COMMONWEALTH OF THE BAHAMAS **2016**

IN THE SUPREME COURT **CRI/con/00011/**

CRIMINAL DIVISION

IN THE MATTER OF AN APPLICATION FOR A STAY OF THE PROCEEDINGS AGAINST TERRANCE HUTCHINSON

BETWEEN

TERRANCE HUTCHINSON

Applicant

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Respondent

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

Appearances: **Ms. Crystal Rolle - Counsel for the Applicant**
Mrs. Maria Zancolla-Willie - Counsel for the Respondent

Date of Hearing: **1 August, 2018; 23 March, 2020; 14th October 2020; 2nd December, 2020.**

DECISION ON CONSTITUTIONAL APPLICATION
DELAY-CHANGE IN CIRCUMSTANCES- BALANCE BETWEEN PREJUDICIAL AND PROBATIVE- BARKER V WINGO (1972) 407 US 514; BELL V DPP.

GRANT-THOMPSON J

BACKGROUND

1. On the 11th May, 2012 the Applicant was charged with Murder before then Deputy Chief Magistrate Roger Gomez. His matter was committed for trial before the Supreme Court (11th January, 2013). His trial was scheduled before another Judge. I inherited the Constitutional Application. Initially his trial was fixed for the 29th May 2017. The trial could not start until the completion of the Constitutional Application before me. The Applicant submitted that:

    a) the delay was prejudicial and has rendered it impossible for him to now receive a fair trial and the trial should be stayed;
    b) the relief sought in the originating Notice of Motion should be granted wherein the Applicant prayed for the following relief;
    c) That the present information is an abuse of the process of the Court;
    d) That the delay is presumptively prejudicial;
    e) That no reasonable explanation has been given for the delay; and
    f) That the Applicant has been severely prejudiced in his defense by reason of such delay.

2. The Criminal trial of this matter was scheduled to commence in less than ten (10) months before the then Senior Justice Jon Isaacs (as he then was) on the 15th

October, 2013 following the Applicant's arraignment on the 11th January, 2013.He had been arrested for the offence on the 9th May, 2012. An attempt was made to transfer the matter before my brother, Justice Mr. Roy Jones (as he then was, now Justice of Appeal Jones) for trial on the 15th October, 2013. However, the scheduled trial of Andre Birbal commenced as the substantive matter and the Applicants matter was duly adjourned for fixture to the 29th November, 2013 to set a new trial date. The commencement of the substantive trial of this matter was obviously delayed due to the Applicant filing a Constitutional Motion before me in the result, another matter commenced in its place. The trial date was originally substantively fixed for the 29 May, 2017 and the 3 December, 2018 respectively.

THE RESPONDENT

3. The OAG strenuously objected to the application and filed an Affidavit in reply supported by Skeleton arguments. The tenor of their arguments was that they can show numerous attempts by the Crown to bring Mr. Hutchinson's matter on for trial. Through no fault of their own they claim, the matter was frequently adjourned. They accept that the Applicant too is not at fault. However, they relied on the extingencies of the system. Paragraph 11 of the opposing Affidavit of Sgt. 2310 Roberts-Conliffe reveals,*" that any delay in this matter cannot be attributed to any fault of any party, as both the Defence and the Crown were amenable to*

*attempting to have the matter brought forward to an earlier trial date. However, due to the fact that the matter was duly assigned as a back-up trial for the 15th October, 2013 the substantive matter proceeded and the Applicant's matter had to be further adjourned."*The Applicant was granted bail for the above offences.

4. The Crown continues in its Affidavit that *"any delay in the hearing of the matter has solely to do with challenges relating to the calendar of the Courts and the large volume of cases in the Criminal Justice system- that the Court cannot be faulted for the delay and the delay has not been inordinate or unreasonable in the circumstances, bearing in mind the nature of the offence charged and the fact that it was committed in 2012."* To date the delay is now eight (8) years. The Respondent further challenged that there has in fact been no unreasonable delay as the adjournments were due they claimed to the Courts hectic schedule. They hung their hats on the fact that the Applicant did not state how the delay was prejudicial to him and that this factor alone was the proverbial nail in the Applicant's coffin.

5. Subsequent to their submissions the Applicant swore a supplemental Affidavit on (May 25, 2018) after the constitutional arguments had commenced before me to the effect that:

i. the Applicant as a result of the delay has been unduly prejudiced in the necessary preparation of his defence and the meaningful contimation of his life;

ii. the Applicant 30 January, 2013- Notice of Alibi details the requirement and intention to call an alibi witness Mr. Shawn Smith who as of the 5th September, 2015 is now deceased
(His Death Certificate was duly produced);

iii. the Applicant lost contact with an additional elderly alibi witness;

iv. that the delay has caused innumerable and immeasurable hardship to him, this capital charge continues to hang over his head causing him to get/and or lose jobs and severely restricted his mobility;

v. he could not travel abroad due to the pending matter and his bail conditions; and

vi. the police have constantly harassed, arrested and detained him without reason and he genuinely believes this is due to the alleged bad character attributed to him as a direct result of being charged with Murder in respect of this matter.

6. In my view, the old adage is still relevant, **"justice delayed is justice denied."** The delay serves no one. The family of the deceased cannot receive any closure. The Applicant too has been denied his proverbial day in Court. Indeed the delay has allowed the Applicant an opportunity to refine and properly plead his case. I found his reasons compelling. How can he be said to have a fair Murder trial if his alibi witnesses are no longer available? How does he get back, as he awaited trial, the eight (8) years which has been lost to him as he has filed numerous reports with the Complaints and Corruptions Unit of the Royal Bahamas Police Force for alleged harassment? The Crown accepted they received notice of his proposed alibi witnesses.

7. This Applicant claims to have been arrested at his sons baby shower (notwithstanding he was subsequently released two hours later). In my view to have these charges languishing over his head would have caused much embarrassment, pain and hardship to the Applicant. Even when new Judges were appointed this matter was not reassigned. The "Bowe and Davis" classic principles which were repeated and cited with approval by Her Majesty's Privy Council that the "first in time shall prevail" relative to the setting down of cases was apparently all but ignored in this case. The system appears to be somewhat ad hoc in terms of which matters the Prosecution brings first. This is through no fault of the Applicant. If convicted, the Applicant faces a severe penalty of life imprisonment

and I will not allow him to face this charge with one of his hands tied behind his back as a result of the loss of the ability to call his crucial alibi witnesses, whom he described as material to his case. Whether they are crucial or are not we will never know. I will not allow him to be so prejudiced.

8. The Applicant filed an Originating Notice of Motion dated the 25th May, 2016 as detailed in paragraph 1 above. The Motion was supported by an Affidavit of the same date laying out the charges, date of arraignment, and the proposed trial date of 29th May, 2017. The Applicant claimed therein to not be responsible for the delay or lack of progress in the matter. The Applicant asked for a stay of the prosecution. I will grant his application.

9. **ISSUES TO BE TRIED**

I. 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; and

II. what happens when initially the delay is not the fault of either parties and if so what constitutes real hardship, anguish and anxiety.

10. CONSTITUTIONAL APPLICATION

I set this matter down for hearing eighteen (18) times and the Crown sought adjournments on each occasion. This is egregious. Initially, they failed to respond to the Applicants application. The Counsel for the Crown changed often and each successive Counsel appearing claimed to be unprepared to respond in writing or orally. They were given many chances by the Court. They were served on numerous occasions with the submissions and the application of Counsel for the Applicant. Counsel for the Applicant had by then fixtures for trial well into 2022/2023. Mr. Murrio Ducille would have been lead Counsel in this matter. I was asked to declare the delay unconstitutional and to stay the prosecution. Whilst I do not accept under the circumstances and the reasons given that failure to bring a matter on for trial within and eight (8) year period is unreasonable having regard to the current system of Justice in The Bahamas, I do find that he can no longer have a "fair trial" under all of the circumstances of this case.

11. CONSTITUTIONAL UNDERPINNINGS

Article 28 of the Constitution provides redress when an Applicant alleges 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.

12. 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).

13. I am not satisfied that an adequate and appropriate 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).***

14. The relief can be in 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?

15. 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."***

16. 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 matter was allegedly committed on 6th March, 2009.

17. 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."***

18. DECISION

i. Notwithstanding that the delay does not appear to have been unduly contributed to by the Applicant and possibly also not the Crown it cannot in my view be cured by appropriate directions at case management or at trial;

ii. the trial of this matter was set for the 3rd December 2018 and Pre Trial Review for 21st November 2018 at 9:30am. No new trial date has been set until now because Counsel for the Applicant has asked the trial court to delay same pending my ruling; and

iii. I find there has been inordinate delay and that the Applicant is prejudiced in the result and can no longer receive a fair trial, and in the result that a stay of these proceedings should be ordered. I so order.

Dated the 25th day of February A.D., 2021.

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The Honourable Madam Justice
Mrs. Cheryl Grant-Thompson