

COMMONWEALTH OF THE BAHAMAS

2015

IN THE SUPREME COURT

CRI/con/00022/

CRIMINAL DIVISION

CONSTITUTIONAL SIDE

**IN THE MATTER of Article 20(1) of the Constitution of
The Commonwealth of The Bahamas**

Between

CRAIG JOHNSON

Applicant

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: The Honourable Madam Justice Mrs. Cheryl Grant-Thompson

Appearances: Mr. Jairam Mangra- Counsel for the Applicant

Mr. Timothy Bailey- Counsel for the Respondent

**Date of Hearing: 15th March 2019, 13th November 2019, 19 February, 2020;
2nd December, 2020.**

**DECISION ON CONSTITUTIONAL APPLICATION- MURDER
APPLICATION TO STAY THE PROSECUTION**

GRANT-THOMPSON J

1. The Applicant claims that:

- a) He failed to receive a fair trial within a reasonable time and that there has been “unreasonable delay” and seeks a Declaration in the result. The offence was allegedly committed on the 22 August, 2009 to the 23 August, 2009- a delay of eleven (11) years at present;
- b) The Prosecution for Murder should be stayed; and
- c) The Notice of Motion dated 11th June, 2018 filed 13 June, 2018 should be granted, wherein the Applicant prayed for the following relief:
 - I. A Declaration that the Applicant has not been afforded a fair hearing within a reasonable time in contravention of Article 20 (1) of the Constitution of The Bahamas;
 - II. A Declaration that the Applicant cannot now be afforded a fair hearing in breach of Article 20 (1) of the Constitution;
 - III. An order staying the criminal prosecution against the Applicant;
 - IV. That the present information is an abuse of the process of the Court;
 - V. That the delay is Presumptively Prejudicial;
 - VI. That no reasonable explanation has been given for the delay; and
 - VII. That the Applicant has been severely prejudiced in his defense by reason of such delay.

2. BACKGROUND

- i. A Constitutional Motion and supporting Affidavit were formalized and filed on behalf of the Applicant on the 13 June, 2018. By three (3) handwritten and unfiled letters written to the Court, the Applicant sought to raise a

constitutional Motion seeking relief for the alleged violation of his constitutional rights to a fair trial within a reasonable time pursuant to Article 20 (1) of the Constitution.

- ii. The Applicant first raised the constitutional motion by a letter to the Court dated 18 June, 2015. The application was heard on the 28 July, 2015 and dismissed without prejudice by the then Honourable Mr. Justice (now Senior Justice) in a written Ruling dated 21 August, 2015. At paragraph 7 therein the judge noted that, "the Applicant does not assert any particular prejudice..."

3. Since that 2015 Ruling, the Applicant has by two (2) handwritten letters further moved the Court for constitutional relief.

The basis of the Applicant's Constitutional Motion is twofold:

- i. That there is a breach of the Applicants right to a fair trial within a reasonable time on the charge of Murder; and
- ii. That as a result of the delay in bringing him to trial he has suffered grave prejudice which will adversely affect the fairness of the trial. Two (2) of his intended witnesses, a family friend and his grandmother, both of whom witnessed the incident during which the injuries resulting in the death of the deceased were allegedly inflicted, have died. That because of the death of his intended witnesses he could not now have a fair trial.(By June 13, 2018 Affidavit- James McKenzie was shot and killed on the August 4, 2015; Ms. Dorothy Francis died on December 12, 2015- they were witnesses upon whom he intended to rely, their death certificates were provided).

The Department of Public Prosecutions alleges that the Applicant stabbed his girlfriend several times causing her death. The Applicant in his statement to the

police asserted that he was acting in lawful self-defense at the time of the alleged stabbing.

4. DELAY & FAIR TRIAL WITHIN A REASONABLE TIME

In **Bell v DPP[1985]1 AC** the four (4) issues for the Court to consider have been set out by the Privy Council as outlined in the case of **Barker v Wingo 919720 US 514:**

“...the authorities are quite clear on the approach the Courts must take in an enquiry the Courts must take. There must be sought an element of what is described as presumptive prejudice, not necessarily actual, and which is caused by an infringement on the right to a fair trial within a reasonable time. The Court must have regard to length of delay, the reasons given by the prosecution for the delay, efforts made by the accused to assert his right and finally the prejudice to the Applicant.”

The Applicant alleges that since the 23 August, 2009 to the present date, more than eleven (11) years have elapsed without him being tried for the alleged Murder.

5. BRIEF HISTORY OF CRIMINAL PROCEEDINGS in the case:

- i. The Appellant was arrested on 22 August, 2009 and charged 23 August, 2009;
- ii. He was remanded to prison from 23 August, 2009 to 30 November, 2012;
- iii. The case was set for Preliminary Inquiry in the Magistrate Court #11 on 29th October, 2009. The Preliminary Inquiry was adjourned and delayed repeatedly; until the service of the VBI on the 30th July, 2015;

- iv. The Applicant by letter dated 18th June, 2015 sought a Constitutional hearing in breach of his rights pursuant to Article 20 (1) of the Constitution;
- v. The hearing of the Applicant's Constitutional Application was held before the Honourable Mr. Justice Bernard Turner (as he then was) on 28th July, 2015;
- vi. The Voluntary Bill of Indictment was served 30th July, 2015;
- vii. The Applicant was arraigned in the Supreme Court on 14th August, 2015;
- viii. The written Ruling by Mr. Justice Turner on the Applicant's Constitutional application was delivered on 21st August, 2015;
- ix. The case was transferred to my court for fixture and trial on the 10th September, 2015, a trial date was set for 28th March, 2016. This did not materialize as the Applicant was before another Court (my sister Justice McKay) in another trial; and
- x. The Applicant further pursued a Constitutional Application in breach of his Article 20 (1) rights by letter dated 27th January, 2016 and gave notice on 6 June, 2018 after his new trial date was set for 18 June, 2018, this halted the commencement of that trial.

WHAT IS A REASONABLE TIME?

6. Although the Constitution does not stipulate what constitutes 'a reasonable time', the **Bail (Amendment) Act 2011, Section (2A) (a) and (b)**, provides a guidance as to what Parliament considered to be a reasonable time as provided therein , a period of three (3) years was deemed reasonable. The Applicant avers that the delay was not caused by anything done by him, but rather by the failure of

the prosecution to prosecute the matter within a reasonable time as guaranteed by Article 20 (1) of the Constitution. The Appellant submitted that this period of delay has resulted in severe prejudice to him, and him having a fair trial. The Prosecution countered that the Applicant has failed to advance any circumstances which resulted in delay which might prejudice his defence. Further, that the alleged witnesses he relies upon he gave the Crown no notice of his intention to call them.

7. The Applicant claims that the Preliminary Inquiry lingered in the Magistrates Court for more than five (5) years. It was set to commence on 29th October, 2009, but was repeatedly adjourned due to lack of prosecution by the Crown. After which the Applicant (by letter dated 18 June, 2015) sought constitutional relief in the Supreme Court. Then finally (the Applicant avers) the Crown served a Voluntary Bill of Indictment upon him on the 30 July, 2015. *“The clearest inference to be drawn is that the Crown’s inaction/inertia, neglect and indifference to the rights of the Applicant was galvanized and precipitated by the Appellant seeking relief for the violation of his Article 20 (1) rights stated therein,”* was the position taken by the Applicant. The Applicant submitted that there has been an inordinate and inexcusable delay since August 2009 in bringing him to trial in violation of his Article 20 (1) rights and that in the result he has been seriously prejudiced in his personal and family life.

8. In **Mervin Smith v Attorney General** the Court at paragraph 7 on the issue of delay, referenced **Barker v Wingo**:

“...Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to a speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.”

9. The Applicant claims to have been proactive in having his case brought to trial. The Crown says he has been on bail since his committal in July 2015 and that the period is not unreasonable in light of the number of matters before the Court. Counsel for the defendant was affected by Hurricane Dorian which cancelled the last trial date. The loss of Court time with “COVID-19” has further exacerbated matters. These latter reasons cannot be laid at the feet of the Crown. Defence Counsel is still not available due to "COVID-19" difficulties.

**PREJUDICE/PERSONAL
CIRCUMSTANCES/FAMILY/WORK/INCARCERATION**

10. The breach of the Applicant’s Article 20(1) rights has prejudiced him he claimed in the ways as averred in his Affidavit:

The Applicant relies on the fourth factor identified in **Baker v Wingo**:

“...Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right 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 defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case shows the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record, because what has been forgotten can rarely be shown.*

While presumed to be innocent, the Applicant indicated that he suffered the loss of his personal liberty by being incarcerated for over three (3) years. As a result of the inordinate delay he was unable to obtain regular employment to support himself and his immediate family. He asserts that he was most prejudicially lost the opportunity to have two intended witnesses for his defence in the trial because they have died during the period of prolonged delay in bringing his case to trial and that the prejudice is obvious, serious and denies the Appellant his fundamental right of a fair trial; the cornerstone of justice in a criminal trial.

11. In reaching a decision on the Applicant's constitutional motion, the Court must balance the fundamental right of the individual to a fair trial within 'a reasonable time' against the public interest in the attainment of justice. In **Mervin Smith v Attorney General, paragraph 21**, the Court referred to the dicta of Thorne, J in **R v Craig Nigel Higgs and Everett Russell** in considering a delay of some four years:

"...I am satisfied that the delay in this case was longer than can be justified, particularly in light of the causes of the delay...and in referencing the Askov's case therein further stated,

"...lengthy and avoidable delay caused entirely by the Crown's sloppiness or inattention or by unjustified delays in the legal system will frequently entitle an accused to the benefit of Section 11 (b)..."

There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and

to have their name cleared and reputation re-established at the earliest possible time.”

12. Justice in the case demands that this Honourable Court balance the right of the Applicant to a fair trial within a reasonable time against the right of society to ensure that those who may have committed serious offences against members of the society are called to account for their actions. The operative period of delay in bringing the case to trial has been long, but affected by a number of matters. The charge is serious although I accept this is not a complex case involving a large number of witnesses and evidential issues; the Crown has provided some explanation and justification for the delay. I am concerned that the delay complained of by the Applicant may have caused him some prejudice as his two (2) crucial witnesses may no longer be able to testify in his defence at the trial. However, I am of the view that this can be adequately addressed at trial.

13. However, I do not accept that the appropriate relief is to stay or dismiss the proceedings. I believe that there can still be a fair trial.

ISSUES TO BE TRIED

14. Whether a trial of the Applicant, at this time, would amount to a violation of his right to a fair trial within a reasonable time, pursuant to Article 20(1) of the Constitution of The Bahamas is the issue here. In my view the Article 20 rights

have been breached to the extent that the length of time he has awaited trial in my view is not reasonable.

GENERAL SUBMISSIONS OF THE APPLICANT

15. The Applicant respectfully submitted that the constitutional issue seeks a Declaration that by reason of delay the Respondent has violated their right to hearing within a reasonable time- a right guaranteed by Article 20(1) of the Constitution which holds:

“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.”

As a result of paragraph 1 above, the prosecution of his trial for Murder should not be stayed. This redress stems from the Applicant’s constitutional right under Article 28 (1) of the Constitution which holds:

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

THE CASE FOR THE RESPONDENT

16. Where the Applicant alleges that there has been unreasonable delay in the prosecution of his case, the prosecution is required to explain the reason for the delay. In determining this factor, the commencement of the period to be taken into account must be determined.

17. In the case of *A.G. Reference (No. 2 of 2001) [2004] 2 AC, pp 90-91, paragraph 26 [TAB]* it highlighted the Court's judgment in the case of **Eckle v Federal Republic of Germany 5 EHRR I, 27 paragraph 73** that the relevant period commences, "*as soon as person is charged; this may occur on a date prior to the case coming before the trial Court, such as the date of arrest, or the date when the person concerned was officially notified that he would be prosecuted (served with a summons as a result of an information being laid).*"

18. It is to be noted that this offence was committed on 22nd August, 2009 and on the 23rd August, 2009; the Applicant was arrested and subsequently charged with the present offence. The relevant period therefore to be taken into account commenced from the said date giving a total period of delay of eleven (11) years. The Respondent avers and respectfully submitted that the offence of Murder in which the Applicant is charged, is a very serious offence and that the public interest would not be satisfied, if the Court were to issue a stay of the proceedings at this stage. They too relied on Privy Council in the case of *Bell v Director of Public Prosecutions and Another [1985] 1 AC 937[TAB2]* endorsed four factors the Courts should take into consideration.

19. The Respondent is holding that although the length of the delay was long, it was not an inordinate delay. The Applicant was arrested and charged on 22nd August, 2009. A Preliminary Inquiry commenced on the 29th October, 2009 in the Magistrate's Court No.11. On the 30th July, 2015 the Applicant was committed to stand trial before the Supreme Court. The Applicant since his committal has been released on bail. In assessing the totality of the progress of this matter it was submitted that the period was not unreasonable in this jurisdiction in light of the number of matters before the Courts to be dealt with.

20. The reason given by the Prosecution: as noted by Powel J in the case of *Baker v Wingo*, page 531, he stated:

“A deliberate attempt to delay the trial in order to hamper the defence should be weighted heavily against the government (prosecution).”

21. The Respondent submitted that the matter was not inadvertently omitted. However, it should be noted that the Crown is prepared to immediately address this outstanding matter by having the matter set down for trial at the next available case management date as the Defendant has already been arraigned. They claim that there was no deliberate attempt to hamper the defence on the part of the Prosecution. In response, Counsel for the Applicant pointed out to me that the Crown kept electing to proceed with trials other than the Applicants. I determine that the Applicant can still have a fair trial.

HAS ACCUSED ASSERTED HIS RIGHTS

22. The responsibility of the accused for asserting his rights: Powell J continued in the case of *Baker v Wingo*, page 531 that:

“Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is

being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.”

23. Prejudice to the Accused: The Respondent insists that notwithstanding that the Applicant avers that the delay is prejudicial to him; he has not put before the Court how the delay is prejudicial to him. In the case of *A.G. Reference No. 1 of 1999 [1992] QB 630[TAB 4]*, the Court held that the Applicant must show on a balance of probabilities that owing to the delay he will suffer some prejudice. This was further noted in the case of *Bell v D.P.P, page 942*, that it is for the Applicant to advance any circumstances as a result of the delay which might prejudice his defence if he were to be tried.

24. The Applicant avers that he was in fact prejudiced because two of his witnesses are presently deceased; therefore he cannot have a fair trial. The Respondent contends that the Applicant can have a fair trial despite the death of his two witnesses. The Applicant never gave notice to the Respondent at his arraignment or any case management hearing of his intention to call witnesses on his behalf it was submitted. I am concerned why the Applicant did not at the first opportunity or even before my brother Justice Turner state he had these relevant witnesses.

25. It was submitted that should the Court find that the eleven (11) year period waiting trial amounts to an inordinate delay, staying the matter, if this is remedy that the Applicant is seeking, would not be the appropriate remedy. According, to Justice John, JA in the Bahamas Court of Appeal decision of *Stephen Ronel Stubbs and The Attorney General SCCrApp No. 153 of 2013*, page 24, paragraph 38[TAB5], he noted that a Court in considering the grant of a permanent stay as a remedy for an alleged breach of the Article 20(1) of The Bahamas Constitution, must consider:

“(1) the period of time which has elapsed in the matter; (2) the complexity of the case; (3) the nature and extent of any delay instituted by the defendant, and (4) the manner in which the case has been handled by the prosecuting, administrative and judicial authorities.”

26. However, it was agreed by Lord Carswell in the case of **Prakash v Boolell PC App. No. 39 of 2005) page 12-13 paragraph 31[TAB6]** by Lord Bingham in the case of A.G’s reference No. 2 of 2001 [2003] UKHL 68 that even where there was a breach of an Applicant’s rights under the Constitution, the appropriate remedy would not be to stay the proceedings as this arises in only exceptional circumstances. In fact it followed the positions that even where there is an extreme delay, which in itself would not justify the remedy. Such a remedy should only be considered where the delay might cause a substantive prejudice. This position was upheld Court of Appeal case of **Stephen Stubbs v The Attorney General**. I agree with this position by the Crown. I also note that no notice of the proposed witnesses was given to them. However, these are not alibi witnesses where notice is required in law but rather these are defense witnesses. As it currently stands in our criminal law the DPP must disclose his witnesses but there is no similar requirement on the defense. But it was never raised in previous hearings before now.

27. This position was upheld in the case of **A.G. Reference No. 1 of 1990[1992] QB 630, page 631** where it was stated that:

“where even delay could be said to be unjustifiable, the imposition of a permanent stay was to the exception rather than the rule; and that even more rarely could a stay properly be imposed in the absence of fault on the part of the complaint or the prosecution and

never where the delay was due to merely the complexity of the case or contributed to by the defendant's actions.”

It was submitted that there was no danger of the trial of the Applicant being unfair. It must always be remembered that permanent stays imposed on the ground of delay should only be employed in exceptional circumstances. The Applicant has not in my view provided the Court with any exceptional circumstances to justify a permanent stay. Therefore, I will dismiss his application.

CONSTITUTIONAL UNDERPINNINGS

28. Article 28 of the Constitution provides redress when an Applicant alleged a breach of a fundamental right. Article 28 states, inter alia:

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

(2). The Supreme Court shall have original jurisdiction-

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

(b). to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:

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

29. I must be satisfied however that no adequate means of redress is or has been available to such persons before I can act pursuant to Article 28 because of the provision contained in Article 28(2).

30. I am satisfied that a means of redress is available to the Applicant in this case as demonstrated by the authorities dealing with the issue of delay in this and other jurisdictions. *See for example DPP v Tokai [1996] A.C. 856 and Attorney General's Reference (No. 2 of 2001).*

31. The relief is the trial judge's ability to ameliorate the effects of the delay both by his summing up to the jury; and in his sentencing of the Applicant should the

Applicant be convicted. However, is that an “adequate” relief under the Constitution when the facts of this case are considered?

The Applicant’s complaint is grounded in Article 20 of the Constitution. That Article states, inter alia:

“20. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

32. The right to a trial within a reasonable time is amorphous but efforts have been made to crystallize it. In **Barker v Wingo (1972) 407 US 514 Powell, J** provided a useful formula for making a determination as to what constitutes a “reasonable time” that has afforded much guidance for subsequent courts to follow both in this jurisdiction and in others. Powell, J identified four factors to which the Court must give heed in deciding whether or not the right to a speedy trial has been breached. This matter has taken some time to come on for trial – the trial was allegedly committed on 6th March, 2009.

33. In addressing the matter of the Sixth Amendment of the Constitution of the United States he observed that it provides that: ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury...’ Powell, J pointed out (at page 522) that:-

“...the right to speedy trial is a vaguer concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate...The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried.”

DECISION

34. My decision is that:

- I. this Honourable Court does have the jurisdiction to hear this matter;
- II. Notwithstanding that there has been a breach of the relevant constitutional provisions for trial within a reasonable period of time, in my view the Applicant can still have a fair trial and in the result the prosecution will not be stayed notwithstanding the delay, I find reasonable explanations provided having regard to the exigencies of the criminal justice system of The Bahamas
- III. the VBI discloses no material defect; and
- IV. the delay such as does exist appears to have been contributed to by both parties in that the Applicant too had matters before

other Courts and periods where there was a conflict in Counsel diary, having regard to the public interest I am of the view that the prejudice can be cured by appropriate directions at trial and I direct that an early trial date since the criminal trials have now resumed after “COVID-19”. There can be no further delay on this matter. The trial should be held within the next six (6) months.

Dated this 18th day of January A.D., 2021.

**The Honourable Madam Justice
Mrs. Cheryl Grant-Thompson**