

IN THE SUPREME COURT

*Criminal Side*

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

AND

In the Matter of an Application Pursuant to Article 20 (1) of the  
Constitution of the Commonwealth of The Bahamas

AND

IN MATTER of an Application by ERNESTO PENN

BETWEEN

ERNESTO PENN

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTION

Respondent

**Before:** The Hon. Ms. Justice Renae McKay

**Appearances** Mr. Bjohn Ferguson for the Applicant

Mr. Basil Cumberbatch for the Respondent

**Date of hearing:** 3<sup>rd</sup> July, 2018

### RULING

**MCKAY, J:**

1. By an Originating Notice of Motion filed on the 7<sup>th</sup> May 2018 the Applicant sought the following relief:
  1. A declaration that Article 20 (1) of The Bahamas Constitution which affords the Applicant the right to be tried within a reasonable time is being infringed or is about to be infringed;

2. A declaration that the delay of (16) years without being tried is a breach of the Applicants right under Article 20(1).
3. A declaration that the delay of (16) years without a trial date amounts to an abuse of process;
4. An order that the Applicant be dismissed and the matter (no.270/2002) be stayed;
5. Damages;
6. Interest;
7. Costs.

2. The grounds stated for the application are:

- (a) That the present charge is an abuse of process of the Court;
- (b) That the Prosecution has not responded to reasonable enquiries made by the Applicant;
- (c) That the Applicant has been severely prejudiced in his defense.

3. The Application was supported by an Affidavit of the Applicant filed on even date in which he stated inter alia:

3. I am 36 years of age and I was born on the 26<sup>th</sup> October 1981.
4. I am a salesman/ entrepreneur by profession.
5. I have been charged with several offences under the Penal Code namely, house breaking, rape, conspiracy to commit armed robbery and armed robbery. I appeared before the Magistrates' court in relation to those charges in 2002.
6. That during the time of the charges my attorneys were Mr. Wayne Monroe and Mr. Dion Smith.
7. That after being brought before the Magistrate I was then remanded to Fox Hill Prison. I was remanded in prison for about 3 months after which I applied to the Supreme Court for bail.
8. I then appeared before Hon Mr. Justice Jon Isaacs, who granted me bail and signed my release order.
9. That from me being released I have not received a trial date in this matter and since the passage of time I will be prejudiced in the preparation of my defense.
10. That my attorney has written to the Attorney General's office to ascertain the status of this matter and has received no response from that office.
11. I have attached and exhibited a copy of the release order (EP1) and letter (EP2) that my attorney has written to the Attorney General's

office. See now exhibited and shown to me and attached is "EP-1" and "EP-2".

4. In response thereto the Respondent filed an Affidavit of Valencia Roberts Conliffe in which she said inter-alia:
  4. That paragraph 1, 2, and 3, of the Applicants affidavit is agreed, the applicant's right to be tried within a reasonable time has been infringed and the Applicant is entitled to a declaration that the delay in bringing the Applicant to trial within a reasonable time has breached the Applicant's right guaranteed by Article 20(1) of the Constitution.
  5. That paragraphs, 4, 5, 6, and 7 of the Applicants Affidavit are denied, the Applicant is still able to receive a fair trial considering all of the material witnesses are currently alive.
  6. That the Respondent has responded in a timely manner upon having received notice of the Applicant's response from the Registrar on June 25<sup>th</sup>, 2018
5. In 2002, the Applicant was charged and remanded to the then Her Majesty's Prison for three months. He then exercised his right to apply to the Supreme Court for bail and was granted bail by Issacs, J (as he then was). From he was granted bail, the Applicant has not re-appeared before the court for anything regarding this matter; he has not received a trial date, nor has any case management occurred.
6. The Applicant wrote to the Attorney-General to ascertain the status of his matter and has not received any response from said office.
7. Based on the aforementioned, the Applicant seeks constitutional protection from this Court as the sixteen year period from which he was granted bail to date is severely prejudicial to his defence and such he asks the Court to grant a stay.
8. The Respondent's position is that despite the time delay in this matter, the Applicant's constitutional right to a fair hearing under Article 20 (1) of the Constitution will not be infringed as the trial judge's purpose, in the instant case, is to ensure that the Applicant receives a fair hearing. Counsel for the Respondent further submits that even if the Court rules that there is a delay, no prejudice has been suffered by the Applicant and the matter should not be stayed as prayed.
9. There are two (2) issues for this Court's determination. The first is whether there is a violation of the Applicant's right to a fair trial within a reasonable time and

whether the remedy for a violation of the Applicant's rights warrants a stay of the proceedings

10. Article 20(1) of the Constitution provides that

*"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."*

11. These two issues were fully discussed in the case of **Anthony Charles Hall v The Attorney General of the Bahamas** No. CRI/CON/00005/2011 a decision of Mr. Justice Roy Jones (as he then was.) In that case he cites the Privy Counsel's decision of **Boolell v State** (2007) 2 LRC 483 at 495 which was accepted as applicable to The Bahamas in the case of **William Fox, Mark Curtis et al v Attorney General of The Bahamas, Supreme Court of The Bahamas**. (Unreported) No. 31/02/2005. It was in the **Boodell's** Case that it was decided that: "If a Criminal Case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 20 (1) of the Constitution, whether or not the defendant has been prejudiced by the delay."

12. In all of these cases, the Court had to consider the facts and circumstances of the particular case; the complexity of the case; the conduct of the Applicant and the manner in which the judicial and administrative authorities have dealt with the matter.

13. Similarly, the Applicant relied on the US case of **Barker and Wingo 1972 496 US 514**, which listed four factors for consideration, namely: the length of the delay; the reason given by the prosecution for the delay; efforts made by the Applicant to assert his rights; and the prejudice to the Applicant.

14. Taking the above mentioned factors in **Hall** and **Boolell** into consideration, it is important to note that the Court has not had the opportunity to delve into the facts and circumstance of the case as a trial has not yet been had. Nevertheless, the Applicant has made efforts to contact the Crown to ascertain the status of his matter which is a direct contrast to the behaviour of the Crown, who made numerous missteps in this matter by their inactions.

15. Counsel for the Applicant also relied on the case of of **Stephen Ronel Stubbs v Attorney General SCCr App No 153 of 2013**, referring the court to paragraph 8 which referred to **Bell v. Director of Public Prosecutions [1985] 2 W.L.R 73** where Templeman LJ said "...a fair hearing within a reasonable time by an independent and impartial court established by law, form part of one embracing form of protection afforded to the individual. The longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial."

16. In Hall Jones J. (as he then was) stated that “cases in this jurisdiction have held that a delay of four (4) to five (5) years is prejudicial. There cannot be any doubt that the delay in this case is on the face of it, for an unreasonable period of time and presumptively prejudicial.”
17. Jones J. applied the test as set out by Lord Bingham in **Attorney General’s Reference (No 2 of 2001)** which states:

“The Respondent has no answer to the protracted delay in setting a trial date for over four (4) years from May 1<sup>st</sup> 2006, to August 10<sup>th</sup>, 2010. The Court was required to set a date bearing in mind the urgency of the matter and compel the Applicant to make arrangements to have representation for the date set by the Court. Accordingly, although the Applicant’s conduct contributed to the delays, this cannot in my view, remove the responsibility from the prosecuting and judicial authorities. They could and should have done more to bring closure to this matter. I hold that the rights of the Applicant to a trial within a reasonable time guaranteed under Article 20(1) of the Constitution of The Bahamas have been infringed.”
18. Additionally, given the circumstances at hand I would refer to paragraph 21(4) of **Cancino Lightbourne v The Attorney General** where the Court said:

“Prejudice, of course, should be assessed in the light of the interest of defendants which the speedy trial was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last... If witnesses die or disappear during a delay the prejudice is obvious. There is also prejudice if a defence witness is unable to recall accurately events of the distant past. Loss of memory however, is not always reflected in the record, because what has been forgotten can rarely be shown.”
19. Based on the aforementioned jurisprudence, it is evident that the inordinate delay of sixteen years is an unreasonable amount of time and as such I find that the period is presumptively prejudicial to the Applicant; particularly, due to the fact that he has made efforts to contact the Crown to determine the status of his matter. As such, I find that the Applicant’s right to a fair trial has been infringed due to the inactions of the Crown.
20. The second and final issue is whether a breach of Article 20 (1) of the Constitution amounts to an abuse of the process and warrants a stay in this case.
21. In the case of **Attorney General’s Reference (No. 1 of 1990)** 1992 QB 630, Lord Lane CJ in that case proposed the following test to assist in the determination of

whether the delay in that case was an abuse of process and would lead to a stay of a prosecution. He states that:

“In our judgment, bearing in mind Viscount Dilhorne’s warning is **Director of Public Prosecutions v. Humphreys ([1976] 2 AER 497**, that this power to stop a prosecution should only be used “in most exceptional circumstances,”...the effect of these cases can be summarized in this way. The power to stop a prosecution arises only when it is an abuse of the process on the Court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of Court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability of the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution’s case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service... The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, for as Lord Diplock said in Sang ) [1979] 2 ALL ER 1222 at 1230, [1980] AC 402 at 437), “...the fairness of a trial...is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. ”. ( *Emphasis Added*)

22. Justice Roy Jones (as he then was) in the case of **Anthony Charles Hall (supra)** also relied on the case of **Frank Gibson v The Attorney General (2010)CCJ 3 (AL)** a decision of the Caribbean Court of Justice as instructive on this point. Justice Adrian Saunders stated the following:

“A permanent stay or dismissal of the charge cannot be regarded as the inevitable or even the normal remedy for cases of unreasonable delay where a fair trial is still possible...as some other jurisdictions have done, would create too great a risk of unnecessarily placing trial courts in the uncomfortable position of having to choose between equally undesirable alternatives, namely: to permit a possibly dangerous criminal to avoid being tried or else to raise to an unacceptably high level the threshold for deeming unreasonable obviously inordinate delay. Having an inevitable permanent stay or dismissal of the charge as the singly sanction for breach of the reasonable time guarantee may well reward the guilty, who escaped being brought to justice, even as it does little or nothing for the innocent who cannot regain the time they have lost suffering under a cloud of suspicion or worse, being remanded in custody. We accept the view of the Inter-American Court of Human Rights that “that state’s duty to wholly serve the purposes of justice prevails over the guarantee to reasonable time.” The

fundamental objective of the reasonable time guarantee is not to permit accused persons to escape trial but to prevent them from remaining in limbo for a protracted period and to ensure that there is efficient disposition of pending charges. The guarantee is an incentive to the State to provide a criminal justice system where trials are heard in a timely manner.” But equally, we do not agree that a mere breach of the reasonable time guarantee could never yield a permanent stay or dismissal of the charge and that instead such relief should be reserved only for instances where the trial will be unfair or the accused can show prejudice. As previously indicated at {4}, Section 24(1) of the Constitution affords the court flexibility, power and a wide discretion in fashioning a remedy that is just an effective taking into account the public interest and the rights and freedoms of others. No conceivable remedy, including a permanent stay of dismissal, ought to be removed from the range of measures at the disposal of the court if the relief in question will prove to be appropriate. Given the high level of public interest in the determination of very serious crimes, however, it will only be in exceptional circumstances that a person accused of such a crime will be able to obtain the remedy of a permanent stay or dismissal for the breach only of the reasonable time guarantee. Of course, such a remedy will be readily granted in cases where the delay has rendered it impossible to hold a fair trial.”

23. At the headnote of Stubbs it was stated that:

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

Any adjudicating body, considering as a remedy for an alleged breach of Article 20 (1) of the Constitution the grant of a permanent stay, must consider, in addition to the to the existence of exceptional circumstances, the following: 1.the period of time which has elapsed in the matter 2. The complexity of the case 3. the nature and extent and extent of any delay caused by the defendant and 4. the manner in which the case has been handled by the prosecuting, administrative and judicial authorities.

It must always be remembered that permanent stays imposed on the ground of delay should only be employed in exceptional circumstances. The appellant has failed to establish to this court that any exceptional circumstances exist that warrant the grant of a permanent stay.”

24. With regard to the appropriate remedy, In **Boolell v State [2006] UKPC 46** the majority adopted the test laid down in **Attorney General's Reference (No 2 of 2001) [2004] 2 WLR 1** where they said:


“Although through the lapse of time in itself there was a breach of art 6(1), the appropriate remedy would not necessarily be a stay but would depend on all the circumstances of the case. Lord Bingham of Cornhill, who gave the leading opinion for the majority, set out as two of the fundamental first principles applying to art 6(1), that (a) the core right guaranteed by the article is to a fair trial and (b) the article creates rights which though related are separate and distinct. It does not follow that the consequences of a breach of each of these rights is necessarily the same.”

25. Counsel for the Applicant submitted that a stay is best in these circumstances as a fair trial is infringed as a fair trial cannot be had due to the sixteen year time period from when the Applicant was granted bail. I am inclined to agree with Counsel for the Applicant and class this circumstance as an exceptional one, taking into consideration the numerous changes that have occurred over that time period inclusive of criminal justice approaches, administration changes, and most importantly the question of evidential fairness. I am of the view that a stay of these matters is the appropriate remedy which is proportionate to the breach inflicted by the Respondent.

26. In all of the circumstances I find that more than 16 years has passed since the commencement of this matter. I also find that there has been an infringement in the part of the Respondent.

27. Accordingly, I will accede to the Applicant's prayer and issue a declaration that Article 20 (1) of The Bahamas Constitution which affords the Applicant the right to be tried within a reasonable time has been infringed and I further order that the matter (no.270/2002) be stayed fothwith;

Dated this <sup>27<sup>th</sup></sup> day of November A.D., 2018

  
- W. RENAE MCKAY  
JUSTICE