensive exchange of accounts and the prompting by the lawyers and ASP Thompson herself, has produced a situation in which the provision of a true account is likely to be compromised and improperly prejudiced by the tactical warnings about what to say and what not to say that were given throughout the prolonged joint witness session. But it will not be easy for the defence to challenge the witnesses on this point without going through the intricate and elaborate process of reconstruction that has been performed for this court; and the jury may not appreciate this or welcome the conduct of this exercise.

(ii) A fair trial is not attainable because it is simply not possible to trust the disclosure process given the very grave breaches that have already taken place. If the police were not prepared to make disclosure to the prosecution so as to enable proper disclosure to be made to the defence and the Court, it is

simply impossible to trust that all the relevant materials have now been disclosed or will ever be disclosed.

(iii) Four signed witness statements from Ms. Bastian have now been disclosed. These are dated 4 July 2017, 19 July 2017 and a further two statements dated 25 July 2017 (although it is now clear that neither of those statements were in fact signed on 25 July 2017 and that at least one was signed at the end of September 2017). However, Ms. Bastian advised Mr. Davis (as set out at paragraph 17 of his affidavit) "that she had been interviewed more than 15 times by the investigating officers and signed over 13 witness statements." Clearly, says Mr. Fitzgerald QC, neither the fact of the 15 interviews nor the contents of the 13 separate witness statements have been disclosed. This adds to the Applicant's justified sense that there has been a total failure to make proper disclosure in this case.

[57] Learned Queen's Counsel Mr. Guthrie appearing for the Respondent submits that the Respondent is prepared to accept that the police ought not to have interviewed Mr. Ash and Ms. Bastian together in the way they did. He however submits that the Applicant's complaints are exaggerated and should on no account lead to a stay of the indictment.

[58] According to Mr. Guthrie QC, the Applicant has been unable to produce a single case where circumstances such as those which presents themselves in the instant case have led to the wholly exceptional result that the trial concerned has been stopped by the judge. He accepts the submission advanced by Mr. Fitzgerald QC that the categories of prosecutorial misconduct that can justify a stay on grounds of abuse are not closed or fixed immutably by past precedent. But Mr. Guthrie QC maintains that there are no reported cases where a stay has been ordered that even approach the present circumstances.

[59] On the question of prosecutorial misconduct, Mr. Guthrie QC submitted that there is no suggestion that ASP Thompson or anyone else, prompted Ms. Bastian to lie

or to invent any evidence against the Applicant. In fact, she was accompanied by her lawyer throughout. He argues that:

(i) Ms. Bastian accepted that she told the truth in her statements and –to give but one example – with her lawyer, she took the officers and showed them places where she handed over substantial sums of money to the Applicant. She accepted, under sworn testimony, that none of this was fabricated or untrue.

(ii) The whole of the complaints against ASP Thompson boils down to this. She should not have retained the 25 July 2017 on more than one statement and in three respects, she removed passages of Ms. Bastian's evidence so that it corresponded with Ms. Ash's version of events. These alterations, as Ms. Bastian herself accepted, have now become manifestly clear and might be misleading (although now this is no longer the case). According to Mr. Guthrie QC, these matters should not have taken place but they are not central to the allegations made against the Applicant and they were not deliberately intended to mislead or be unfair.

[60] On the application of the "first" test in **Warren** to the present circumstances, Mr. Guthrie QC submits:

(i) The idea that public confidence in the criminal justice system would be shaken by what occurred in the present case, on 25 September and/or 27 September and/or 30 September 2017, is wholly mistaken.

(ii) What would, however, be likely to do just that, would be if the Court were to stop the criminal trial from taking place.

(iii) There is great deal more in the witnesses' statements than a few discrepancies. There is evidence of wholesale corruption by a Government Minister on the take, taxing a contractor by holding back his payments until and unless substantial bribes were paid.

(iv) Stopping the Applicant being tried for those offences is just what would be likely to shake the public's confidence in the criminal justice system.

[61] Mr. Guthrie QC reminds the Court of the passage from **Stephen R. Stubbs v Attorney General** (SCCivApp No. 153 of 2013) in which the Bahamas Court of Appeal said at para [37]:

> **"I also remind myself of the statement of Lord Lane in *Attorney General's Reference No. 1* …where he said inter alia '…Stays imposed on the grounds 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.' In addition, I reiterate the statement of Lord Lane in *The Director of Public Prosecutions v Tokai* …the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded application for a stay."**

[62] Learned Queen's Counsel Mr. Guthrie asks: is the Applicant unable to have a fair trial?

[63] According to him, there is no basis for suggesting that the Applicant will not. He next submits that every complaint that the defence makes can be dealt with in the ordinary course of his trial: see: paras [54] to [56] of **Momodou**; a case heavily relied upon by the Applicant.

[64] Mr. Guthrie QC argues that, in the present case, all the matters raised by the Applicant are capable of being dealt with by the trial process itself. He contends that first, learned Queen's Counsel Mr. Fitzgerald can cross-examine on all the matters which he raised in this application. Generally, (i) he can ask ASP Thompson why there is more than one statement from Mr. Ash and why it was altered; (ii) why there is more than one statement from Ms. Bastian; (iii) why she used the date of 25 July 2017. He can even suggest to her that this is because you wanted to give the false impression that the statement was made before the Applicant was charged; (iv) he can ask her why she conducted a joint witness session on 25 September 2017; and (v) he can ask her about the alterations she made on 27 September 2017.

[65] Mr. Guthrie QC suggests a few more questions that Mr. Fitzgerald QC may wish to ask ASP Thompson namely: (i) why did she alter Ms. Bastian's first version as to what she and Mr. Ash agreed before the start of the meeting; (ii) he can ask her why she altered Ms. Bastian's version of who got to the meeting first; (iii) he can ask her about changes in the amounts of money; (iv) he can ask her why the words 'coach' and 'coaching' were removed. He can say you wanted to avoid the impression that there was a conspiracy and (v) he can even put to her, you didn't want the defence to know that she had said something different.

[66] Mr. Guthrie QC suggests that if Ms. Bastian gives evidence, learned Counsel Mr. Fitzgerald QC can also explore all these matters with her. He can even suggest that she was bullied, harassed and pressured, and only said what she did to get her immunity.

[67] If she does not give evidence, Mr. Fitzgerald QC can say to the jury that they cannot convict the Applicant on his evidence alone. He can ask why was she not called? 'Hamlet without the Prince', no doubt, he will say – just as he said when asking for her to be called at the present hearing.

[68] According to Mr. Guthrie QC, it is not, however, only a question of what learned Queen's Counsel could do – the Court will itself be able to ensure that the trial is fair.

[69] Mr. Guthrie QC submits that:

(i) The Court will be able to direct the jury how to assess the evidence of Mr. Ash, Ms. Bastian and ASP Thompson and to warn them to take into account that they were together on 25 September 2017 when they should not have been;

(ii) The Court will be able to tell them to take into account the possible effect of an immunity on a witness' truthfulness and reliability; and

(iii) The Court will be able to direct the jury about any inconsistencies, previous inconsistent statements and the reasons for them and how generally they should approach the evidence.

[70] Mr. Guthrie QC submits that the case of **R. v Skinner** [1994] 99 Cr App R 212 at page 217 relied on by Mr. Fitzgerald QC provides a possible helpful example. In that case, the appellant was convicted of possession of a prohibited drug. The issue on appeal was whether discussion between witnesses before testifying was improper. One of the arresting officers admitted that before coming into court, he and other officers had gone into a room and discussed the case. It was held that, as a general rule, discussions between witnesses, particularly just before going into court to give evidence, should never take place. Nor should statements or proofs of evidence be read to witnesses in each other's presence. The appeal was however, dismissed.

[71] Mr. Guthrie further submits that depending on the evidence at the trial, the reliability of the witnesses will be one of the matters that the jury will have to decide with the assistance of cross-examination and subject to the Court's directions and assistance. The jury will be well able to do that.

[72] Learned Queen's Counsel urges this Court to find that there is no good reason why this trial should not take place. In fact, he asserts that there are overwhelming reasons why it should. There are serious allegations which ought to be resolved and it is very much in the public interest that they should be. He concludes that the Court should dismiss the Applicant's Notice of Motion for a quashing of the indictment and a stay of the criminal proceedings.

Court's analysis and findings

[73] The jurisdiction to quash an indictment or to order a stay of proceedings on the basis of an abuse of process at common law is not in doubt. However, it is settled law that this discretionary power should be sparingly exercised and employed only in exceptional circumstances. This power would not be appropriately exercised

where the perceived unfairness can be cured within the trial process: **A.G. Reference (No. 1 of 1990)** [1992] 1 Q.B. 630 at 643.

[74] As Brooke LJ said in **R (on the application of Ebrahim) v Feltham Magistrates' Court & Another & Mouat v Director of Public Prosecutions** [2001] 1 All ER 831 at para. [17]:

> **"We think it may be helpful to restate the principles underlying this jurisdiction. The Crown is usually responsible for bringing prosecutions and, prima facie, it is the duty of a court to try persons who are charged before it with offences which it has power to try. None the less the courts retain an inherent jurisdiction to restrain what they perceive to be an abuse of their process. This power is 'of great constitutional importance and should be … preserved' (per Lord Salmon in *DPP v Humphrys* [1976] 2 All ER 497 at 527–528, [1977] AC 1 at 46). It is the policy of the courts, however, to ensure that criminal proceedings are not subject to unnecessary delays through collateral challenges, and in most cases any alleged unfairness can be cured in the trial process itself. We must therefore stress from the outset that this residual (and discretionary) power of any court to stay criminal proceedings as an abuse of its process is one which ought only to be employed in exceptional circumstances, whatever the reasons submitted for invoking it. See *A-G's Reference (No 1 of 1990)* [1992] 3 All ER 169 at 176, [1992] QB 630 at 643."**

[75] Generally speaking, the two categories of cases which are accepted as justifying the exercise of the court's discretion to stay proceedings are: (i) cases where the court concludes that the defendant cannot receive a fair trial, and (ii) cases where it concludes that it would be unfair for the defendant to be tried: Neill LJ in **R. v Beckford** (1996) 1 Cr App R 94 at 101.

[76] In the present case, both parties are agreed that the categories of prosecutorial misconduct that can justify a stay on grounds of abuse are not closed or fixed immutably by past precedent. This very point was highlighted by Lord Bingham in **Attorney General's Reference (No. 2 of 2001)** [2003] UKHL 68 at para [25]:

> **"The category of cases in which it may be unfair to try the defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by *R.v Horseferry Road Magistrates Court, ex p Bennett* [1994]1 AC 42 but Mr. Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted."**

[77] I now turn to the two categories of cases in which the Court might exercise its jurisdiction to stay proceedings for abuse of process, namely (1) where it will be impossible to give the accused a fair trial and (2) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. Often times, a case may fall into both categories, but it must be noted that the two categories are distinct and should be considered separately: **Horseferry Road Magistrates' Court, ex p Bennett, Latif, Maxwell** and the leading case of **Warren** [supra] are all illustrative of this principle.

[78] In the Applicant's Written Submissions in Reply, he relies, first, on the second category of case alleging '*grave prosecutorial misconduct which undermines public confidence in the criminal justice system and makes it wrong for a criminal trial to take place at all…*': para 4.2 (i) – (iv) of his Written Submissions in Reply.

[79] Undoubtedly, the Applicant has set himself a very high test as demonstrated by the authorities on this point. Apart from cases of abduction and entrapment cases, or where there has been breach of an assurance to prosecute, I agree with Mr. Guthrie QC that such cases are very hard to find: **Warren** at paras [25] - [26]. When considering whether to grant a stay in the second category, the balance must always be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that any prosecutorial misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute. While in abduction and entrapment cases, the court will generally conclude that the balance favours a stay, there are, however, no rigid classifications.

[80] In **Warren**, the Jersey police suspected that the appellants were planning to import a large quantity of drugs into Jersey. They believed that the plan involved the drugs being transported from Amsterdam to France by the Second Appellant, Mr. Welsh, in his Jersey-registered car and then shipped to Jersey. The police wished to fit a tracking device and an audio recording device in the car. Consent was obtained from the Attorney General for use of the two devices in Jersey. The French, Dutch

and Belgian authorities authorized the use of a tracking device but the French and Dutch authorities refused permission for audio monitoring. A senior member of the Law Officers' Department in Jersey advised the police that despite the French and Dutch refusals, he did not think that a Jersey court would be likely to exclude any evidence so obtained and that the use of the devices was an operational decision for the police. In short, the police officers in Jersey made illegal audio recordings of conversations without which the appellants could not have been tried. The Privy Council found at para [45] as follows:

> **"The police were unquestionably guilty of grave prosecutorial misconduct in this case. They acted in the knowledge that the Attorney General and the Chief of Jersey Police had not given authority to install the audio device without the consent of the relevant foreign authorities and would not do so; and that the foreign authorities had refused their consent. To some extent, they no doubt felt encouraged to take the approach that they took by the unwise advice given by Crown Advocate Jowitt on 11 July. <u>But nothing can detract from the seriousness of the misconduct.</u> The Commissioner was right to characterise it as "most reprehensible". It is a matter of concern to the Board that in his witness statement of 21 January 2008, DCI Minty said: "Given identical circumstances again I believe that we would respond in the same way". It is to be hoped that, having read the strictures of the Commissioner as well as those of the Board, he no longer adheres to this view** 'Emphasis added]

[81] Nonetheless, the Privy Council went to find that the trial judge was entitled to refuse the stay.

[82] In **Momodou**, there was extensive and organized training of some 16 witnesses for the purpose of their giving evidence. This should surely not have happened. It was curable, however, by the trial process and the complaints of unfairness were in fact cured by the way in which what had happened was explained to the jury, during the course of the trial by the Judge's directions. The appeals against conviction were dismissed.

[83] In **Skinner** [supra], there was a trial before a judge and jury. The appellant was convicted of possession of a Class A drug. He appealed his conviction. Although the Court of Appeal found that it was improper for discussions between witnesses to take place, they nevertheless dismissed the appeal.

[84] At page 216, Farquharson LJ had this to say:

> **"The question then arises as to the propriety of such conduct. It has certainly been permissible, since Lord Goddard's time, for officers to confer together in the making up of their notebooks immediately after the events or interviews in which they have both been participating, as an aid to memory. That is shown by one of the cases that has been referred to this morning, namely the case of *Bass* (1953) 37 Cr. App. R. 51, [1953] 1 Q.B. 680. Furthermore, it has been the practice, certainly since the case of *Richardson* [1971] 55 Cr. App. R. 244, [1971] 2 Q.B. 484, that before coming into court witnesses can be shown their original statements, so that they can refresh their memory immediately before giving their evidence. <u>There has been no authority which directly bears upon the question of whether witnesses may discuss the matter together in the way it occurred in the present case. In some circumstances, of course, it is inevitable that discussions between witnesses will take place as where, for example, all the witnesses come from the same family. But it is a very different situation, in our judgment, when one is dealing with the evidence of police officers. Indeed, the rules should apply so far as they can be enforced in all circumstances.</u>**
>
> **The Court is clearly of the opinion that Mr. Mitchell is correct when he says that it is wrong for a discussion of that kind to take place immediately before the witnesses, or any of them, go into court to give their evidence. The difficulties are manifest, and he has shown through a review of such cases as do assist us, such as *Richardson* and *Bass* that the general thrust of the court's findings are that such conversations should never take place.**
>
> **He has helpfully drawn together a number of principles which he is able to discern from the authorities, and some of them would be obvious to any practitioner. He emphasizes that any rehearsal of the evidence of witnesses or the coaching of witnesses are practices to be strongly discouraged. He is assisted in that by dicta from the case of *Richardson* which I have already cited, where the learned judge giving the judgment of the Court, Sachs L.J. said at p. 251 and p. 490B:**
>
> > **"Obviously it would be wrong if several witnesses were handed statements in circumstances which enabled one to compare with another what each has said."**
>
> **Whilst that is not directly the situation here, obviously the sense of what the Lord Justice is saying would apply in the present case. <u>In other words, as a general rule, any discussions as to what evidence is going to be given by them should never take place between two or more witnesses</u>….**
>
> **As a practice, therefore, the Court disapproves of such conferences taking place. It is to be hoped that they will not do so in the future. It is particularly important in the case of police officers because, as is well known, they are the only ones who give evidence fortified by the use of notes made at the time. In such a case, as indeed is the case here, witnesses can be attacked for giving evidence on grounds that they are giving not a true account of**

what occurred but something which has been affected by the discussions they have had with somebody else…."

[85] At page 217, Farquharson L.J. continued:

> **"…However, one cannot make an absolute rule, and that I think emerges from the judgment of Nolan L.J. in the case of *Arif.* He says this at p. 10 of the transcript:**
>
> > **"It follows, in our judgment, that the fact that there has been a pre-trial discussion of evidence between potential witnesses cannot be said to render the evidence of such witnesses at the trial so unsafe that it ought always to be excluded. Each case has to be dealt with on its own facts. In some cases it may emerge in the course of cross-examination at the trial of the witnesses concerned that such discussions may well have led to fabrication of the evidence in the sense which we have described. In such a case the court might properly take the view that it would be unsafe to leave any of the evidence of the witnesses concerned to the jury. There may however be other cases where the nature of such pre-trial discussions is such that it would be quite sufficient to draw to the jury's attention in the course of summing up the implications which such conduct might have for the reliability of the evidence of the witnesses concerned. In each case it must be a matter for the trial judge."**[Emphasis added]

[86] The Lord Justice then went on to say at page 218:

> **"…As appears from the case that I have just cited, namely *Arif*, it is a matter for the judge to deal with in his own way according to the particular circumstances that apply at the time. His task is to bring to the notice of the jury what the learned judge in this case properly described as the "down-side" of what had undoubtedly taken place. In other words, the jury should have very clearly put before them the fact that because the conference had taken place and the interchange of recollections of evidence which is to be inferred from what occurred, they should bear in mind that the evidence for that reason is all the more suspect. To use his own words "if the officers had made up their minds to lie about it, it gives them an opportunity to get their lies straight". So long as the jury have in mind that that is a consequence that would arise from this kind of conduct, it seems to us that it is sufficient. We do not, however, in the same breath, approve of the way in which he approached the matter for the reasons I have already explained. It is not correct to say that there is nothing wrong with conferences of the kind that I have been describing."**

[87] As can be seen, I have quoted quite extensively from these cases particularly since it was the Applicant who commends them to this Court. I can do no better but to

endorse and apply the principles emanating from these cases to the facts of the present case.

[88] Just to reiterate, first, it is clear from the transcripts, tapes and evidence that it was only on the first occasion on 25 September 2017 (joint witness session) that both Mr. Ash and Ms. Bastian and their lawyers were present with ASP Thompson. On the second and third occasions on 27 and 30 September 2017, Mr. Ash was not present. Ms. Bastian was present with her lawyer (who was not present on 30 September 2017).

[89] It is safe to say that the events of 25 September 2017 were complicated and involved a series of transactions in which Mr. Ash and Ms. Bastian were involved. Their respective lawyer intervened from time to time. Properly dissected, both witnesses' evidence is that the Applicant received corrupt payments although that was altered by Ms. Bastian for the first time before me. Given what the police had, it was reasonable for ASP Thompson to seek "to clear up" as she puts it, what was discussed between them prior to the meeting with the Applicant, whether they had agreed to pay the Applicant the money before they met with him; who proposed the payment and whether the amount of $200,000 or $250,000 was given to Ms. Bastian by Mr. Ash.

[90] That said, there is no gainsaying that it was wrong and unwise for ASP Thompson to conduct that joint witness session in bringing the two key witnesses for the prosecution together but, on the principles emanating from **Warren, Momodou, Skinner** and kindred cases, this is a far cry from gross prosecutorial misconduct as is alleged by the Applicant. Obviously, it was wrong if Mr. Ash and Ms. Bastian had each other's statement and were comparing what each has said. I believe learned Queen's Counsel Mr. Fitzgerald submits that the Court could infer that even the lawyers had the statements.

[91] Next, a fair reading of the transcript does not suggest that improper pressure was put on either witness or that either was ‘coached’ with regard to their evidence or asked by the officers to alter their account of what had taken place.

[92] It is worth repeating that the joint witness session took place on 25 September 2017 when Mr. Ash had already given his witness statement to the police on 28 June 2017: Tab 2 of Bundle of Statements of Jonathan Ash and Deborah Bastian. This statement was signed on 30 June 2018. There is no other statement from Mr. Ash and his statement was not altered.

[93] With respect to Ms. Bastian, she had already been interviewed under caution on 1 July 2017 and her answers recorded: Tab. 4 of Bundle of Statements of Jonathan Ash and Deborah Bastian. Then, she made a statement under caution on 4 July 2017: Tab. 5 and two further witness statements on 19 and 25 July 2017.

[94] The 19 July 2017 statement was taken by Insp. McCartney: see Tab. 6. It was taken from Ms. Bastian when ASP Thompson was on vacation.

[95] In addition, Insp. McCartney took the 25 July statement: Tab. 7. She told the Court that it was on this day that Sgt. Rolle told her that it was her ‘last shot otherwise they would take away the immunity’. Under cross-examination by Mr. Fitzgerald QC, Ms. Bastian said the following: (at page 53 lines 9:19 of the Transcript of Court Proceedings):

> “E. Fitzgerald: And when you signed that statement, parts of which were not correct (she earlier stated so), were you influenced by them saying that we’re going to withdraw your immunity?
>
> D. Bastian: Yes, sir. I was influenced by that and the fact that I have already been there about five or six times giving statements.

E. Fitzgerald: So were you giving this statement freely or under pressure of the threat of immunity?

D. Bastian: I felt pressured.

E. Fitzgerald: With the threat of them taking away your –

D. Bastian: Withdrawing the immunity.

[96] Ms. Bastian also told the Court that there is nothing untrue about her 25 July statement but something is missing. She did not dictate this statement. They wrote down what they wanted her to say and according to Mr. Fitzgerald QC, they left out things said by her that would have been helpful to the defence such as that the money given was said to be for political contributions. In my opinion, all that Ms. Bastian has disclosed and any discrepancies therein (including the questions when they were made and any amendments to them) can be the subject of cross-examination at the Applicant's trial.

[97] Under the sub-heading: witness training and coaching, at paragraphs 40 - 42 of Humes 1, he averred:

> **"40. That the recordings clearly disclosed that the police organized sessions at the instance of the AG's Office in which the principal prosecution witnesses Ms. Deborah Bastian and Mr. Jonathan Ash were summoned into the presence of ASP Thompson and Sgt. 1877 Rolle (the two police officers in charge of the case) and the attorneys of these witnesses when they together discussed their evidence, exchange their accounts and decided as to what they should say and what they should omit to say in their statements and evidence.**
>
> **41. That these sessions resulted in the contamination of the evidence of both principal witnesses and such that it would not be possible for them to give independent evidence free of that contamination.**
>
> **42. That during the course of the coaching sessions the police deliberately instructed Ms. Deborah Bastian to put a false date of her Statement and dated it as having been made on the 25th July, A.D., 2017, rather than the 30th September, A.D., 2017. This created the misleading impression that the statement had been made before the charge and arraignment of the Applicant on the 3rd August. A.D., 2017.**

[98] I reiterate that it was wrong and imprudent for both Mr. Ash and Ms. Bastian to be seen together, with their lawyers, discussing their evidence. This should never had happened. But any potential prejudice to the Applicant can be prevented by suitable directions to the jury. I agree with Mr. Guthrie QC that what took place in the present case is nowhere near the wholesale coaching considered in **Momodou**, where this was found to cure the position.

[99] Next, there are two particular matters which need to be dealt with for completeness. In so far as there is a mention of 'coaching' (see pages 124 – 125 of RH1), referred to in paragraph 47 of Humes 1, this was said on 27 September 2017 when Mr. Ash was not present. It concerned a meeting which had taken place between Mr. Ash and Ms. Bastian before they attended the first meeting with the Applicant. Ms. Bastian was coaching him what and how to speak to the Minister. At the discussion on 27 September 2017 (Mr. Ash was not present), Ms. Bastian objected to the word 'coaching' because she said that she had not 'coached' Mr. Ash as to what he should say to the Applicant and she asked that the word be taken out of the statement to avoid giving a false impression. That, to my mind, was perfectly proper.

[100] Then, there is the allegation at paragraph 50 of Humes 1, that the tapes show ASP Thompson suggesting that Ms. Bastian alter the date of her statement to 25 July 2017, which is, as Mr. Guthrie QC correctly states, misleading. The passage relied on, at pages 127 -128 of RH1, appears in the course of a conversation between Ms. Bastian and her lawyer, Mr. Rolle, when ASP Thompson was not even present: she had left the room indicating "I'll be right back." The reference to changing the date then comes from Ms. Bastian and this was followed by an exchange about dates with her attorney. This is how it went:

> "**ASP Thompson:** Alright, let me just print this quick and then she can sign off on it.
> **I''ll be right back**.

Deborah Bastian:	**She don't have to change the date? Because she has the 25th of July. Remember the last day we did was the 3rd of August.**
Raymond Rolle:	**She wanted that date.**
Deborah Bastian:	Oh, she wanted that date. Okay.
Raymond Rolle:	The charge is officially when they go before the court.
Deborah Bastian:	**Ohhh, it has to be before they charge him.**
Raymond Rolle:	**No, it don't have to be before. They can gather information after they charge him.**
Deborah Bastian:	Okay
Raymond Rolle:	**They can gather information after. I see she has the 25th**
Deborah Bastian:	**No, she has the 25th of July not the 25th of September**
Raymond Rolle:	**Oh, I was thinking September (laughing)**
	…. … … … …
Deborah Bastian	**No we were here, remember? Oh, you know what happen? We were here on the 4th August to sign but she said she needed it to be done before he got charged. The statement? Now, I remember. She said the statement needed to be reflected..**
Raymond Rolle:	**That's why she has the 27th on it.**
Deborah Bastian:	**25th July**
Raymond Rolle:	**25th**
Deborah Bastian:	**Yeah Yeah"**

[101] Thus, the suggestion in Humes 1 that "*the police deliberately instructed Ms. Deborah Bastian to put a false date on her Statement*" to create the misleading

impression that the statement had been made before the Applicant was charged and arraigned is not supportive of what took place. In fact, before this Court, ASP Thompson categorically stated that she retained the dates of 25 July 2017 because that was the date when she took the comprehensive witness statement from Ms. Bastian since her status was changed from suspect to a witness for the prosecution. In any event, there is nothing precluding the police from obtaining witness statements from witnesses even after an accused has been arrested, charged and arraigned. In any event, these are all matters which can be explored by the Applicant's counsel at his trial, by questioning of the relevant witnesses.

[102] As I see it, the Applicant is represented by a cadre of eminent Queens' Counsel and lawyers who, no doubt, at his criminal trial, will 'dig' holes in the prosecution's case. That is their profession. On the other hand, the prosecuting attorneys, as ministers of justice, ought to put forward the evidence fairly.

[103] Now, to the disclosure issue. The Applicant alleges that the prosecution failed to disclose the fact of the September witness sessions and the statements made during those sessions which would have been of assistance to the defence. The Applicant argues that ASP Thompson admitted that she told both the Commissioner of Police and the DPP of the fact of this joint witness session. Neither saw it fit to disclose to the defence and the Court that it had taken place until after they were confronted with the audio recording and transcript.

[104] By letter dated 31 May 2018, one of the attorneys for the Applicant, Mr. Owen Wells of McKinney, Turner & Co. wrote to the Respondent seeking discovery of various documents: see pages 1 to 3 of that letter. On 18 July 2018, the Respondent responded accordingly. Some requests were denied because the Respondent considered them "unnecessary and unjustified". The Respondent submits that it has clearly acknowledged its duty to act fairly, in particular with regard to disclosure and that it has observed the underlying principle that it must disclose any material upon which either the prosecution proposes to rely, or which it is otherwise lawfully required to.

[105] The prosecution is under a duty to disclose as soon as is reasonably practicable all relevant material. The question of what material should be disclosed was considered in **Keane** (1994) 99 Cr. App. R. 1. The Court of Appeal said that the test of what was discloseable was to determine whether the material was relevant (or possibly relevant) to the issue in the case, or raised (or possibly raised) a new issue the existence of which was not apparent from the prosecution evidence, or held out a real prospect of providing a lead on evidence relevant to these matters. If the prosecution was in doubt about the materiality of information the court should be asked to rule.

[106] The principle establishes that it will be for the defence to establish why the material might be expected to assist them. The requirement that it might "reasonably be expected" to assist means that fishing expeditions or fanciful possibilities will not suffice as reasons for an order for disclosure. On the other hand, if proper explanation of the relevance of the material and as to how it might assist is given, the court will be under a duty to order disclosure in the interests of a fair trial.

[107] The duty to disclose is a continuing one and continues until the trial is over as a result of an acquittal or conviction or because the prosecutor abandons the case. In **Maguire** (1992) 94 Cr. App. R. 133, 146, the Court of Appeal said:

> **"The Court has now consistently taken the view that a failure to disclose what is known or possessed and which ought to have been disclosed, is an 'irregularity in the course of the trial'. Why there was no disclosure is an irrelevant question, and if it be asked how the irregularity was 'in the course of the trial' it can be answered that the duty of disclosure is a continuing one."**

[108] The obligation on the prosecution to make disclosure, however, does not include details of every twist and turn of an investigation: see **The Attorney General v Sean Cartwright and others** Criminal/Constitutional Appeal No. 8 of 2004; **Clarke v Commissioner of Police** [2003] BHS J. No. 43 and **The State v Paul (Michael) et al** (1999) 57 WIR 48. In **Paul (Michael)**, the headnote reads as follows:

> **"The defence has no right to see material which is available to the prosecution but unused, except where such disclosure is dictated on the ground and the defence can show that prejudice would result from non-disclosure. Nor is the prosecution under any consequential duty to preserve all material gathered in the course of an investigation, except to the extent that it would be unfair not to preserve unused material or where its non-disclosure would be an affront to the public conscience as undermining accepted standards of fairness."**

[109] In the present case, there is no evidence to show that the police audio or video recorded these meetings or that they even made written notation of what took place during those meetings. At best, there are the entries in the diary. In my experience, this is the practice here. The Applicant has been provided with the case diary and now, with the audio recordings made by Ms. Bastian. Any disadvantage that might have ensued has now been obliterated. But I go a step further. As the Respondent submits, it seems likely that the defence had known about the meetings (and has had the tapes) for some considerable time. Their letter dated 31 May 2018 seeks '*confirmation dates and times when Mr. Jonathan Ash and Deborah Bastian met with the investigative officers in the matter*' (details which would not normally be disclosed or fall within the underlying principles of disclosure). The Respondent says that this somewhat unusual request seems likely to have been intended to set a trap. I make no finding on this issue.

[110] Mr. Guthrie QC maintains that the police had no idea or reason to suspect that Ms. Bastian was audio recording the meetings and did not transcribe them so there was no further relevant documentary material to disclose.

[111] That said, the Applicant has not explained how disclosure of the meetings in September 2017 '*would have been of assistance to the defence*.'

[112] In the present case, which must be considered on its own peculiar facts and circumstances, none of the matters raised by Mr. Fitzgerald QC, taken either singly or cumulatively, establish 'gross prosecutorial misconduct' by the police.

[113] The facts and circumstances of the kindred of cases referred to by Mr. Fitzgerald QC including the leading authorities of **Warren** and **Momodou** do not come

anywhere close to the facts of the present case. In fact, they are all distinguishable. Even if the Applicant's complaints were justified and established (which I did not find), they do not come anywhere near those that might reasonably justify the Court exercising its discretion to stay the criminal proceeding. In fact, the case is probably the first of its kind since a parallel case with similar circumstances was not provided to this Court.

[114] I am also of the firm opinion that all the matters raised by the Applicant in the present case are capable of being dealt with by the trial process itself. Mr. Fitzgerald QC can cross-examine on all the matters which he raised in this application. Mr. Guthrie QC has elegantly dealt with them in his submissions. Undoubtedly, Mr. Fitzgerald QC will continue to fight hard and will 'dig' holes in the prosecution's case.

[115] Now, I am required to carry out a balancing exercise: **Warren** at [45] to [50]. In my considered opinion, when the balance is struck between (i) the public interest in ensuring that those who are accused of serious crimes should be tried, and (ii) the competing public interest ensuring that any prosecutorial misconduct is not such as to undermine public confidence in the criminal justice system, the balance is plainly in favour of the Applicant standing his trial.

[116] There is another question to be answered: Is the Applicant unable to have a fair trial?

[117] In **AG's Reference No. 2 of 2001** [supra], Lord Bingham stated at para [13]:

> **"It is accepted as "axiomatic" that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried at all: *R v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 A.C. 42, 68."**

[118] Undoubtedly, this principle is derived from an accused' right to a fair trial and if such trial cannot be held, the Court **must** stay the criminal proceedings.

[119] Mr. Fitzgerald QC suggests that the fairness of the Applicant's trial is threatened by the fact that Mr. Ash and Ms. Bastian were seen together by the police, in the presence of their lawyers, on a single occasion on 25 September 2017. According to him, once contamination takes place there is a very real risk that the damage cannot be undone. The extensive exchange of accounts and the prompting by the lawyers and ASP Thompson herself, has produced a situation in which the provision of a true account is likely to be compromised and improperly prejudiced by the tactical warnings about what to say and what not to say that were given throughout the prolonged joint witness session.

[120] This is simply not true. The Court is reminded of the evidence given of Ms. Bastian during this very hearing. Even though she was a participant in the joint witness session, she told her story her way reminiscing of the lyric "*I did it my way*."

[121] The complaints that a fair trial is unattainable because it is simply not possible to trust the disclosure process given the very grave breaches that have already taken place may be moot since Ms. Bastian's statement(s) are now answered by the disclosure of (i) the original typewritten statement marked B, which was the statement signed on 5 August 2017, the 'intermediate' statement which was altered on 27 September 2017, and the final version served with the VBI.

[122] In my opinion, every complaint the Defence makes can be dealt with in the ordinary course of his trial. In fact, the matters in dispute are all about the trial process. They have nothing to do with the fundamental right to a fair trial guaranteed by the Constitution which I shall consider momentarily. There is therefore no real basis for suggesting that the Applicant will not have a fair trial.

[123] Accordingly, I find that the balance falls in favour of refusing a stay of the present proceedings.

Issue 3: The Constitutional Motion

[124] The question which arises now is whether the application based on alleged breaches of the Constitution is misconceived because it discloses no cause of action.

[125] Learned Queen's Counsel Mr. Guthrie states that the basis of the constitutional claim is an allegation of '*impermissible witness training and coaching'* which, it is said, constitutes grave prosecutorial misconduct and abuse of process.

[126] The articles of the Constitution relied upon by the Applicant provide, by Article 20(1), for the right to fair trial and by Article 20(2), for the right to be given adequate time and facilities for the preparation of his defence.

[127] The Respondent correctly submits that, on a proper consideration of the case, neither of these rights are in issue.

[128] The right to a fair trial is provided for by Article 20(1) of the Constitution which provides:

> **"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."**

[129] The Respondent submits that the scope of the constitutional right to a fair trial was considered by the Privy Council in detail, by reference to the equivalent right in Trinidad & Tobago where it is contained within the right to due process, in **Boodram v A-G of Trinidad and Tobago** [1996] A.C. 842 at 853 - 855. In that case, the right to fair trial was said to be likely to be contravened, not by prosecutorial misconduct, but by press coverage of a character that allegedly made a fair trial impossible. The Board found:

> **'In the opinion of their Lordships those provisions have no bearing on the appeal. The purpose of subsection (2) is to make clear that certain fundamental rights which would otherwise exist in law are not taken away. Here, neither Parliament nor any other body is seeking to take away the applicant's right to the fair trial which is part of the due process of law guaranteed by section 4(a). <u>That right is undisputed, and the applicant has</u>**

no need for recourse to the High Court in order to establish it. Properly analysed, the real gist of the applicant's complaint is that the adverse publicity will prejudice, not the existence of the right, but the exercise of it. Whether this complaint is well founded is a matter for decision and if necessary remedy by the ordinary and well-established methods and principles of criminal procedure which exist independently of the Constitution, and which the newspapers and broadcasts could not even purport to abrogate. Provided that the safeguards remain in place and are made available to the applicant in the trial court, and if necessary on appeal, he has the benefit of the fair trial process to which he is entitled.

A similar flaw vitiates the arguments based on section 4. The 'due process of law' guaranteed by this section has two elements relevant to the present case. First, and obviously, there is the fairness of the trial itself. Secondly, there is the availability of the mechanisms which enable the trial court to protect the fairness of the trial from invasion by outside influences. These mechanisms form part of the 'protection of the law' which is guaranteed by section 4(b), as do the appeal procedures designed to ensure that if the mechanisms are incorrectly operated the matter is put right. It is only if it can be shown that the mechanisms themselves (as distinct from the way in which, in the individual case, they are put into practice) have been, are being or will be subverted that the complaint moves from the ordinary process of appeal into the realm of constitutional law. No such case is made out here. It is not even suggested that if an application to stay the trial is made, either at the commencement of the trial or in advance if a sufficient need is shown, the court will fail to receive it; or will not do its best to arrive at a solution which measures together the risk of prejudice, the steps which can be taken to ensure that the verdict is uninfluenced by improper comment, and the public interest in making sure that a case which has been committed for trial does in fact come to trial, and at a proper speed. Nobody could pretend that these are always easy decisions for the judge to make, but they are concerned with trial management within the context of a system whose fairness as a system has not been attacked. Thus, in the opinion of the Board, no constitutional question is invoked.' [Emphasis added]

[130] Applying these principles to the facts of the present case, it is clear that the Applicant's complaint is similarly directed not at the existence of his right to fair trial, which is similarly undisputed, but to the exercise of it. Whether the Applicant's complaint, that the fairness of his trial has been prejudiced by the alleged *'witness training and coaching,'* is well-founded, is similarly a matter for decision and, if necessary, remedy by the ordinary and well-established methods and principles of criminal procedure which exist independently of the Constitution. This is a matter for the Applicant's trial. As in **Boodram**, *'no constitutional question is invoked':* see also: **Independent Publishing Co v A-G of Trinidad and Tobago** [2005] 1 AC

190 at [83] – [94]; **Maharaj v A-G of Trinidad and Tobago (No. 2)** [1979] AC 385 at 399 – 400; **Chokolingo v A-G of Trinidad and Tobago** [1981] 1 W.L.R. 106; **Hinds v A-G of Barbados** [2002] 1 A.C. 854; **Forbes v A-G of Trinidad and Tobago** [2002] UKPC 21 and **Thakur Persad Jaroo v AG of Trinidad & Tobago** [2002] UKPC 5; The short point is that the Applicant's right to fair trial is not in question. His complaints are about the trial process, not for breaches of the Constitution.

[131] The Applicant's right under Article 20 (2) (c) of the Constitution, to be given adequate time and facilities for the preparation of his defence, is also not in question. There is no question that he does not have the protection of the law in this respect: he does. Such protection is a part of the ordinary criminal process, and the trial judge has control of it. In the present case, it is not suggested that an application to the trial judge, for example, additional discovery, would not be considered, and, if necessary, appropriate orders made.

[132] Mr. Guthrie QC submits that it appears, in fact, from the Respondent's evidence, that the Applicant, at the hearing on 24 July 2018, indicated an intention to apply to the trial judge for discovery and remedies for failure of discovery. He did not do so. It is the Respondent's submission there are two possible reasons for this omission. First, it is inconsistent with his mistaken claim for constitutional redress and secondly, such a claim would immediately focus the Court's attention on the proviso to Article 28 of the Constitution.

The proviso to Article 28

[133] The right of application to the Supreme Court for redress in respect of breaches or likely breaches of the fundamental rights provisions of the Constitution is subject to a proviso in the following terms:

> **"Provided that the Supreme Court <u>shall not</u> exercise its power under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."**[Emphasis added]

[134] The words *'shall not'* are imperative.

[135] The Respondent submits that it is beyond dispute that adequate means of redress are available to the Applicant in the ordinary trial process. His complaints of abuse of process are not accepted by the Respondent, but in the event that he was able to establish them, and the interests of justice required it, the trial judge has power to quash the indictment and order a stay under the common law. Therefore, by the plain terms of the proviso to Article 28, the Applicant's claims for breaches of the Constitution must fail: see **Jaroo** [supra] and **Terry Delancey v Attorney General of The Bahamas** SCCivApp No. 43 of 2006.

[136] Learned Queen's Counsel Mr. Fitzgerald asserts that there is not an inflexible rule that the common law provides the exclusive remedy where there is police misconduct that endangers the fairness of his criminal trial. He submits that the principal cases relied upon by the Respondent namely **Boodram** and **Independent Publishing Co.** were cases where there was adverse publicity from newspapers that endangered the fairness of the trial. There was no misconduct by the State engaging constitutional right to the "protection of the law" and the right to a fair trial. He submits that the media cases established that the proper remedy was to be sought in the common law remedies that exist "independently of the Constitution". He next submits that if the State is itself threatening the right to the protection of the law and to a fair trial, as is alleged in the present case, then there is clearly a breach of the Constitution and the only question is whether the remedies at common law by recourse to the abuse of process jurisdiction are adequate.

[137] Moreover, says Mr. Fitzgerald QC, many of the cases emphasize that the proper remedy is ordinarily to be found in the common law or statute and only exceptionally by recourse to the Constitution. He referred to what Lord Bingham said in **Hinds v Attorney General of Barbados** [supra], quoted at para [89] of **Boodram**:

> **"<u>It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal</u>. As it is a living, so the Constitution must be an effective instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision ... The applicant's complaint was one to be pursued by way of appeal against conviction, as it was ..."**[Emphasis added]

[138] Mr. Fitzgerald QC submits that one of the problems of declining to hear the Constitutional Motion is that the Applicant will then, if unsuccessful in his abuse application, have to go through the whole trial process before raising this preliminary issue on appeal in the normal course of the criminal procedure. The Constitutional Motion provides a means of testing this preliminary issue in the appellate courts, if necessary, before the trial takes place.

[139] Mr. Fitzgerald QC next submits that the case of **Jaroo** is distinguishable. He asserts that in this case, the issues are ones of high constitutional importance involving the misuse of police powers with the apparent approval of the Commissioner of Police and the DPP (this Court found otherwise). Moreover, the Applicant has also sought a remedy under the common law by way of an application for a stay on the grounds of abuse of process. So, he is merely seeking constitutional redress as an additional remedy given the nature of the issues in this case and the potential need for a more flexible remedy.

[140] Learned Queen's Counsel seeks to rely on **Stubbs** [supra] which did involve resort to the right to a fair trial under the Constitution since Mr. Stubbs alleged that his right to a fair trial had been impaired by adverse pre-trial publicity.

[141] The Court of Appeal said at para. 42:

> **"The appellant was also granted a declaration to the effect that the adverse pre-trial publicity was a breach of his constitutional rights but that it did not make a fair trial impossible".**

[142] Mr. Fitzgerald QC submits that what is significant is that neither the trial judge nor the Court of Appeal ruled that it was improper to raise the issue of a pre-trial breach

of constitutional rights that endangered the fairness of the trial by way of constitutional motion rather than solely by way of a common law application to stay the proceedings on grounds of abuse.

[143] Like Mr. Guthrie QC, I am also of the opinion that the Constitutional Motion is misconceived and ought to be struck out for reasons elaborated by the Privy Council in many decisions before that Board, particularly, **Boodram** at pages 853-854; **Independent Publishing Co.** at pages 83 – 90 and **Jaroo** at paras [37] – [40].

[144] I agree with the Respondent that the Applicant has provided no good answer to these binding authorities except that **Jaroo** is distinguishable from the present case in that it did not involve issues of high constitutional importance and that Mr. Jaroo had not added a claim under common law. With respect to **Boodram** and **Independent Publishing Co.**, the Applicant states that they involved prejudice caused by publicity and not by officers of the State.

[145] The short answer is that the right to fair trial is not in question which I have already found (above). The complaints made are about the trial process. These are being and will be dealt with by the Court as part of the trial process. This is in fulfilment of the fair trial right; the right itself is not under any threat.

[146] The Applicant's reliance on **Stubbs** is ill-conceived because in **Stubbs**, the Applicant / Defendant alleged (i) delay; and (ii) (to a lesser extent) adverse publicity. Allegations of delay engage the distinct constitutional guarantee of trial within a reasonable time, which applies whether there can be a fair trial or not: See **Boolell v The State** [2006] UKPC 46 [2102] 1 WLR 3718, and so the guarantee can operate outside the ordinary trial process.

[147] The oral *extempore* judgment in **Stubbs** was terse.

> **"This is the decision of the court:**
>
> **The sole issue on this appeal is whether the appellant is entitled to a permanent stay of his indictment. The trial judge granted him certain declaratory relief, namely that the delay was excessive and,**

> **further, he said that notwithstanding the adverse publicity the appellant could still have a fair trial. Having listened to the submissions, we are not satisfied, as the learned trial judge found, that the appellant cannot get a fair trial. We see no basis for interfering with the order of the trial judge.**
>
> **Accordingly, we dismiss the application and direct that the trial be proceeded with as a matter of urgency.**
>
> **We note that but for this appeal the trial would have commenced today. We will provide our written reasons within the shortest possible time, certainly by the end of June.**
>
> **The application for a temporary stay pending an appeal to the Privy Council is dismissed."**

[148] **Stubbs** does not justify the Applicant's written submissions dated 30 October 2018 at paragraph 10 that:

> **"The two courts did not dismiss the application on the basis that the proper remedy was to seek a stay on grounds of abuse of process at common law. So this is clear evidence that there can be cases where a constitutional remedy can be invoked even at the pre-trial stage in criminal proceedings and even where there is an alternative but limited remedy at common law.'**

[149] **Stubbs** is totally distinguishable from the present case. But even if it is correct that there *'can'* be such cases, and delay is the obvious example, this is not one of them. The Applicant's complaints will be dealt with in the trial process. In the written reasons delivered by the Court of Appeal in due course the Court (per John JA) stated at para [37]:

> **"I also remind myself of the statement of Lord Lane in *Attorney General's Reference No 1* [1992] QB 630 ... where he said inter alia ' ... Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstance. 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.' In addition, I reiterate the statement of Lord Lane in The Director of Public Prosecutions v Tokai … the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded application for a stay."**

[150] The Court of Appeal in **Stubbs**, at paras [42] – [45] dismissed the claim based on adverse publicity and followed the decision in **Boodram**.

[151] The short *extempore* judgment in **Stubbs** also makes an observation that the Respondent submits is relevant in the present case: *'We note that but for this appeal the trial would have commenced today.'* An application based only on abuse of process (as this should be) will be dealt with by this Court and, if it does not succeed, the trial will follow within a reasonable time. In the case, the Court has already missed the 25 February 2019 trial date and hopes that this trial kicks off on the firm trial date of Monday 23 September 2019.

[152] The Applicant has been candid and already indicated to this Court that if the Constitutional Motion is unsuccessful, there will be an appeal to the Court of Appeal, and possibly thence to the Privy Council.

[153] Like the Respondent, I surmise that the application for constitutional relief may be an attempt to ensure that a trial will not take place for as long as possible. It follows, because the alleged constitutional breach is without reasonable foundation, the constitutional application in itself is a breach of the Court's process, and is likely to prejudice, embarrass or delay the Applicant's fair trial.

[154] In **Jaroo**, the Privy Council addressed the proposition of dressing up a case in constitutional clothes to avoid a trial. At para 39, the Board said:

> **"Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the Applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse."**

[155] The Constitutional Motion faces a brick wall in the proviso to Article 28 of the Constitution which is in mandatory terms. It is cannot be disputed that the Order sought by the Applicant under the ordinary law, that is, to quash the VBI and to

stay the criminal proceedings against him, would be an adequate means of redress.

[156] It is well established that the right to apply to the Supreme Court pursuant to Article 28 of the Constitution should be exercised only in exceptional cases where there is a parallel remedy. See: **Jaroo**; **Harrikissoon v Attorney General of Trinidad and Tobago** [1980] AC 265 and **Chokolingo** at pp. 111-112 and **Hinds**.

[157] **Harrikissoon** concerned the case of a teacher who was transferred from one school to another. He sought redress under the Constitution. Plainly, no constitutional right was implicated by these facts. The Privy Council was resolute in stating that constitutional redress could not be used as a substitute for judicial control of administrative action. Lord Diplock at p. 268 said:

> **"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle an applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."**[Emphasis added]

[158] In **Jaroo**, the appellant filed a constitutional motion seeking relief for infringement of certain of his rights. The Privy Council held that a parallel remedy was available to the appellant to enable him to enforce his right to the return of the vehicle. He could have pursued an action for delivery in detinue. The Privy Council reverberated its salutary warning that the right to apply to the High Court under the Constitution should be exercised only in exceptional circumstances where there is a parallel remedy.

[159] In the premises, I will strike out the Applicant's Constitutional Motion. The Respondent has applied for a striking out of this Constitutional Motion under O. 19 r. 19(c) or under the inherent jurisdiction of the Court. I do not believe that it is necessary for me to resort to the Civil Procedure Rules to do so. Mr. Fitzgerald QC may be correct that those rules are inapplicable. I will therefore strike out the Constitutional Motion as an abuse of process of the Court under the Court's inherent jurisdiction.

Conclusion

[160] For all of the reasons given and, in the exercise of my discretionary powers, I refuse to quash this Voluntary Bill of Indictment which is preferred against the Applicant and to stay the criminal proceedings against him. In my considered opinion, the Applicant faces very serious allegations of corruption in public office. He should be tried. Public confidence in the criminal justice system is more likely to be shaken if the Applicant is not tried. The Court has fixed another trial date of Monday 23 September 2019. This is to facilitate any appeals. The parties are to appear before me on Tuesday, 7 May 2019 at 10.00 a.m. for a status hearing and any applications that either party may wish to make.

89. In addition, the Constitutional Motion is struck out as an abuse of the process of the Court given my findings that an adequate means of redress exists and indeed, was engaged by the Applicant.

90. Last but not least, I am immeasurably grateful to all Counsel for their sterling contribution which no doubt, has fortified the jurisprudence on this subject since no case with similar facts and circumstances was provided to me.

Dated this 8th day of March A.D., 2019

Indra H. Charles
Justice