COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Division

2022 CRI/CON/00002

IN THE MATTER OF Articles 20(1) and 28(2) of the Constitution of The Commonwealth of The Bahamas

AND

IN THE MATTER OF a Complaint laid by the Commissioner of Police against Shavon Bethel on the 30th March 2015 in accordance with Section 58 of the Criminal Procedure Code Act

AND

IN THE MATTER of a decision of The Bahamas Court of Appeal dated 28th April 2018 remitting the matter for hearing before the Magistrate's Court

BETWEEN

SHAVON BETHEL

Applicant

AND

THE COMMISSIONER OF POLICE

Respondent

Before:	**The Honourable Madam Justice Camille Darville Gomez**
Appearances:	**Tai Pinder- Mackey for the Applicant**
	Darnell Dorsett for the Respondent
Hearing Date:	**29th September, 2022**

Criminal law – trial – stay of proceedings – abuse of process – delay in bringing proceedings – applicant committed on criminal charges but to date no arraignment having taken place – applicant awaiting trial for more than seven years – whether delay prejudicial to fair trial – whether breach of applicant's right to fair hearing – whether prosecution should be stayed.

RULING

Darville Gomez, J.

This action arose out of the attempt to arraign the Applicant on ten (10) counts of Fraudulent dealings including four counts of Possession of a False Document contrary to section 377 of the Penal Code, Chapter 84, four counts of Uttering a False Document 377 of the Penal Code, Chapter 84; four counts of Uttering a False Document contrary to Section 375 of the Penal Code, Chapter 84, one count of Deceit of

a Public Officer contrary to Section 432 of the Penal Code, Chapter 84 and Perjury contrary to Section 324 of the Penal Code, Chapter 84 sometime in June, 2015. There is disagreement about the reasons for the delay, however, the last hearing was before the Court of Appeal which declined to stay the proceedings in the Magistrates Court on April 24, 2018. Since then, the Applicant has not been tried and has in the instant action applied to have the criminal proceedings permanently stayed on the basis that it is a breach of his constitutional right to a fair hearing and further that, by reason of the delay a trial would be an abuse of the process of the Court.

Held: I find that there has been no breach of Article 20(1) of the Constitution of The Bahamas as it relates to the Applicant nor has there been an abuse of process by delay as it relates to the Applicant. In any event, had I found that there had been a delay to raise the complaint to the level of an abuse of process there has been no prejudice to the Applicant and furthermore the charges raised are of such a serious nature with public policy implications that it would be inappropriate for the Court to grant a permanent stay in such circumstances. Therefore, I order as follows:

(i) The Applicant's application for a permanent stay is hereby denied.
(ii) The criminal trial is to be set down for hearing in the next ninety (90) days; and
(iii) I make no order for costs.

The Application

1. The Plaintiff commenced this action by an Originating Notice of Motion filed on the 11th February, 2022 seeking the following reliefs:

I. *"A Declaration that by reason of the protracted delays so far in fixing a date for the hearing of the complaint laid and commencing the trial of the Applicant in Case Number 885/15, (Commissioner of Police v Shavon Bethel) before the Magistrate's Court, the time which has elapsed, and which is likely to elapse, between the Applicant's arrest (and notification to him of the allegation that he had committed the offences which is now the subject-matter of the said complaint) on the one hand, and the determination of his case, on the other hand is such as to amount to a breach of the Applicant's Constitutional right to a hearing within a reasonable time as guaranteed by Article 20 (1) of the Constitution.*

II. *A Declaration that by reason of the said delay, a trial of the said matter would be an abuse of the process of the Court.*

III. *A Declaration that in relation to Case Number 885/15 the Respondent's failure to disclose to the Applicant written statements made to the police by persons the Respondent intends to call as witnesses at the trial of the Applicant amounts to a breach of the Applicant's Constitutional right:*

(a) To a fair hearing; and/or

(b) To be given adequate facilities for the preparation of his defence, as is guaranteed by Article 20(1), and 2 (c) respectively, of the Constitution of the Commonwealth of The Bahamas.

IV. *An Order that the trial of the Applicant on Charge Sheet 885/15 before the Magistrate's Court be permanently stayed.*

V. *Such further Orders and/or directions pursuant to Article 28 of the Constitution as the Court may consider appropriate for the purpose of enforcing or securing the enforcement of the provisions of the said Article 20 of the protection of which the Applicant is entitled."*

2. At the outset, I wish to commend Counsel for the Applicant and the Respondent for their submissions which aided the Court in reaching its decision.

3. The Applicant was arrested and detained on the March 30, 2015 and subsequently charged on April 1, 2015. When he appeared before the Magistrate's Court on April 14, 2015, Counsel for the Applicant informed the Magistrate that an application relative to the matter was instituted in the Supreme Court contending that the issues raised in the Magistrates Court were res judicata. The Magistrate was shown a copy of the Motion that had been filed. The Magistrate adjourned the matter pending the outcome of the hearing of the res judicata application in the Supreme Court.

4. The offences for which the Applicant was charged are:

   i. Count No. 1 – Possession of a False Document: Contrary to Section 377 of The Penal Code Chapter 84.
   ii. Count No. 2 – Uttering a False Document: Contrary to Section 375 of The Penal Code Chapter 84.
   iii. Count No.3 – Possession of a False Document: Contrary to Section 377 of The Penal Code Chapter 84.
   iv. Count No.4 – Uttering a False Document: Contrary to Section 375 of the Penal Code Chapter 84.
   v. Count No.5 – Possession of a False Document: Contrary to Section 377 of the Penal Code Chapter 84.
   vi. Count No.6 – Uttering a False Document: Contrary to Section 375 of the Penal Code Chapter 84.
   vii. Count No.7 – Possession of a False Document: Contrary to Section 377 of the Penal Code Chapter 84.
   viii. Count No.8 – Possession of a False Document: Contrary to Section 375 of the Penal Code Chapter 84.
   ix. Count No. 9 – Deceit of Public Officer: Contrary to Section 432 of the Penal Code Chapter 84
   x. Count No. 10 – Perjury: Contrary to Section 324 of the Penal Code Chapter 84.

The Law

5. Article 20(1) of The Constitution provides "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."

6. Further, Article 28 reads as follows:

   "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."

   28 (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 under any other law."

Issues

7. The Applicant's Counsel has submitted that the there are two (2) issues for consideration. I have adopted them and have added a third issue.

   (i) Whether the Applicant's constitutional right to a fair trial within a reasonable time granted under Article 20(1) of the Constitution of the Bahamas has been breached or is there an abuse of process?

   (ii) If there is a violation of the Applicant's rights under Article 20(1) or at common law as an abuse of process, what is the appropriate remedy?

   (iii) Whether the Applicant can still obtain a fair trial?

Issue I: Whether or not the Applicant's constitutional right pursuant to Article 20(1) have been breached or has there been an abuse of process?

8. I find it helpful to set out the chronology of the criminal proceedings and the way in which the action proceeded through the Courts.

March 30, 2015	The Applicant was arrested and detained by officers of the Royal Bahamas Police Force.
April 1, 2015	The Applicant was charged with the alleged offences.
April 9, 2015	The Applicant brought a res judicata application before the Supreme Court.
April 14, 2015	An attempt was made to arraign the Applicant before the Magistrates Court on 10 counts of fraudulent dealings including 4 counts of possession of a false document; 4 counts of Uttering a false document; 1 count of deceit
	The Applicant's Counsel successfully obtained a stay of the proceedings due to the filing of a judicial review application in the Supreme Court on the grounds of res judicata.
August 14, 2015	Application for judicial review heard before Winder, J (as he then was)
November 13, 2015	Winder, J (as he then was) ruled that the criminal proceedings could proceed in the Magistrates Court because there was no abuse of process and the matter was not res judicata
November 18, 2015	The Applicant lodged an appeal to the Court of Appeal against the Supreme Court's decision.

November 26, 2015	Applicant applied for leave to appeal before Winder, J (as he then was). It was denied.
	Applicant filed a Notice of Motion for leave to appeal and stay in the Court of Appeal.
28th June, 2016	Attorney Patrick Sweeting held brief before the Court of Appeal for Senior Counsel Darnell Dorsette and requested an adjournment.
27thFebruary, 2017	Senior Counsel Darnell Dorsette and Patrick Sweeting appeared before Court of Appeal reference to the Applicant's matter.
4th October, 2017	Attorney Patrick Sweeting requested an adjournment on behalf of Senior Counsel Darnell Dorsette due to a "very hard slip and fall". The matter was adjourned
April 24, 2018	The Applicant's appeal was dismissed by the Court of Appeal.
May 17, 2018	Applicant appeared before Magistrate Swain (as Deputy Chief Magistrate Forbes was serving in a different capacity). Documents requested on behalf of the Applicant. Prosecutor promised to provide. Matter adjourned.
August 17, 2018	Adjournment requested by the prosecutor
November 1, 2018	Adjournment requested by prosecutor
November 7, 2018	Privy Council refused permission to appeal
December 8, 2018	Matter adjourned at the request of the prosecutor
February 9, 2019	Trial scheduled before Deputy Chief Magistrate Swain but did not proceed for various reasons including Miss Dorsette had replaced the police prosecutor.
April 17, 2019	Adjournment requested due to attorney for both the Applicant and the Prosecutor being in the Court of Appeal. Applicant alleges that the attorney holding brief again advised that he was not in receipt of documents necessary to prepare his defence.
July 19, 2019/July 22, 2019	Adjournment requested by the Crown due to the death of the father of the Prosecutor, Miss Dorsette who was out of office on compassionate leave. Both sides agreed this is what occurred.
December 16, 2019	Adjournment requested in writing by Prosecutor, Miss Dorsette due to trials/hearings in the Supreme Court and Court of Appeal by she and Patrick Sweeting.
March 16, 2020	Prosecutor hospitalized during the Covid 19 pandemic and underwent surgery. She remained off work until July, 2021 but returned to "light duties"
May 6, 2020	Appearance by the Applicant but matters were not being heard due to the Covid 19 pandemic.
November 22, 2021	The Applicant and Attorney Roberto Reckley appeared and the warrant that had been issued for his non-appearance was cancelled. Matter adjourned to January 31, 2022.
January 31, 2022	Applicant appeared with Counsel but no appearance by Prosecutor. Adjourned to March 25, 2022.
March 15, 2022	DPP office served with notice of the instant application (Originating Notice of Motion; Affidavit in support and skeleton arguments)
March 25, 2022	Trial scheduled in the Magistrate Court.

9. The test enunciated in **Barker v Wingo (1972) 407 US 514** is critical to the issue of whether the Applicant's right to be tried within a reasonable time have in fact been breached. Lord Templeman in **Bell v DPP [1985] A.C. 937** also adopted the principles pronounced by Powell J in **Barker** concerning the factors to be considered: (i) length of delay (ii) reason for the delay (iii) the defendant's assertion of his right, and (iv) prejudice to the defendant.

10. I consider each of these issues in turn.

Length of delay

11. Counsel for the Applicant in the course of her supplemental submissions raised the issue of the failure to arraign the Applicant. She submitted that *"it was incumbent upon the learned Magistrate to charge and arraign the Applicant"* on April 14, 2015 when the Applicant initially appeared. Further, she submitted that *"the delay is more egregious when regard is had to the fact that even after the Court of Appeal rejected the res judicata argument on 24 April 2018 and declined to stay the proceeding before the Magistrate Court on that ground, essentially giving the go-ahead to commence the hearing of the matter, some 4 years and 4 months have elapsed and the Applicant has still not been arraigned before the Magistrate Court"*.

12. The issue of failure to arraign the Applicant was not included in the reliefs sought by the Applicant in his Originating Notice of Motion. I refer to the relevant provisions of the reliefs he sought:

    (i) *"A Declaration that by reason of the protracted delays so far in fixing a date for the hearing of the complaint laid and* ***commencing the trial of the Applicant in Case Number 885/15*** *(Commissioner of Police v Shavon Bethel) before the Magistrate's Court, the time which has elapsed, and which is likely to elapse, between the Applicant's arrest (and notification to him of the allegation that he had committed the offences which is now the subject-matter of the said complaint) on the one hand, and the determination of his case, on the other hand is such as to amount to a breach of the Applicant's Constitutional right to a hearing within a reasonable time as guaranteed by Article 20 (1) of the Constitution.* (my emphasis added)

    (ii) *A Declaration that* ***by reason of the said delay, a trial of the said matter*** *would be an abuse of the process of the Court.*(my emphasis added)

    (iii) *An Order that* ***the trial of the Applicant on Charge Sheet 885/15*** *before the Magistrate's Court be permanently stayed.* (my emphasis added)

13. Therefore, as a result of this failure, I do not intend to address this submission fully because it is not part of the Applicant's pleaded case.

14. The instant action while relative to criminal proceedings is a civil action therefore those civil general principles do apply.

15. The well- settled principle that parties are bound by their pleadings is applicable to this point. In **The National Insurance Board and Rowena Bethel SCCivApp No. 115 of 2023** the Court of Appeal at paragraph 93 of the judgment cited the CCJ's case **Wilfred P Elrington v Progresso Heights Limited [1014] CCJ 4 (AJ) BZ** where Anderson J, at paragraph 47 said:

"As I have had cause to say on another occasion (Nicholson v Nicholson [2024] 1 (AJ) BZ) pleadings are the alpha and omega of litigation in our legal system. They are the guardrails which guide the commencements, progression and disposition of the case. The rules governing pleadings are therefore not optional. They are pivotal. They are mandatory. They are to be complied with by the parties lest chaos overtakes the process of adjudication and lest the unruly horse of litigation be allowed to roam free."(my emphasis added)

16. The Applicant relied on a miscellany of cases on the issue of whether a reasonable time had elapsed including **Curry v Attorney General of The Bahamas [2007] 2 BHS J. No. 119; Ernesto Penn v Director of Public Prosecutions 2018/CRI/CON/0016** amongst others.

17. However, the starting point for these cases and the other authorities cited was the case of **Barker (supra)**. In that case, Powell J. highlighted that *"It is clear that the length of delay between arrest and trial --well over five years was extraordinary."* Further, that *"...more than four years was too long a period, particularly since a good part of that period was attributable to the Commonwealth's failure or inability to try... under circumstances that comported with due process..."*

18. The Applicant's Counsel has defined the operative period for consideration as being from the moment that the Applicant was arrested, viz. March 30, 2015 to the time of the filing of the instant application on February 11, 2022; a period of seven (7) years. Additionally, added to this is the date when the offence was alleged to have occurred, that is, between June 2012 and July 2013; some ten (10) years ago. Finally, it has been four (4) years since the Court of Appeal remitted the matter for hearing before the Magistrates Court. She has submitted that the delay is presumptively prejudicial.

19. **Bain-Thompson v The COP 2018 2 BHS J. No. 88** was relied upon by the Applicant's Counsel. In that case, eight (8) years had passed from the date of the alleged commission of the offences and three (3) years had elapsed since the decision of the Court of Appeal remitting her matter back to the Magistrates Court for hearing and there had been no disposition or determination of the charges.

20. In both **Bell v DPP (supra) and Bain-Thompson v The COP (supra)** Counsel for each of the Applicants had written the respective Magistrates Courts setting out the full complaint of the delay and requesting that the respective matters be listed so as to address the issue of delay. In the instant case the Applicant has not drawn the Magistrates Court attention to the fact of his not having been arraigned and the need for the delay in the arraignment to be corrected. He has raised it in this Court during the course of the submissions (not even in his pleadings) with the consequence that the Magistrates Court and the office of the DPP have not been alerted to this deficiency until his submissions had been laid over. This is the distinguishing feature of the instant case from **Bell v DPP** (supra) and **Bain-Thompson v The COP (supra).** I find that the Applicant cannot rely in these circumstances on the alleged delay in his arraignment. If there was delay it is less than four years and not seven years. I will explain how I arrived at this later.

21. It is pellucid from the date of arraignment in April, 2015 until the decision of the Court of Appeal in April, 2018 that the proceedings in the Magistrates Court were in effect stayed pending the outcome in the higher courts. Therefore, the Applicant's active pursuit for justice in these various courts led to a delay of the criminal proceedings for three years.

22. This fact was accepted by the Applicant at paragraph 14 in his Affidavit filed on February 11, 2022. In fact, he averred that *notwithstanding the three (3) year lapse of delay, he and his attorney were always willing and able to proceed with the matter before the Magistrates Court.*

23. Additionally, the Applicant referred to other trial dates which had similarly been adjourned, beginning with September 5, 2015 through to March 26, 2018.

24. A review of the chronology showed that the criminal proceedings had been set down for trial on numerous occasions post the decision of the Court of Appeal. If we deduct the three years from the seven years, then we arrive at a period of four years.

25. I now review the subsequent four (4) years commencing with the four adjournments of the trial in the year 2018 between May and December.

26. In the year 2019 there were an additional four adjournments as follows; (i) in February, there was a change from the police prosecutor to the prosecutor, Miss Dorsette from the Office of the Director of Public Prosecutions (the "the office of the DPP");(ii) in April, both Counsel for the Applicant and the Respondent were engaged in matters in the Court of Appeal; (iii) in July, the prosecutor was on compassionate leave due to the death of her father; (iv) and another adjournment in December requested by the prosecutor in writing for five (5) months due to hearings in the Supreme Court and the Court of Appeal. The Applicant averred that his Counsel made an application to have the matter dismissed for want of prosecution which was denied.

27. In 2020, there were two adjournments, the first in March due to the illness and subsequent hospitalization of the prosecutor, Miss Dorsette and then in May due to the Covid 19 pandemic. The Applicant explained that he and his Counsel's attempt to make contact with the office of the DPP and Court #8 to ascertain when he would receive the necessary documents to prepare for the case and the date of his hearing respectively.

28. The prosecutor, Miss Dorsette returned to "light duties" in July, 2021.

29. The Applicant averred that on November 18, 2021 upon making an application for a police record that he was informed that a warrant of arrest had been issued for his non-appearance before Magistrate Court #8, therefore, he attended at the said Court on November 22 and Magistrate McKinney had taken over the diary of the previous Magistrate. He averred that the warrant was cancelled by the said Magistrate and a new date of January 31, 2022 was given for the trial.

30. He appeared on the date however, no one from the office of the DPP appeared and the matter was adjourned to March 25, 2022. He alleged that his Counsel requested that the matter be dismissed for want of prosecution which was denied. He alleged that his Counsel requested that the adjournment be made final, however, this was also denied.

31. I do not accept the submission of Counsel for the Applicant that the delay is four (4) years when the closure of the courts as a result of the Covid 19 pandemic during March 2020 to March 2021 is considered. In fact I find the period of one (1) year as being consecutive because trials in the Magistrate Court did not resume until later.

32. Therefore, the delay is less than four (4) years. I will elucidate further on how I arrived at this when I consider the reasons for the delay.

Reason for delay

33. The Respondent's Counsel defined the reasons for the delay in prosecuting the matter as follows:

    (i) the Applicant's pursuit of proceedings in differing courts relative to the magistrate's criminal matter;
    (ii) the case load within the office of the Attorney General
    (iii) the COVID 19 pandemic; and
    (iv) the unforeseen illness of the lead prosecutor in this matter, Ms. Darnell Dorsette on two occasions as well as the death of her close family members.

34. I respond to these reasons set out in paragraph 33 as follows:

    (i) resulted in a three (3) year delay which the Applicant and the Court has accepted;
    (ii) I do not regard this as a sufficient reason for the delay
    (iii) I accept that the pandemic resulted in a justifiable delay of at least one (1) year or slightly more as evidenced by the lack of trial dates during after May, 2020 and during the year 2021; and
    (iv) while I accept that the prosecutor with carriage of the matter suffered personal challenges during 2020 and 2021 which may amount to justifiable delay, other Counsel in the office of the DPP ought to have been instructed to deal with the matter given the previous delays.

35. I find that the period post the decision of the Court of Appeal in 2018 through to March 2020 was not properly addressed hence I find that the delay throughout this period unjustifiable save for the date when both Counsel were before higher courts. I estimate this period to be about two years.

36. Given the way that the action commenced at the outset with a delay in the arraignment of the Applicant which spanned three years, it was incumbent upon the Respondent to prosecute this matter with the utmost speed and diligence. If that had been done, the trial would not have been impacted by the Covid 19 pandemic at all. In fact, if any of the Magistrates had given a final adjournment in the matter that may have spurred the Respondent into action with some alacrity.

37. The Applicant's Counsel has cited **Johnson v The Attorney General of The Bahamas 2005/CRI/CON003** and **Pinder v Attorney General of The Commonwealth of the Bahamas No. 101/8/2001** where Isaac, J (as he then was) and Allen, J (as she then was) stayed the proceedings against each of the accused where the delay was four years and thirty six (36) months respectively.

38. However, I find that despite the delay of two (2) years that has elapsed in this case, it is not presumptively prejudicial and even if I extend it to three (3) years, I find the same.

Defendant's assertion of his rights

39. Powell J, in *Barker* emphasized:

> *" We reject, therefore the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right."*

40. The Applicant in his supporting Affidavit filed on the 11th February, 2022 swore that he attended every hearing but for one time on the 1 April, 2021 when a warrant was issued for his arrest due to his non-appearance. Further, that he was unaware of the adjourned date and surprised by the issuance of a warrant as he carried out due diligence in contacting court staff to ascertain an adjourn date. In addition, he alleged that both he and his Counsel contacted the Office of the DPP and the Magistrates Court #8 to be updated on the status of receiving the documents to prepare his defence and as to the hearing date of the matter.

41. He also alleged that after numerous adjournments on the part of the prosecution, that his Counsel requested a dismissal for want of prosecution and final adjournments in the matter. However, both of these applications were denied by the Magistrate. The difficulty with these assertions by the Applicant is that there is no evidence to support them because they were not in writing.

42. Further, the Applicant has now complained that he was not arraigned after the Court of Appeal's decision in April, 2018 and has proffered that as a reason why this Court ought to permanently stay the criminal proceedings in the Magistrates Court.

43. The difficulty with this assertion is that the Applicant at paragraph 15 of his first Affidavit filed in support of the Originating Notice of Motion on February 11, 2022 set out at least thirteen (13) court appearances which pre-date the Court of Appeal's decision including September 5, 2015; November 10; December 14; April 5, 2016; August 14; September 5, November 12; December 14, 2016; April 5, 2017; June 17; July 12; October 30; March 26, 2018. Then, the chronology set out at paragraph 8 sets out the remaining court appearances which were no less than ten (10) appearances.

44. The Applicant before now has never in writing or orally raised this issue of a failure to not be arraigned on the offences for which he has been charged with either the office of the DPP or the Magistrate in Court #8 at all.

45. At several of the hearings in the Magistrates Court the Applicant in his Affidavit noted that his Counsel applied to have the action struck for want of prosecution or to have a final adjournment issued. These were denied by the Magistrate. Additionally, he referred to a warrant having been issued for his non-appearance at the Magistrates Court; the follow-ups made by him and his Counsel with the office of the DPP to receive documents to assist with the preparation of his case and with Magistrates Court #8 to inquire about the date of his trial.

46. Therefore, I find that the Applicant has failed to assert his right to be arraigned and now seeks to rely on this failure as a deprivation of his right to a have a trial within a reasonable time.

Prejudice to the Defendant

47. The Court in *Barker* had this to say as it relates to prejudice:

> *"...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 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..."

48. The Applicant in his Affidavit filed on February 11, 2022 addressed two of these. As it related to the first of such interests, viz. to prevent oppressive pre-trial incarceration is not applicable in the instant case because the Applicant has not been incarcerated.
49. As it related to (ii) The Applicant has expressed at paragraph 36 (a) through 36 (m) what he termed as a profound and adverse effect on his personal life causing innumerable and immeasurable hardship and (iii) the prejudice to his defence. The third interest is regarded as the most serious for obvious reasons.

50. The Applicant at paragraphs 36 (n) to 36 (s) sets out what he has referred to as the grave and genuine prejudice in his defence which has been severely hampered by the death of two of his potential witnesses, Mrs. Demetria Sands Severe who passed away on January 22, 2020 and Superintendent of Police Mr. Derek Butler who died on January 21, 2021. Additionally, he referred to the potential witnesses, namely, E.V. Douglas Sands, an attorney who is now retired and suffers from dementia and two witnesses in the UK, namely, Daniel Ryan and Alex Linsdell who cannot be located despite his best efforts.

51. The Court does not have the benefit of any statements from the potential witnesses to thoroughly assess how their evidence would have benefited the Applicant. However, the Applicant provided the Court with some information and it was unclear how those witnesses would have effectively assisted the Applicant's case based on the majority of the charges which related to eight (8) counts of uttering of a forged document.

52. Additionally, as it related to the evidence of attorney, Mrs. Douglas Sands who now suffers from dementia, it is unclear the relevance of her evidence that the Applicant had successfully completed pupilage in her office and further that a senior Attorney in the Office of the Attorney General could corroborate his duties within the office during his tenure. I did not accept this argument because the central issue is not the successful completion of pupilage but rather, whether the Applicant had in fact obtained a LL.B.

53. Moreover, it appears that the primary issue before the Magistrates court can be proven or disproven via documentary evidence obtained from the Records Department of the various institutions and therefore, the reliance on recollection of evidence from witnesses is minimal.

Issue III: Whether the Applicant can still obtain a fair trial.

54. Isaacs JA in delivering the judgment in ***Kinglsey Adderley and The Director of Public Prosecution SCCrApp. No 218 of 2018*** enunciated that:

> *" There is a fundamental principle of law which says, in effect, that he who alleges must prove. The principle is memoralised in section 82 of the Evidence Act. The appellant alleged that he would not be able to receive a fair trial due to the delay in bringing his case to that stage of the proceedings. Therefore, the onus of demonstrating the reason(s) for his allegation rested on him."*

55. I find that (i) there has been a delay of about two years; (ii) that do not find that the applicant was severely prejudiced to an extent whereby he cannot have a fair trial due to the delay of a trial.

56. The Respondents have stated that the Applicant is the author of his own delay and have opposed the request for a permanent stay of proceedings. In addition, the Respondents have also expressed that they are ready to proceed with the matter and witnesses are in place.

57. In the case of ***Attorney General's Reference (No.1 of 1990) [1992] QB 630***, Lord Lane CJ had this to say:

> *" 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 be only a short time before the public, understandably, viewed the process with suspicion and mistrust. We respectfully adopt the reasoning of Brennan J. in Jago v. District Court of New South Wales (1989) 168 C.L.R. 23.*
>
> *In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay.*
> *...no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court."*

58. Countless authorities have adopted the long standing principle that a stay is not the normal remedy for matters involving breach of the constitutional right to be tried within a reasonable time. This was affirmed in the decision ***of Larry Amonte Artilus and The Attorney General SCCivApp. No. 181 of 2022*** pronounced that *"... a stay of criminal proceedings due to a breach of the applicant's right to be tried in a reasonable time is not a normal remedy. The applicant must demonstrate to the court that, as a result of the delay, he is unable to receive a fair trial. The burden is on the applicant to show that the trial would be unfair."*

59. In the case of **David Shane Gibson v AG 2017 CRI/CON/ 233/10** the Claimant complained that there was an abuse of process and a breach of Article 20(1) of the Constitution of The Bahamas in that the police held a witness conference which he alleged affected a fair trial. The Honourable Justice Charles (as she then was) accepted that there had been an illicit witness conference but declined a permanent stay on the basis that the Claimant had been charged with a serious matter which demanded to be heard. In the instant case, the Claimant similarly pleaded an abuse of process in support of his application for a stay. I find that the delay claimed is not sufficiently long to constitute an abuse of process but even if it were, for the reason given by Justice Charles (as she then was) in the said case, I would likewise decline as I hereby do to order a permanent stay. In this case a very serious has been raised by the Crown that impacts the proper functioning of the Bar and by extension the courts of the Commonwealth of The Bahamas. This is a serious matter that demands to be heard.

60. The question is what then the most appropriate remedy for the Applicant. Lord Bingham at paragraph 24 of the judgment in ***Attorney General Reference (No. 2 of 2001)*** **[2001] 2 AC 72**, recommended alternative remedies that are available to an Applicant in the present circumstances. He noted:

"if, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1) be just and appropriate or (in Convention terms) effective, just and proportionate. 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 established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances." (my emphasis added)

Conclusion

61. Accordingly, I find that the Applicant's rights pursuant to Article 20(1) have not been infringed and the delay is not an abuse of the process of the Court. Further, I refuse to permanently stay the trial of the Applicant on Charge Sheet 885/15 before the Magistrates Court.

62. In spite of the fact that application for a stay of proceedings has been denied. I am of the view that this matter should be given priority. I am concerned about the possibility of this matter not being set down for trial in the immediate future and in the interest of justice, I take the liberty to direct the Respondent to set this matter down for trial within the next ninety (90) days.

63. Given the decision of the Court of Appeal in **Shavon Bethel v Regina SCCrApp. No. 301 of 2015** where the court found that since the action arose out of criminal proceedings that the Applicant ought not to be required to bear the burden of costs, I therefore, make no order as to costs other than each party is to bear their own costs.

64. Accordingly, I make the following Orders:

    (i) The Applicant's application for a permanent stay is hereby denied.
    (ii) The matter is to be set down for hearing in the next ninety (90) days; and
    (iii) I make no order for costs.

Dated the 22nd day of March, 2024

Camille Darville Gomez
Justice