

**COMMONWEALTH OF THE BAHAMAS**  
**In The Supreme Court**  
**Criminal Division**  
**No. CRI/CON/00011/2021**

**IN THE MATTER OF THE Constitution of The Commonwealth of The Bahamas**

**AND**

**IN THE MATTER OF an application pursuant to Articles 20(1) and 20(2)(c) of The Constitution of The Bahamas**

**BETWEEN**

**MARVIN COLEBY**

**APPLICANT**

**AND**

**THE ATTORNEY GENERAL**

**RESPONDENT**

Before: Her Ladyship, The Honourable  
Madam Justice Guillimina Archer-Minns

Appearances: Ms. Eleanor Albury  
Ms. Linda Evans for the Respondent

Hearing Date: 9 December, 2021

**RULING**

## Archer-Minns J

1. In September 2009, the Applicant was arrested in relation to a number of offences including Murder, Attempted Murder and Conspiracy to Commit Armed Robbery. He was charged along with Genear McKenzie and Rhonda Knowles.
2. The Applicant was released from custody in 2013 and has remained on bail todate.
3. He was arraigned in the Supreme Court before the Honorable Mr. Justice Bernard Turner on 17 July 2015 in VBI No. 163/7/2015.
4. By Originating Notice of Motion filed on 18 October 2021, the Applicant herein seeks the following relief and or redress
  - (i) A Declaration that the fundamental rights of the Applicant to a fair hearing within a reasonable time by an independent and impartial court established by law has been infringed and that the charges against him ought to be dismissed as it would be unfair and unconstitutional in these exceptional circumstances to require him to stand tiral particularly in light of the judgment in the Supreme Court and the Court of Appeal relative to a co-accused Genear McKenzie – it being held that the co-accused's constitutional right to a trial within a reasonable time had been infringed thereby staying proceedings on behalf of the former co-accused.
  - (ii) A Declaration that due to the particulars of being concerned together that the proceedings against the Applicant be stayed as to continue to prosecute the Applicant would be an abuse of the process of the court thereby creating abuse under the inherent jurisdiction. The Applicant was charged along with the aforementioned former defendant and another allegedly being concerned together in the commission of divers criminal offences, allegedly all of which occurred on the same date in 2009.
  - (iii) An Order that the Honourable Court pursuant to the aforesaid judgments grant the Applicant a similar stay of proceedings being satisfied that his right to have a fair trial within a reasonable period of time had been infringed.
  - (iv) An Order that to put the Applicant (or any of the remaining defendants in this case) on trial would be vexatious and an abuse.
  - (v) An Order that the proceedings against the Applicant be stayed.
  - (vi) Such Orders, Writs or Declarations pursuant to Article 28 of the said Constitution or otherwise as may to this Honourable Court seem appropriate for the purpose of enforcing

- or securing the enforcement of any right or freedom to the protection of which the Applicant is entitled, and
- (vii) An Order for the costs being a fixed amount to be paid further or alternatively, that the award of costs to the Applicant be taxed, if not agreed.

### **Background Facts**

5. The Applicant along with co-accused Genear McKenzie (former) and Rhonda Knowles were charged in September 2009. On 18 February 2011, the accused persons were committed to stand trial in the Supreme Court for the offences of Murder, Attempted Murder and Conspiracy to commit Armed Robbery.
6. On July 2015, the Applicant was served with a Voluntary Bill of Indictment which required him to appear before Mr. Justice Turner for arraignment on VBI No. 163/7/2015. The Applicant pled not guilty on all charges.
7. A backup trial date was initially set for 24 April, 2017 and a substantive trial date for 9 July, 2018 were fixed on 10 August 2015. On 24 April 2017 the matter was unable to proceed as the Court was involved in an ongoing trial. The matter was eventually adjourned for trial to 18 May 2017. On this date, the Respondent was unable to proceed as its key witness had taken ill and was about to give birth in August 2017. The back up trial date was scheduled for 13 November 2017. On 10 November 2017 due to the court being involved in trial with respect to another matter, the Applicant's matter was transferred to then Mr. Justice Evans for trial on 13 November 2017. The matter was subsequently returned to this court due to a family conflict of interest with the judge and an accused.
8. On 13 November, 2017 the court fixed a new back up trial date for 26 February 2018. The matter on 26 February 2018 was thereafter scheduled for trial on its fixed trial date of 9 July 2018 as the Respondent proceeded with another matter.

9. On 29 June 2018, the fixed trial date of 9 July 2018 was vacated and a new date of 22 October 2018 was fixed on 27 July 2018. The matter did not proceed on the 22 October 2018 as the court was involved in an ongoing Murder trial. The matter was thereafter given a back up trial date for 25 November 2019 and a fixed trial date for 23 November 2020 on 2 November 2018.
10. On 15 November 2019 due to an ongoing evaluation of one of the co-accused the back up trial date of 25 November 2019 was vacated and scheduled for the fixed trial date of 23 November 2020.
11. The matter did not proceed to trial on 23 November 2020 due to the non-appearance of the Applicant who had some challenges traveling to the island of New Providence because of the covid protocols in place and the outstanding warrant of arrest in relation to the accused, Rhonda Knowles. The matter was consequently permanently stayed in respect of the co-accused Genear McKenzie – a Court of Appeal decision viz Genear McKenzie and The Director of Public Prosecutions SccrApp No 124 of 2020.
12. On 16 December 2020, the matter was given a back up trial date of 6 September 2021 and a fixed trial date of 21 August 2023. The matter did not proceed to trial on 6 September 2021 due to the suspension of criminal trials as a result of the covid pandemic. On resumption of criminal trials in October 2021, the matter was scheduled for a pre-trial review for 26 January 2022 and trial on 7 February 2022.

13. **Applicable Law**

**Constitution**

Article 20(1) states:

**“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.”**

## Issues

14. The issues for the Court to determine are as follows:
  - (i) has the Applicant's Article 20(1) right been infringed
  - (ii) should the Applicant be given the same consideration as was previously given by the Court to the co-accused, Genear McKenzie. The Court having determined that the co-accused at the time of her application had not received a trial within a reasonable time. The decision of the Court being upheld by the Court of Appeal save that the Court of Appeal ordered a permanent stay of the proceedings if the matter did not proceed to trial on its scheduled date of 23 November 2020 whether or not jury trial resumed in the Supreme Court on the aforementioned date.
15. Jury trials had not resumed on the fixed trial date of 23 November 2020 and therefore the matter was permanently stayed against the co-accused, Genear McKenzie. The matter was subsequently fixed for trial for the Applicant and the second co-accused for 7 February 2022.
16. Article 20(1) Rights - Unreasonable Delay

Cory, J in *Elijah Anton Askov, et. al. v. Her Majesty the Queen (March 23 1990)*, opined that **"[t]here is a no more corrosive element upon the edifice of justice than the perception that those persons who may have committed serious crimes against members of the society are not held responsible for their actions"**. He further stated: **"Justice so delayed is an affront to the individual, to the community and to the very administration of justice."**
17. The four principles of (i) the length of the delay (ii) the reason given by the prosecution to justify the delay (iii) the efforts made by the applicant to assert his rights; and (iv) the prejudice to the accused - these four principles enunciated in *Barker v Wingo 407 US 514* have been widely referenced in this jurisdiction and adopted by the courts when determining whether one's right of receiving a trial within a reasonable amount of time has been infringed.

18. In Taylor v. Attorney General of the Commonwealth of The Bahamas [2013] 1 BHS J.No. 218 wherein the case of Barker was referenced and in which Powell J stated:  
**“Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the impression of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less for a serious, complex conspiracy charge.”**
19. The offences with which the Applicant has been charged were allegedly committed in 2009, the same year the Applicant was charged with same. The operative period of delay to date is in excess of twelve (12) years.

#### **Reasons for the delay**

20. The record of the court reflect varying reasons for the delay such as (i) the unavailability of key prosecution witnesses (ii) non-appearance or unavailability of co-accuseds/Counsel (iii) the suspension of jury trial in the Supreme Court due to the Covid 19 Pandemic (iv) ongoing trials on the dates for which the matter was scheduled for trial. Clearly, the fact that the matter did not proceed to trial in a timely manner cannot be attributed to anyone particular party.
21. Responsibility of the Applicant to assert his rights:  
Powel J opined:  
**“Whether, and how, a defendant asserts his rights is closely related to the other factors we have mentioned. The strengths of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain.”**

22. The Court notes from the trial file that save for this current Motion of the Applicant filed on 18 October 2021 following the decision of co-accused, Genear McKenzie was the only time that the Applicant asserted his rights to a trial within a reasonable time had been infringed. However in the Applicant's Affidavit filed on 9 December 2021, the Applicant avers at paragraph 7 "that by letter dated 22 February 2021 to the Director of Public Prosecutions a request was made for a Nolle Prosequi to be entered in respect of the proceedings for the remaining defendants based on the Court of Appeal's decision handed down on 19 February 2021. No response was received to the submitted letter".
23. The Respondent acknowledges receipt of the request for consideration to be given to the entering of a Nolle Prosequi. However, the Respondent's intent was to proceed with the prosecution of the matter given the strength and cogency of the evidence against the Applicant; there being no unreasonable delay in the prosecution of the matter.

### Prejudice

24. Powell, J in Barker further opined that:  
**"Prejudice of course should be assessed in the light of the interests of defendants which the speedy trial was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last ... If witnesses die or disappear during a delay the prejudice is obvious. There is also prejudice if the defence witnesses are unable to recall accurately events of the distant past. Loss of memory however, is not always reflected in the record because what has been forgotten can rarely be shown."**
25. Counsel for the Applicant submitted that the Applicant has been severely prejudiced by the delay. The Applicant also advanced that (i) prior to the Corona virus pandemic, which compelled the courts to employ the use of remote hearings, he had the expense of having to purchase a plane ticket each time he had to attend court which was priced in excess of \$200.00 to travel to Nassau from Freeport where he has been living and working since being admitted to bail. This happened

so many times which proved very costly, as the trial never took place all of these years as he was met with adjournments after adjournments (ii) During the course of the hearings and despite the numerous witnesses listed as being witnesses for the prosecution only four (4) witnesses attended at a hearing (iii) the Applicant's Attorney is yet to receive from the prosecution, the Record of Detention which is considered vital to the due preparation of the trial (iv) with the very serious charges, he is disadvantaged having them hanging over his head than is reasonably required and because of his fundamental constitutional right to a trial in a reasonable time, he remains in a state of limbo subjecting him to daily distress whilst being employed and positively contributing to the development of the country.

26. Counsel for the Respondent countered that the Applicant would not be prejudiced by a trial of the matter at this time. Reliance was placed on the authority of Stephen Ronel Stubbs v Attorney General SCCr App No 153 of 2018 in which *Bell v. Director of Public Prosecution* was also referenced. Further, there is sufficient and cogent evidence against the Applicant to have this matter proceed to trial (ii) the Applicant was admitted to bail sometime in 2013 which was varied in December 2013 (iii) the matter involves a confession statement by the Applicant ; the voluntariness of which if questioned, the Respondent can and has provided to defence Counsel all medical evidence to assist with the defence. (iv) since the Applicant moved to Grand Bahama, the Applicant did not have to travel back and forth to Nassau for hearings during the pandemic as the Applicant was only required to appear via Webex for case management hearings (v) the matter is now set for trial on 7 February 2022.
27. Undoubtedly, the Applicant has experienced some challenges due to the inordinate delay in the prosecution of this trial which spans in excess of twelve years todate. Counsel for the Respondent nevertheless contended that there has been no unreasonable or inordinate delay in the prosecution of this case against the Applicant. Further that in light of assessing the totality of the progress of the matter, the period is not unreasonable in this jurisdiction in light of the number of matters before the courts to be dealt with. The Court however does not accept that this is the standard that the system should hold itself to. More ought to be done to ensure the disposition of matters in a more timely manner.



28. In *Frank Gibson v. The Attorney General* [2010] CCH 3 referenced in *Genear McKenzie v. D. P. P.* SccrApp No. 124/2020 at paragraph 62 – 64 stated in part:

**“ 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 -----  
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.**

**63. 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.”**

### **The Evidence**

29. It is vital that the Court give consideration to the evidence upon which the prosecution intend to rely upon concerning the Applicant. This matter involves a confession statement by the Applicant. The voluntariness of which is customarily determined by a Voire Dire, if it arises. The trial itself consisting of the evidence of usually police officers who were involved in the detention of the accused. Whilst the Court notes the unavailability of the detention record which can be useful in determining what transpired and which the Applicant's Counsel insist is crucial to the defence, the Court is mindful that there are alternative means by which such evidence can be obtained and therefore is not absolutely necessary.

30. In *R v Brown* [2002] BHS J. No. 40, over 11 years had elapsed since the Applicant was arrested and it was held that the delay was inordinate and the rights of the applicant in these proceedings had been breached. In *Culpepper v The State (Trinidad and Tobago)* [2000] UKPC 51, 6 years was considered a breach of our equivalent Article 20(1) rights. The circumstances dictate what is an inordinate length of time. In these circumstances, it is the Court's view that some twelve plus

years having elapsed without a trial being had is an inordinate amount of time, therefore, the constitutional rights of the Applicant have indeed been breached.

31. A breach of the Applicant's Constitutional rights having been established, it is necessary that the Court determine the appropriate remedy. The authority of Stephen Ronel Stubbs v Attorney General SCCr App No 153 of 2013 was considered. The Applicant herein was never tried in excess of twelve years and there was actually a period of four years in which this matter laid dormant. Additionally, the delay is so excessive that a presumption of prejudice arises.
32. Counsel for the Respondent has maintained, that staying the proceedings would not be an appropriate remedy in the circumstances of this case. The charges with which the Applicant is charged are very serious offences and that the public interest would not be satisfied if the court was to issue a stay at this stage.
33. In Stubbs, at paragraph 25, the Court of Appeal referencing Lord Lane in Attorney General's Reference (No. 1 of 1990) stated:

**"The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability 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: ----- 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 *R v Sang [1980] AC 402 at page 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 those about whose guilt there is any reasonable doubt should be acquitted."**

34. In Attorney General v Jermaine Samuel Seymour Appeal No 29 of 2006 it confirmed that whilst the Supreme Court had the power to stay prosecutions which amounted to an abuse of the process of the courts, it was incumbent that,

**"it must be borne in mind however that there are at least two sides to justice in every criminal case-- the side of the alleged victim (the prosecution) and the side of the accused (the defence) and as noted by Lord Morris of Borthy-Gest in Connelly's case.....generally speaking, a prosecutor has much right to demand a verdict of the jury in an outstanding indictment and where either demand a verdict a judge has no jurisdiction to stand in the way of it."**

35. A breach of the Applicant's constitutional rights under Article 20 (1) of the Constitution has occurred. This notwithstanding it does not automatically result in the staying of the trial viz Kenneth Anthony Patton Mills v H.M Advocates et al 2002 JCJ No 81. Article 28 of the Constitution provides that the court may inter alia, make such orders, give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Articles 16 to 27 inclusive to the protection of which the person concerned is entitled whilst bearing in mind, public interest in the attainment of justice.

36. The Court further notes in Stephen Ronel Stubbs v Attorney General :

**"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."**

37. Lord Bingham in Prakash Boolell v The State Privy Counsel Appeal No. 39 of 2005, Lord Bingham stated in part where delay is established:

**"the appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established... if the breach is before the hearing, the appropriate remedy**

**may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable..."**

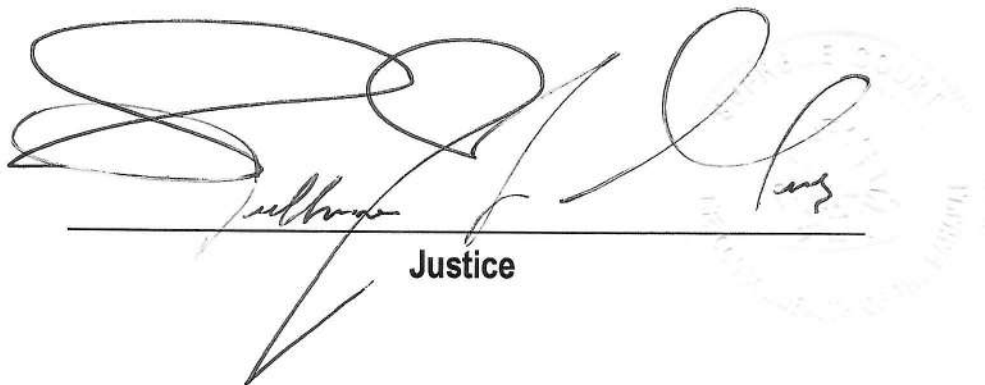
### **Conclusion**

38. The Court so finds in these circumstances, there has been a breach of the Applicant's constitutional right to receive a trial within a reasonable time. The Court is cognizant that the Applicant herein is seeking a stay of the proceedings, an ultimate remedy. The Applicant has advanced that the same circumstances that existed at the time his former co-accused Genear McKenzie was granted a stay were the same that were applicable to him. Had he moved the court at the same time as she did, his outcome would have more than likely been the same.
39. Since the ruling in Genear McKenzie's application, the matter has not proceeded to trial on another scheduled date due to the covid pandemic and the suspension of criminal trials. The court further notes from the most recent pre-trial review in January 2022, that the Crown appeared once again not to be in a state of readiness with respect to this matter. The Applicant's remaining co-accused still remain at large notwithstanding that a warrant of arrest was issued since October 2020. Also, the mental stability of the co-accused has been an ongoing issue and there has been no application made by the prosecution for severance of the co-accused from the indictment; and the certainty of this matter proceeding to trial on 7 February 2022 is slim to nil. Further, a Constitutional Ruling was delivered by this court on 7 October 2020 in respect to Genear McKenzie in which a stay of the proceedings were granted due to the inordinate delay of the proceedings, and which Ruling was upheld by the Court of Appeal save to the limited extent that the stay was to take effect on the scheduled date of trial 23 November 2020 notwithstanding that all criminal trials had been suspended at that time due to the Covid 19 pandemic.
40. In all of the circumstances, the Applicant has advanced that he ought to have the same outcome as that of his former co-accused, Genear McKenzie. To this urgency, the Court is mindful that the circumstances in relation to each applicant must be considered independently of any other. The circumstances of this case however are such that the Applicant herein has endured an even

longer period of time awaiting trial than his former co-accused since the trial did not proceed on the scheduled date in November 2021 and its prospects of commencing on 7 February 2022 does not seem favorable which will result in the matter having to be given another trial date subject to the court's calender sometime in 2023/2024 if the prosecution does not otherwise seek to dispose of it.

41. In the circumstances of this case pertaining to the Applicant, the Court so finds that there has been an inordinate delay and that the Applicant is prejudiced in the result and can no longer receive a fair trial. Consequently, the Court will order a stay of these proceedings against the Applicant, Marvin Coleby. The Court so orders.
42. Cost of these proceedings to the Applicant, to be taxed if not agreed.

Dated this 2 day of February 2022



Justice

The image shows a handwritten signature in black ink, which appears to be "Justice". The signature is written over a horizontal line. To the right of the signature, there is a faint, circular stamp or seal, likely an official court seal, though the text within it is illegible.