COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

CRIMINAL DIVISION

IN THE MATTER OF Articles 20(1), 20(2)(c) and 28 of the Constitution of

The Commonwealth of The Bahamas

and

IN THE MATTER OF THE Criminal Law Act 1977

and

IN THE MATTER OF Section 7 of The Public Bodies Corrupt Practice Act 1889

BETWEEN

NGOZI ADEYEMI CASH

Applicant

AND

DEPARTMENT OF PUBLIC PROSECUTION

1st Respondent

AND

HON. ATTORNEY GENERAL

2nd Respondent

Before: **The Honourable Mr. Justice Franklyn K M Williams, KC**

Appearances: **Mr. Basil Cumberbatch for first Respondent on 17 August 2023; Mrs. Abigail Farrington with her Ms. Vashti Bridgewater for the first Respondent on 5 October 2023**

Applicant pro se on 17 August 2023; Mr. Phillip Lundy for Applicant on 5 October 2023

Hearing Dates: **17 August 2023; 6 October 2023**

Written submissions by first Respondent (undated) received 20 October 2023

Criminal Law – Charges laid summarily – Stay of Criminal Proceedings – Application to quash charges – Abuse of process – Allegations of gross prosecutorial misconduct – Allegation no fair trial possible

Constitutional motion – Abuse of process – Breach of Applicant's Article 20(1) and 20(2)(c) rights – Whether proviso to Article 28 of the Constitution applicable – Whether Application itself is an abuse of process – Applicant seeking to not be tried

Variation of conditions of bail

The Applicant is charged with Attempted Fraud by False Pretences, contrary to section 83(1) and 348 of the Penal Code, Chapter 84, Unauthorized Modification of Computer Materials contrary to section 5(1) of the Computer Misuse Act 2003 and Unauthorized Obstruction of Use of Computer, contrary to section 7(1)(a)(b) of the Computer Misuse Act 2003

On 26 May 2003, the Applicant was arraigned before Magistrate Kendra Kelly, whereupon she pleaded not guilty to all charges. She was granted bail in the amount

of $2500.00 with one or two sureties and ordered to be outfitted with an ankle monitor, and to sign in at the Grove Police Station every Thursday before 6:00 pm. The matter was adjourned to 16 June 2023, again to 22 September 2023 and again to 30 October for trial, all dates of which have expired because of the present application for quashing of charges and stay of criminal proceedings on the grounds of abuse and gross prosecutorial misconduct. She further alleges that her constitutional rights to a fair trial and to be given adequate time and facilities under Articles 20(1) and 20(2)(c) of the Constitution of The Bahamas are being contravened.

Held: (i) application to quash charges and stay the proceedings refused and (ii) Constitutional Motion found to be an abuse of the process of the Court.

R v Maxwell [2010] UKSC 48 considered

Warren v Attorney General [2011] UKPC 10 considered

R v Horseferry Road Magistrates' Court Ex p Bennett [1994] 1 AC 42 considered

Thakur Persaud Jaroo v AG [2002] UKPC 5 considered

Harrikissoon v AG [1980] AC 265 considered

Chokolingo v AG [1981] 1 WLR 106 considered

R v Maxwell [2010] UKSC 48 considered

Stephen R. Stubbs v AG SCCivApp No.153 of 2013 considered

Boodram v AG [1996] AC 842 considered

The Queen v David Shane Gibson SC No. 233/2017 considered

Attorney General's Reference (No.2 of 2001) [2003] UKHL 68 considered

R (on the application of Ebrahim) v Feltham Magistrates' Court & Anr & Mouat v DPP [2001] 1 All ER 831 considered

Attorney General's Reference (No. 1 of 1990) [1992] 1 QB 630 mentioned

Williams J

1. On 22 May 2023, the Applicant was arrested, charged with the several offences of Attempted Fraud by False Pretences contrary to sections 83(1) and 348 of the Penal Code Chapter 84, Unauthorized Modification of Computer Materials contrary to section 5(1) of the Computer Misuse Act, 2003 and Unauthorized Obstruction of Use of Computer contrary to section 7(1)(a)(b) of the Computer Misuse Act, Chapter 107A. She was subsequently arraigned before Magistrate Kendra Kelly and granted bail in the amount of $2500 upon condition that she be fitted with an ankle monitor and report to the Grove Police Station once weekly (Thursday) on or before 6 pm.

2. By Notice of Motion and Affidavits of the Applicant ("the Cash Affidavit") one Arthur Armbrister who styles himself "Willie Ray" ("the Armbrister Affidavit") and Caroline Mackey ("the Mackey Affidavit") in support thereof dated 6 June 2023,the Applicant sought to move the Court

> **"...to quash the said "VBI" and a stay of all proceedings pending adjudication of Applicant Notice of motion before this Supreme Court."**

on the grounds of

> **"...abuse; in that there have been and continue to be Gross Prosecutorial Misconduct which undermines Public Confidence in the Criminal Justice System, which renders a fair Trial Impossible ... ."**

3. The Applicant purports to seek redress under Articles (20)(1), 20(2)(c), and 28 of the Constitution of The Commonwealth of The Bahamas, the Criminal Law Act (UK),1977 and s.7 of the Public Bodies Corrupt Practice Act,1889.

4. On 4 October 2023, the Director of Public Prosecutions ("the Respondent") filed an Affidavit of Ms. Vashti Bridgewater, presumably in response to the Notice of Motion and accompanying Affidavit of the Applicant. The Affidavit did not support a Summons, but, *inter alia,* avers:

> **"11. The Respondent verily believes that this application is an**

abuse of the process of the court and ought to be dismissed."

thereby, and in fact seeking to have the Notice of Motion struck out. An affidavit contains the facts and evidence relied on by the Respondent; it does not move the Court.

5. I note that notwithstanding its criminal genesis, this action is a public law action, and therefore the Civil Procedure Rules ("the Rules") govern its conduct. In seeking to have the Applicant's Notice of Motion struck or as put by the Respondent, "...be dismissed", the Respondent is reminded that reference to and use of the Rules are apposite. The Rules require the Respondent in seeking to have the Notice of Motion Struck to file a Summons attended by Affidavit.

6. Notwithstanding, I now turn to consider the matter *qua* the inherent jurisdiction of the Court.

7. The Public Bodies Corrupt Practice Act (UK) 1889 and the Criminal Law Act(UK),1977 are statutes of the United Kingdom, neither of which, either by reception or expressly have been incorporated into the law of the Bahamas. Thus, they are disregarded.

8. On 5 October 2023 the parties appeared before me for hearing of arguments. Neither of the parties came prepared to make arguments in breach of my direction to so do given on 17 August 2023. On 5 October 2023, the Applicant appeared represented by Phillip Lundy, Counsel. At that time, I gave directions for the further management and conduct of the case. The Applicant to provide written submissions on or before 13 October 2023, whereupon the Respondent to provide written submissions on or before 20 October 2023. I would hear the case on the papers and give my ruling thereon. The Respondent duly provided its submissions; the Applicant as of this writing has not.

9. There is no Voluntary Bill of Indictment ("VBI") in this matter. The charges are preferred summarily.

10. The law in relation to abuse of process was 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.

> **"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 balancing of competing interests arises. In the second category of the 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 Latiff* [1996] 1 WLR 104, 112 f)."**

11. Lord Dyson in **Warren**:

> **"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 breach of extradition laws. The speeches in Ex p Bennett conclusively establish that proceedings may be stayed in 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."

12. 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 a particular case 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 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."**

13. That summary was approved in **Warren.**

14. Neither the Armbrister Affidavit, the Mackey Affidavit nor the Affidavit of the Applicant herself disclose any evidence of prosecutorial misconduct, gross or otherwise, by the police in the conduct of the investigation or the laying of charges. Each of the Affidavits contain, at best, evidence to be utilized by the Applicant in her defence at trial.

15. The Court of Appeal in **Stephen R. Stubbs v Attorney General** SCCivApp No. 153 of 2013 said:

> **"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 only be 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 is equipped to deal with the bulk of complaints which have in recent Divisional Court cases** founded **applications for a stay."**

16. No doubt this court has the jurisdiction to quash an indictment and or order a stay of proceedings at common law. However, this discretionary power should be exercised sparingly and employed only in exceptional circumstances. Where the perceived unfairness can be cured through the trial process, the exercise thereof would not be appropriate: **Attorney General's Reference (No.1 of 1990)** [1992] 1 QB 630 at 643

17. The court 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] stated:

> **"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. 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."

18. The two categories of cases in which the court might exercise its jurisdiction to stay proceedings for abuse of process are (1) where it will be impossible for the accused to receive a fair trial and (2) where in the particular circumstances to try the accused would offend the court's sense of justice and propriety. In **Attorney General's Reference (No. 2 of 2001)** [2003] UKHL 68 at para. [25], the court provided some guidance:

> **"The category of cases in which it may be unfair to try the defendant of course includes cases of bad faith, unlawful and executive manipulation of the kind classically illustrated by *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42."**

and in **The Queen v David Shane Gibson** SC No. 233/10/2017 (Charles J):

> **"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 not to prosecute, ...such cases are very hard to find."**

19. Applying then these principles to the Applicant's circumstances (**Horseferry Magistrates' Court ex p Bennett, Latif, Maxwell and Warren)** far from being exceptional, there is nothing in the Applicant's circumstances which would cause even consideration of a stay. The application fails *ab initio* and accordingly I refuse a stay of the trial of the charges against the Applicant.

20. The Applicant relies on articles 20(1), for the right to fair trial and 20(2)(c), for the right to be given adequate time and facilities for the preparation of her defence.

21. On a proper consideration of the Applicant's case, none of these rights are in issue. I adopt the dicta of the court in **Boodram v AG of Trinidad and Tobago** [1996] A.C. 842 at 853 -855:

> **"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 [20(1)]. That right is undisputed and the applicant has no need for recourse to the High Court, in order to establish 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 independent of the Constitution, … . Provided that the safeguards remain in place and are made available to the applicant in the trial court, and if necessary on appeal, [she] has the benefit of the fair trial process to which [she] is entitled. … . Thus, in the opinion of the [court], no constitutional question is invoked."**

22. There is, in my view, no question that the Applicant does not have the protection of the law in respect of her right(s) under Article 20 (2) (c). She does.

23. Assuming, *arguendo*, breach(es) of the Applicant's fundamental rights under 20(1) and 20(2)(c) or likely breach, such **"...adequate means of redress are or have been available to"** her. **Proviso to Article 28.** Such is to be found in the trial process and if necessary, the appellate process.

24. The right to apply to the Supreme Court pursuant to Article 28 of the Constitution where there is a parallel remedy is to be exercised only in exceptional circumstances See **Thakur Persaud Jaroo v AG of Trinidad and Tobago** [2002] UKPC 5; **Chokolingo v AG** [1981] 1 WLR 106; **Harrikissoon v AG** [1980] AC 265

25. In my considered view, the application for constitutional relief is no more than an attempt to not be tried any at all and is without reasonable foundation. It is in itself an abuse of process, and is likely to prejudice, embarrass and or delay the Applicant's fair trial.

26. Of this feint of the Applicant, the Privy Council in **Jaroo** had this to say:

> **"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 that 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."**

27. I note that but for this application the Applicant's trial would have commenced. The trial of the charges was to commence 16 June 2023.

28. In the premises, and in the exercise of the inherent jurisdiction of the Court, I strike out the Applicant's Constitutional Motion as an abuse of the process of the Court. There is nothing to suggest that the Applicant will not or is unlikely to receive a fair trial.

29. On the issue of variation of the conditions of the Applicant's bail, the trial court having cognizance of same, any such application ought to be made thereto.

Dated this 11th day of November A.D., 2023

FKM Williams

Franklyn K M Williams KC
Justice