COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Law Division

2023/CRI/con/00001

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

B E T W E E N

ANTHON LIGHTBOURN SR.

Applicant

AND

THE ATTORNEY GENERAL

First Respondent

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

Before:	The Honourable Madam Justice Camille Darville Gomez
Appearances:	Ms. Christina Galanos for the Applicant
	Ms. Jacklyn Burrows for the 1st and 2nd Respondents
Hearing Dates:	6 March 2023; 20 July 2023; 27 September 2023; 20 October 2023

Constitutional Motion – length of delay – Article 20 - right to be tried within a reasonable time – Applicant discharged – 19 years delay – whether delay prejudicial – Criminal law – whether Applicant asserted his rights – whether entitled to damages

JUDGMENT

Darville Gomez, J

This is an action brought by the Applicant by Originating Notice of Motion filed on January 9, 2023 for declaratory reliefs arising from a charge made against the Applicant of attempted rape in 2004. He was granted bail however, a condition of his bail was the surrender of his passport. He was a Police Reservist at the time and was placed on suspension pending the outcome of the matter. Later, he was able to have the sign-in conditions of the bail removed and the preliminary inquiry was commenced. He was committed in or about 2005

to stand trial. However, since that time the matter had not been heard and despite his repeated follow ups to have the matter discharged prior to instituting the instant action; it had not.

However, the Court was advised that the Director of Public Prosecutions had withdrawn the charge against the Applicant and had returned his passport to him in March, 2023. Therefore, the Applicant reduced his claim for the reliefs sought in his Originating Notice of Motion to (i) breach of Article 20(1) of the Constitution and (ii) damages arising from the discharge of the Applicant and the return of his passport.

The Application

[1.] The Applicant originally claimed the following reliefs by Originating Notice of Motion and Affidavit filed on the 9th January, 2023 :

(i) A declaration that Article 20(1) of the Bahamas Constitution which affords the Applicant the right to a fair hearing within a reasonable time by an independent tribunal established by law has been infringed;
(ii) That the proceeding be stayed;
(iii) An order directing the Respondents to return the Applicant's passport to him;
(iv) Damages.

[2.] The grounds of the original reliefs sought were as follows:

(a) That the present information is an abuse of the process of the Court;
(b) That the delay is presumptively prejudicial;
(c) That no reasonable explanation has been given for the delay;
(d) That the Applicant has been severely prejudiced in his defence by reason of such delay;
(e) That the Applicant has not been able to travel outside of the jurisdiction for approximately 19 years, as he was made to turn over his passport to the Respondents in order to be released on bail;
(f) That the Applicant has experienced depression, anxiety and anguish as a result of this matter hanging over his head for nearly two decades.

HELD: I find that the Respondents have breached the Applicant's constitutional right pursuant to Article 20(1) and have awarded vindicatory damages in the sum of $10,000.

[3.] At the first hearing of this action on March 6, 2023, the Respondents advised that they intended to withdraw the criminal matter against the Applicant, viz. attempted rape contrary to section 125 of the Criminal Procedure Code. At the second hearing of the action on July 20, 2023, the Respondents confirmed that they had (i) withdrawn the charge of attempted rape against the Applicant on March 1, 2023 and (ii) returned his passport on March 13, 2023.

Law

[4.] According to Article 20(1) of the Constitution:

> "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."

The Issues

[5.] At the third hearing on September 27, 2023 the Applicant submitted that there were two issues remaining to be addressed as follows:

(i) A declaration that Article 20(1) of the Bahamas Constitution which affords the Applicant the right to a fair hearing within a reasonable time by an independent tribunal established by law has been infringed; and

(ii) Damages arising from the discharge of the Applicant and the return of the passport.

Background

[6.] For ease of reference, I have set out below the chronology of events. Most of these were undisputed, however where there is a disagreement between the parties, I have indicated the same.

Date	Event	Support
2004	Applicant arrested and charged before Magistrate Crawford McKee with Attempted Rape pursuant to section 6(2) of the Sexual Offences and Domestic Violence Act Chp 99	See paragraphs 8 and 9 of the Applicant's affidavit filed on January 9, 2023
	Applicant granted bail in the sum of $7,000 with two conditions: (i) surrender of passport; and (ii) sign in to the Police Station twice per week	See paragraph 9 of the Applicant's affidavit filed on January 9, 2023
	Applicant was suspended as a Police Reservist by Police Officer Geo Iffill pending the outcome of the case.	See paragraph 4 of the Applicant's affidavit filed on
	Sign-in conditions removed upon application by the Applicant due to interference with his job as a Surveyor	See paragraph 11 of the Applicant's affidavit filed on January 9, 2023.
	Preliminary inquiry commenced. He was represented by Godfrey "Pro" Pinder. It took about 1 year.	See paragraph 12 of the Applicant's affidavit filed on January 9, 2023.
2005	Applicant committed to stand trial in the Supreme Court	See paragraphs 12 and 13 of the Applicant's affidavit filed on January 9, 2023.

2019	Applicant confirmed that he had been represented by Mr. Godfrey Alexander Pinder between approximately 2005 and 2019 and that he would call his office at least twice per year to obtain status updates in the matter. He was advised (when he was able to speak to his attorney) that there was major backlog in the criminal justice system) and therefore, during this time he did not contact the Director of Public Prosecutions' (the "DPP") office because he thought it inappropriate to do so.	See paragraph 4 of the Claimant's affidavit filed on October 5, 2023.
	Applicant contacted the Office of the Attorney General. Spoke with a Sgt Deveaux who promised to revert as to whether the virtual complainant (the "VC") would be proceeding. She responded that the she was taking a withdrawal statement from the VC. The Applicant heard nothing further.	See paragraph 14 of the Affidavit of the Applicant filed on January 9, 2023
May 20, 2019	Applicant alleged that his attorney, Mr. Pinder died and that he was no longer represented by an attorney and therefore commenced making direct contact with the Office of the DPP in search of answers. The Applicant conceded that he had been misinformed about his attorneys' death. He alleged that he was constantly told by someone at the DPP's office that they would look into the matter and revert. He alleged that by his 5th or 6th call that he was informed that the VC no longer wished to proceed and that he would be served with a Summons to appear at Court so that the matter would be discharged. That did not occur. *[see Affidavit of Claimant filed on October 5, 2023)*	This is disputed by the Respondents who deny that the attorney Dr. Godfrey "Pro" Wallace Pinder is not dead and that the person referred to by the Applicant as being his attorney and who died on May 20, 2019 is not a different individual. *[see Affidavit of the Respondents filed on October 17, 2023]*
June 2020	Applicant wrote then DPP, Gaskin Gaskin requesting that the matter be discharged.	Letter from the Applicant to then DPP Gaskin exhibited in his Affidavit filed on

	He received neither an acknowledgment nor a response to the same.	January 9, 2023 as Exhibit "A".
January 2023	Instant action filed/commenced	
March 1, 2023	Charge against the Applicant withdrawn by the DPP	As confirmed by the Respondents' attorney. (this was foreshadowed at the First hearing on March 6, 2023 but was not known at that time. This date was subsequently confirmed at a later hearing.)
March 6, 2023	First hearing of the instant action. Respondent's Counsel advised that the matter was being withdrawn.	As confirmed by the Respondents' attorney.
March 13, 2023	Applicant's passport returned.	As confirmed by the Respondents' attorney.

The Applicant's Case

[7.] The Applicant commenced his submission on the right to a fair hearing with the Bahamian case of **Taylor v The Attorney General of the Commonwealth of The Bahamas** [2013] 1 BHS J.No. 218 where then, Senior Justice Stephen Isaacs cited with approval the four factors referred to the seminal case of **Barker v Wingo** (1972) 407 US 514 by Powell J that the Court must give heed in deciding whether or not the right to a "speedy" trial has been breached.

[8.] Further a plethora of cases were submitted which showed the circumstances where the courts have granted a stay as well as awarded damages for undue delay including: **R v Higgs** [1994] BHS J. No. 59; **R v Campbell** [2004] BHS J. No. 422; **Curry v AG** [2006] 2 BHS J. No 119; **Smith v AG** [2006] 2 BHS J. No 176; **Stubbs and others v AG** [2008] 2 BHS J. No. 32; **Harris v AG** CRI/CON/0005/2012; **Taylor v AG** [2013] 1 BHS J. No. 218; **Regina v Jasmyr** [2013] 1 BHS J. No. 93; **Gibson v AG** [2016] 2 BHS J. No. 226; **Bain- Thompson v COP** [2017] 2 BHS J. No 88; **Genear McKenzie v Director of Public Prosecutions** SCCrApp No. 124 of 2020.

[9.] The length of the delay in each of the cases varied; in **R v Campbell** it was as little as three (3) years and in **Stubbs and others v AG** it was thirteen (13) and sixteen (16) years.

(i) ***Length of the delay***

[10.] It was submitted that the delay in the instant case has been nineteen (19) years. The Applicant had been charged with attempted rape. It was submitted that this offence is not complex and that the delay is definitely, in any event, inordinate and presumptively prejudicial.

(ii) Reasons given for the delay

[11.] The Applicant submitted that the Respondents have offered no reason whatsoever for the nineteen (19) year delay and therefore, the Court ought to resolve this issue in the Applicant's favour.

(iii) Accused assertion of his rights

[12.] It was submitted that the Applicant did complain. He reached out to the Respondents after fourteen (14) years had passed and then a few years later, writing a letter to then DPP Gaskin requesting that the matter be discharged so that his life and his family's life could return to some level of normalcy. The letter was not even acknowledged and therefore, it was submitted that this factor ought to be decided in his favour.

> "June 17, 2020
>
> Garvin Gaskin
> Office of the Attorney General
> Department of Public Prosecutions
> P.O. Box N-3007
> Nassau, Bahamas
>
> Dear Mr. Gaskin,
>
> My name is Anthon Lightbourn, I am writing in reference to a matter that I was charged with in 2004 of Attempted Rape. As a result of being charged, I was put on bail and my passport seized. At that time, I served as a Police Reservist on The Royal Bahamas Police Force and as a result, I was placed on suspension pending the outcome.
>
> From 2004 to present day, I've had great difficulty and challenges getting things done for myself and my family. Some of those challenges include but are not limited to me being able to obtain a Business License reason being I didn't have Passport in my possession. To some degree I was also hindered regarding some levels of Banking because I'm not able to open a bank account without having a valid Passport.
>
> I am respectfully seeking for this matter to be discharged. It is unfair to any citizen of The Commonwealth of The Bahamas to be held back for 15 years without any answer or resolve to any matter without it being brought to some level of completion. While this is unfair to me, I stood by my innocence and waited for the process to start and come to head. Unfortunately, that day never came. As matter to be discharged so my life and that of my family can return to some level of normalcy.
>
> Thank you in advance for your consideration. Should you require any further information please feel free to contact me at (242) 801-8704 or via email at anthonbernard33@gmail.com.
>
> Sincerely,
>
> Anthon Lighbourn"

(iv) Prejudice to the Accused

[13.] The Applicant's position is that for the past eighteen (18) years he had been waiting to be tried in this matter and during this time because he had surrendered his passport he was (i) unable to travel internationally; (ii) apply for a business license; or (iii) open a bank account.

[14.] I refer to his Affidavit filed on January 9, 2023 where he alleged as follows:

"This entire ordeal has placed a tremendous amount of stress on me and my family. For many years, I felt demeaned and disadvantaged as a Bahamian and a passport holder and I felt like many of my rights and privileges were stripped away from me."

[15.] He has alleged that he has experienced depression, anxiety and aguish as a result of this matter being unresolved for nearly two decades. Due to his inability to travel internationally since 2004, he has missed the opportunity to take his daughter, Twanesha Lightbourn to medical school or attend her graduation. Further, he was unable to go on a honeymoon with his first or second wife and even now he is unable to travel with her.

[16.] He submitted that the Respondents are clearly not asserting that there is no prejudice and that he is able to have a fair trial because they have already discharged him. Therefore, it was submitted that this factor ought to also be decided in the Applicant's favour.

[17.] Finally, the Applicant advanced that the delay in the instant cases exceeds the cases that they have relied upon and when the other factors are considered, the instant case is even more egregious. His concluding submission is "*the Respondents' downright refusal to concede that the Applicant's constitutional right to a fair hearing within a reasonable time has been infringed only adds further insult to injury*".

Damages

[18.] The Applicant in his Originating Notice of Motion claimed inter alia, damages. However, in his submissions he has claimed (i) loss of earnings; (ii) vindicatory damages; and, (iii) damages for suffering broken down under each of the heads as follows:

Item	Amount
Loss of earnings	$114,000.00
Vindicatory damages	74,069.12
Damages for suffering	26,627.65
SUBTOTAL	**217,696.77**
VAT@10%	21,769.68
GRAND TOTAL	**239,466.45**

[19.] I will address later how he arrived at these figures.

[20.] The Applicant relied upon the case of **Genear McKenzie v Director of Public Prosecutions** in relation to his claim for damages where there has been a breach of the right to a fair hearing within a reasonable time. He referred to paragraph 43 where it read as follows:

> *".....depending on the circumstances an award of damages may be an appropriate remedy for breach of any of the fundamental rights including a breach of the right to be tried within a reasonable time"..... An award of damages for breach of the reasonable time guarantee should be considered as an appropriate remedy only where the accused will no longer be tried or has been tried and acquitted or where his conviction has been quashed. And even in those cases the making of such an award should not be regarded as automatic but would depend on the particular circumstances of each case."*

[20.] The Applicant submitted that based on the foregoing that he does qualify for an award of damages because since he has been discharged by the Respondents, it is no longer possible for him to be tried and convicted therefore, a stay would not be an appropriate remedy in the circumstances of the case.

(i) *Loss of Earnings*

[21.] The Applicant under this head of damage claimed $114,000 based on the lower amount that he earned as a Reserve Police Officer of $500 per month. He had this to say in his submissions:

> "Moreover, in the instant case, the Applicant did suffer actual damage as he was a reserve police officer at the time he was charged and according to his Supplemental Affidavit filed herein, his salary in that regard ranged from $500 per month to $800 per month depending on the amount of hours that he worked and that when he was charged with this offence, he was placed on suspension. Therefore, on a low estimate, the Applicant has lost the sum of approximately $114,000 ($500x12 monthsx19years) in earnings as a result of being charged with the said offence and having it remain outstanding for the past 19 years. The Applicant is therefore, claiming this amount as loss of earnings."

(ii) Vindicatory Damages and (iii) General Damages

[22.] The Applicant also claimed vindicatory damages and have relied upon the case of **Gibson v AG** where the claim for breach of the right to a fair trial within a reasonable time was assessed. The Honourable Justice Hilton was cited as follows:

> *"43. Generally in assessment of damages for breach of person's constitutional right the nature of damages awarded may be compensatory but should always be vindicatory. The object in awarding damages for breach of the constitutional right to trial within a reasonable time broadly speaking are:*
>
> *(a) To vindicate the rights of the Applicant;*
> *(b) To secure the protection of the constitutional right;*
> *(c) To compensate the Applicant for the proven injury or loss suffered both pecuniary and non-pecuniary;*
> *(d) To provide an incentive to the state to ensure that criminal trials are heard in a timely manner;*
> *(e) It is not for the purpose of the punishment of the State.*
>
> *45. When considering what may be an appropriate award in any given case the court must exercise rationality and proportionality, taking into account the seriousness of the breach, the impact of the breach on the Applicant, the seriousness of the state misconduct (if any) and public interest in good governance. The quantum awarded must be a reflection of the gravity of the breach in each case."*

[23.] Hilton J, in **Gibson v AG** also considered the quantum of damages that had been awarded in **Stubbs and others v AG** where the delay was thirteen (13) years for one of the Applicants and 16 years for the other two Applicants. The Applicant with the delay of thirteen (13) years was granted $26,000 and the others $32,000. It was submitted therefore, that they each received the sum of $2,000 per year of delay. In the end, Hilton J, awarded Gibson who was also a police officer a vindicatory award in the sum of $25,000 where the delay was 7 years and 4 months and an award of $10,000 "for the suffering, distress, anxiety, humiliation, and sting of the rape charge hanging over his head for such a long time, and resulting end of his contractual employment with the police force in 2015". Gibson was also awarded loss of earnings and pension which is similarly claimed in the instant case.

[24.] Accordingly, it was submitted that based on the reasoning in **Gibson v AG** that the Court ought to award the Applicant (i) vindicatory damages of $65,068.54 (rounded to $65,000) based on $3,324.66 per year ($25,000/7.3 years)x19 years and (ii) general damages of $26,027.34 (rounded to $26,000) based on $1,369.86 per year ($10,000/7.3 years) in damages for suffering, anxiety, stress and humiliation because in the instant case the delay is nineteen (19) years

Uplift for Inflation

[25.] The Applicant then submitted that these figures should take into account inflation and therefore, calculated them as follows; (i) $26,000 for suffering, anxiety and stress has a present day value of $29,627.65 and (ii) $$65,000 for vindicatory damages has a present day value of $74,069.12.

[26.] The loss of earnings claim using the lower estimate would amount to $114,000 ($500x19 years) as a result of being charged with the said offence and having it remain outstanding for the past 19 years.

[27.] Therefore, it was submitted that the Applicant ought to be awarded the sum of $239,466.46 plus costs.

The Respondents' case

(i) Length of the delay

[28.] The Respondents submitted that the Court should consider the period after the Applicant had been committed viz., October 20, 2005 to 2019 which was when the Applicant had first reached out to the Second Respondent. They allege that during this fourteen (14) year period of inaction on the part of the Applicant, he had not even requested the return of his passport.

(ii) Reason for the delay

[29.] The Respondent's proffered that the principal reason for the delay was due to the fact that the Applicant's file never moved through the system after he was committed to the Supreme Court on October 20, 2005 because it remained in Abaco. The original copy of the Applicant's file was discovered on August 17, 2023.

[30.] To account for some of the delay, the Respondents' relied on the extensive damage sustained as a result of Hurricane Dorian between August 24, 2019 – September 10, 2019 to the Police Station and the Magistrate's Court in Marsh Harbour, Abaco.

(iii) Accused assertion of his rights

[31.] The Respondent's submitted that during the years, 2005 through 2019 the Applicant took no steps to assert his rights to a speedy trial therefore he lacked interest in his right to a fair trial within a reasonable time. Further that this constitutional application is an abuse of the process of the Court.

[32.] The Respondents advanced the argument that because the Applicant took no steps to assert his rights, it can be inferred that he was uninterested in being brought to trial. They placed reliance placed on **Barker v Wingo** where Powell J's stated as follows:

> *"Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the*

delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."

[33.] In further support of their argument, the Respondents quoted this passage from **Roasio Zamorana v the State of Texas** No.1442-00 which also relied on principles from **Barker v Wingo**:

"According to the Supreme Court, the nature of the speedy trial right 'makes it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants". Of course, the defendant has no duty to bring himself to trial; that is the State's duty. This does not mean that the defendant has no responsibility to assert his right to a speedy trial. Whether and how a defendant asserts his speedy trial right is closely related to the other three factors because the strength of his efforts will be shaped by them. Therefore, the defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the Defendant is being deprived of the right. Conversely, a failure to assert the right makes it difficult for a defendant to prove he was denied a speedy trial."

[34.] The Respondents alleged that the Applicant had adequate reliefs available to him to recover his passport in the same way that he did concerning his sign in requirements. However, he chose not to avail himself of this relief. They relied on the variation provisions of the Bail Act, section 8(1) and advanced that since he was aware of his ability to apply for a variation of his bail (having previously done so relative to the sign-in conditions), it was open to him to do the same for the return of his passport.

[35.] They proposed that even after the Applicant's passport had expired in February, 2010, he did not apply to vary his bail having regard to all that he alleged that he had suffered including inter alia: (i) the inability to travel internationally; (ii) open a bank account or (iii) apply for a business license.

[36.] Further, they submitted that the making of the bail variation application after his matter was committed would have been a form of assertion of his Article 20(1) right. This bail variation application they submitted would have been the only thing that stood between the Applicant and the final determination of his matter. In fact, he did not complain until some fourteen (14) years later in his letter of June 17, 2020.

[37.] They submitted that the Applicant had "not taken" any steps therefore, it can reasonably be inferred that the Applicant was not particularly interested in his right to a fair trial within a reasonable time. Their position was that the taking of the step to apply for the return of his passport would have alerted the relevant authorities that the matter was still outstanding and would have prompted an earlier search to be made for his file.

(iv) Prejudice to the Accused

[38.] The Respondents submitted that when determining the issue of purported prejudice occasioned by the delay, the Court should have regard to whether, an accused person has asserted his right to a fair trial within a reasonable time. In the instant case, they have submitted that the Applicant's constitutional right to a fair trial within a reasonable time has not been breached because he failed to assert his rights.

[39.] The Respondents have placed reliance on the following cases including the **Barker v Wingo** 407 U.S 514 (1972); **Terry Delancey v Attorney General** SCCivApp. No. 43; **Craig Johnson v DPP** Crim/con/00022 of 2015; **Rosario Zamorano v State of Texas** No. 1442-00.

[40.] They cited the dicta of President Dame Sawyer in **Terry Delancey** where the delay was some nineteen (19) years:

> *"59. It should be noted that Sanderson Roberts' case was decided by this court following the decision of Darmalingum's case and that the time which had elapsed between his conviction and the hearing of his appeal in the Supreme Court was some 19 years during which no complaint was made about the failure of the magisterial court to prepare the record of that trial and in which the record was only produced when I stated in open court that the police would be asked to investigate the matter; shortly after I made that statement – in fact over the lunch break that same day – the record, apparently mysteriously, arrived at the court "yellowed with age". Sanderson Roberts had signed a recognizance to prosecute his appeal "to judgment and to abide the judgment thereon of the court...." But he had taken no steps to prosecute the appeal once it was filed and he was granted bail."*

[41.] They also relied upon the decision of **Craig Johnson** where the Judge stated at paragraph 22 as follows:

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

[42.] Finally, I refer to the **Barker v Wingo** decision where the Respondents advanced that the principle of the responsibility of an accused person to assert his right to a "speedy trial" was fully ventilated.

[43.] Their submissions read as follows:

> "This case settled on the notion that there exists, defendants who are not interested in a speedy trial, and who would prefer to "gamble" with the delay, for it might work in their favour.

[44.] The Respondents referred to the words of the Court at page 533 of the judgment,

> *"Instead the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced and thereby obtain a dismissal of the charges, he definitely did not want to be tried."*
>
> "We also note at page 537 of the judgment where Justice White stated:
>
> *"...It is also true that many defendants will believe that time is on their side and will prefer to suffer whatever disadvantages delay may entail...."*

[45.] In summary, the Respondents relied on the decisions in the miscellany of cases they cited to demonstrate that the Applicant had not taken any steps in pursuance of this matter, not even to apply for the return of

his passport. They have advanced that the Applicant, a former Police Reservist was fully aware of the workings of the system including his ability to apply for the return of his passport. Therefore, they alleged that the Applicant was willing to suffer all of the disadvantages of not having his passport with the belief that time was on his side, until the case became cold, and he could seek a discharge.

Analysis/ disposition

[46.] Both Counsel have assisted the Court with their comprehensive submissions and I thank them for their diligence.

Article 20(1) of the Constitution – Right to a Fair Hearing

[47.] The Applicant argued that his right to a fair trial within a reasonable time has been infringed by the nineteen (19) year delay in the instant case.

[48.] It is undisputed that the right to "speedy" trial was laid out in the seminal case of **Barker v Wingo** where a four-part balancing test was established and which case was cited with approval by then Senior Justice Stephen Isaacs in the Bahamian case of **Taylor v AG**. I must now consider these factors in view of the evidence tendered.

(i) Length of delay

[49.] At the outset, the Applicant admitted to having been represented by an attorney during the period 2005 through 2019. The following letters from his attorney were exhibited in the Applicant's affidavit filed on October 5, 2023:

(i) letter dated August 22, 2005 from Godfrey "Pro" Pinder to the Magistrate Crawford McKee requesting an adjournment in the matter.

(ii) letter dated September 8, 2005 from Godfrey "Pro" Pinder to the Magistrate Crawford McKee – requesting an adjournment in the matter.

(iii) letter dated October 20, 2005 from Godfrey "Pro" Pinder to the Magistrate Crawford McKee – requesting that the matter proceed on the scheduled date.

[50.] All of the communication exhibited from the Applicant's attorney were in 2005, there were no others post 2005.

[51.] I observed the following as it related to the actions of the Applicant:

(i) he stated that he would follow up with his attorney "at least twice per year so as to ascertain whether there were any updates in my matter". During the times that I was able to reach Mr. Pinder, he always informed me that there was a major backlog in the criminal justice system and that he was aware of many matters that was committed to stand trial in the Supreme Court before 2005 that had not come up for trial as yet."

(ii) Sometime in May, 2019 he thought (albeit mistakenly) that his attorney had died and thereafter, he took an active role in pursuing and following up with the Respondents in relation to his matter, by telephone calls in the first instance, then by letter dated June 17, 2020. In his said letter dated

June 17, 2020 to then DPP Gaskin, he requested that the matter be discharged due to the then, fifteen (15) year delay.

[52.] In view of the above observations, the question then becomes at what point did the time begin to run for the purpose of calculating the delay or, in other words, what is the "operative period" as referred to by then Senior Justice Stephen Isaacs in **Taylor v AG**. Is it from the date when the Applicant was charged or committed to stand trial in the Supreme Court in 2005? Or, was it later, sometime after May, 2019 when the Applicant thought that he was no longer represented and had to take matters into his own hands?

[53.] The Applicant has submitted that the period of delay is nineteen (19) years.

[54.] The Respondents have not definitively addressed the length of the delay, however, they submitted that the Applicant did not complain about the matter until fourteen (14) years later, and they specifically took note of the Applicants letter dated June 17, 2020. Therefore, it would appear that the Respondents' position is that the delay was only five (5) years.

[55.] In **Taylor v AG**, there had been a passage of five years since the Applicant was arrested to the hearing of the application. Senior Justice Isaacs (as he then was) noted that:

> ***"On its face the period appears inordinate. However, I must determine the "operative period", i.e., the time which must be used to calculate the length of the delay, before arriving at a conclusion that such period is in fact inordinate and amounts to a constitutional breach."***

[56.] Following the reasoning in **Taylor v AG**, the operative period would be from the date when the Applicant was arrested until the date that the Applicant was discharged. Therefore, I concur with the Applicant, that it would be a period of nineteen (19) years.

(ii) Reasons for the delay

[57.] The Respondents' proffered reason for the delay in prosecuting this matter related to the misplacement of the file and the resultant damage caused by Hurricane Dorian in 2019 to the Police Station and the Magistrates Court as contained in the Affidavit of Timothy Bailey filed on August 21, 2023.

[58.] It is obvious that none of these reasons can be attributed to the Applicant and further, I find them unsatisfactory and unreasonable in all of the circumstances.

[59.] The Applicant was committed to stand trial in 2005, some fourteen years prior to Hurricane Dorian. Further, the said Affidavit showed that the search for the file did not commence until ***after*** the Applicant had contacted the Respondents' offices:

> "4. That the Respondents note that the Applicant contacted the Offices of the Respondents between 2019 and 2020 seeking that the matter be discharged as particularly evidenced in the Applicant's letter dated 17th June, 2020.
>
> 5. **That the Office of the Second Respondent had subsequently sought out the Applicant's file. Searches were conducted at both its Offices in New Providence, as well as in Freeport, Grand Bahama, but to no avail.**
>
> **6. That the Marsh Harbour, Abaco, Police Station, as well as the Magistrates Court in Abaco were also contacted in an effort to locate the file.** However, personnel from the Office of the Second

Respondent were advised that the Police Station had sustained extensive damage as a result of hurricane Dorian, which occurred between the 24th of August, and the 10th of September, 2019, thus it was not able to its copy of the file. Further, as it related to the Magistrate's Court, that the archives (based on the age of the matter) as well as filing cabinets were searched, and that the file could not be located."

[Emphasis added]

[60.] There was nary any evidence to demonstrate that the Applicant contributed to the length of delay in this matter despite being represented by attorney, Godfrey "Pro" Pinder. There was one letter from his attorney to the Magistrate in which he requested and adjournment, however, there was nothing else tendered to show that he would have contributed to the significant length of the delay.

[61.] The Respondents sought to attribute the delay to the Applicant because if he had applied to vary his bail to have his passport returned, this would have alerted the authorities to look for his file and prompt them to pursue the matter earlier. While this may be true and I am inclined to agree that it may have had that effect, the onus is not on the Applicant to bring himself to trial. **Barker v Wingo**

(iii) Assertion of the accused's right

[62.] The Applicant admitted that he did not contact the Second Respondent until 2019 because he believed that his attorney Godfrey "Pro" Pinder had died. Therefore, he began reaching out to the Second Respondent sometime in 2019 via telephone calls and again in June 2020 by way of letter addressed to the DPP, the contents of which were set out in paragraph 12.

[63.] The Applicant's belief that his attorney had died was mistaken and the Respondents in their Affidavit of Timothy Bailey filed on October 17, 2023 addressed this. The Applicant then admitted in his Affidavit filed on October 19, 2023 that he honestly believed that his attorney had died, however, he maintained that he only began reaching out directly to the Second Respondent after he had formed that "genuine mistaken belief". I refer to his evidence as contained in his Affidavit filed on October 5, 2023:

"4. Before I started contacting the Office of the Second Respondent, I was represented by Mr. Godfrey Alexander Pinder and between approximately 2005 and 2019, I called Mr. Pinder's Chambers at least twice per year so as to ascertain whether there were any updates in my matter. During the times that I was able to reach Mr. Pinder, he always informed me that there was a major backlog in the criminal justice system and that he was aware of many matters that was committed to stand trial in the Supreme Court before 2005 that had not come up for trial as yet. During this time, I didn't think that it was appropriate for me to contact the Office of the Second Respondent directly because I was represented by Counsel. The Supplemental Affidavit in Response of Timothy Bailey filed herein on 21st August, 2023 does indeed exhibit three letters from the Chambers of Mr. Pinder confirming his representation of me in 2005. For ease of reference……

5. On or about 20th May, 2019, Mr. Pinder died and so at that point, I no longer was represented by an Attorney and there was no one that I could have called other than the Office of the Second Respondent for an update. I therefore took the matter into my own hands and in 2019, the same year that my Attorney passed away, I started to contact the Office of the Second Respondent directly in search of answers (as Mr. Timothy Bailey confirmed in his evidence, which is outlined above). Initially when I made contact with the Office of the Second Respondent, it was with the objective of obtaining an update on the matter. I called the said office approximately four times within six months and I was constantly told by an agent in the said office that they would look into the matter and get back to me. During my fifth or sixth call to the

said office, I was informed that the virtual complainant no longer wished to proceed and as such, I would be served with a Summons to come to Court within a few short weeks and the matter would be discharged. Frankly, I was surprised that they finally did look into the matter for me and I was relieved that closure was being brought to this matter. My satisfaction was short-lived when I realized that another six months had passed and I still did not hear anything from the Office of the Second Respondent nor was I served with a Summons instructing me to appear before Court."

[64.] The Respondents make the argument that because the Applicant took no steps to assert his rights between the years, 2005 through 2019, that it can be inferred that he was uninterested in being brought to trial. They placed reliance placed on Powell J, statements in **Barker v Wingo** which I set out in paragraph 32. However, I highlight a portion of his statement below which I find pertinent to this issue of the assertion by the Applicant of his rights:

> *"The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."*
>
> [Emphasis added]

[65.] In addition, they relied upon **Roasio Zamorana v the State of Texas** No.1442-00 which cited with approval the principles from **Barker** which I set out in paragraph 33, however, I highlight the portion that I find most relevant to this issue:

> ***" Of course, the defendant has no duty to bring himself to trial; that is the State's duty. This does not mean that the defendant has no responsibility to assert his right to a speedy trial. Whether and how a defendant asserts his speedy trial right is closely related to the other three factors because the strength of his efforts will be shaped by them. Therefore, the defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the Defendant is being deprived of the right. Conversely, a failure to assert the right makes it difficult for a defendant to prove he was denied a speedy trial."***
>
> [Emphasis added]

[66.] The Applicant admitted that he did not reach out to the Office of the Second Defendant until after his attorney had died (albeit mistakenly) because he thought it was "inappropriate to do so". These efforts to reach out by calling and then later, writing a letter to the DPP in the terms as set out in paragraph 12 came after the passage of fourteen (14) years.

[67.] The Applicant alleged that the following occurred during the period of the delay due to his not having his passport:

(i) he was unable to travel internationally;
(ii) he was married twice and missed two honeymoons;
(iii)he missed taking his daughter to school and attending her graduation;
(iv)he was unable to obtain a business license;
(v) he was unable to open a bank account;

[68.] It is unclear from the evidence at what period during the nineteen (19) year delay did any of the items in (i) through (v) occurred, viz., whether it occurred during the fourteen (14) year period when the Applicant was represented or thereafter. This is relevant when considering whether and how a defendant asserts his right per **Barker v Wingo**: "*the strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always identifiable, that he experiences*". *[Emphasis added]*

[69.] The Applicant has pellucidly identified the prejudice that he had experienced as a result of the delay. Further, the court in **Barker v Wingo** asserted that "*the more serious the deprivation, the more likely a defendant is to complain*".

[70.] Notwithstanding that, the Applicant never complained until after the expiration of fourteen (14) years and only because he thought his attorney had died. During the entire nineteen (19) year period of the delay, he was on bail and not incarcerated, however, he was without his passport. It appeared that his attorney's death made him feel that it was "appropriate" to now reach out to the Office of the Second Respondent thereby, "asserting his rights".

[71.] The Applicant from his own evidence seemed to have "accepted" the explanation of the delay in the matter being brought on for trial due to what his attorney termed "a major backlog in the criminal justice system" for fourteen (14) years and thereby in my view acquiesced. I am fortified in this view by the Applicant's failure to (i) insist on his attorney writing a letter to urge the DPP to bring his matter on for trial; (ii) to express concern about the availability of any witnesses that he intended to rely upon; and (iii) to complain about the emotional distress or hardship he was suffering due to the delay.

[72.] Additionally and even more startling was the Applicant's failure to avail himself of the right to apply to vary his bail to have his passport returned. Perhaps, it may have been his fear that such an application may have done exactly what the Respondents have asserted, viz., alerted the relevant authorities that the matter was still outstanding and prompted an earlier search of the file because the bail variation application would have been the only thing that stood between the Applicant and the final determination of his matter.

[73.] In fact, the Applicant admitted to having made an application for variation of his bail to remove the sign-in conditions because it would have interfered with his ability to perform his job as a surveyor. Therefore, the Applicant was fully aware of his right to make another application for the return of his passport which would have significantly minimized or indeed eliminate the prejudice or injury he claimed to have suffered as a result of it being surrendered.

[74.] I refer to **Bain-Thompson v The Commissioner of Police** where the Applicant's attorney had written on her behalf to the Deputy Chief Magistrate and copied the DPP for a date for the retrial of her matter and had made oral requests through multiple phone calls with the Chief Magistrate; all of which fell on deaf ears.

[75.] Further, I refer to the submissions of the Respondents with which I agree, that **Barker v Wingo** settled on the notion that there are defendants who are not interested in a speedy trial, and who would prefer to "gamble" with the delay, for it might work in their favour. I cite the dicta of the Court at page 533:

"Instead the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced and thereby obtain a dismissal of the charges, he definitely did not want to be tried."

[76.] In the instant case, the Applicant "patiently" waited fourteen (14) years before he asserted his rights which the Court finds may similarly suggest that *"he hoped to take advantage of the delay in which he had acquiesced and thereby obtain a dismissal of the charges."*

(iv) Prejudice to the accused

[77.] The issue of prejudice would have arisen if the Applicant was proceeding to trial. As already noted, the Applicant is not being tried as his matter was withdrawn in March, 2023 by the Respondents.

[78.] In any event, I have considered the issue of prejudice under the previous heading entitled "Assertion of an Accused's right", therefore, I will not address it again here.

Damages

[79.] I have found that the Respondents have breached the Applicant's right to a fair hearing as guaranteed by the constitution, and I find that the circumstances of this case warrant compensation.

[80.] Therefore, I will consider the Applicant's claim for damages broken down into three heads totaling $239,466.45. I have set them out again below. I have already addressed how these figures are arrived at, therefore, I do not intend to repeat them here.

Item	Amount
Loss of earnings	$114,000.00
Vindicatory damages	74,069.12
Damages for suffering	26,627.65
SUBTOTAL	**217,696.77**
VAT@10%	21,769.68
GRAND TOTAL	**239,466.45**

Loss of Earnings

[81.] The Applicant's claim for loss of earnings of $114,000 falls under the head of special damages which was neither pleaded in the Originating Notice of Motion, nor was it independently substantiated by any evidence, other than that of the Applicant.

[82.] Special damages must be specifically pleaded and proven. **Attorney General v Raymond Gibson and Atlantic Ocean View Limited and Little Savannah Estates & Farms Limited** SCCiv. App. No. 36 of 2006 Therefore, for these reasons, I refuse the claim for loss of earnings in the sum of $114,000.

Vindicatory and General Damages

[83.] The Applicant relied heavily on **Gibson v AG** to support his claim for vindicatory and general damages or damages for inter alia, suffering, distress, anxiety and humiliation.

[84.] The principle in **Merson v Cartwright and Another** [2005] UKPC 38 at paragraph 18 of the judgment addresses the issue of vindicatory damages:

> *"[18] These principles apply, in their lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian Constitution. If the case is one for an award of damages by way of constitutional redress (and their lordships would repeat that 'constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course'; Siewchand Ramanoop, 66 WIR at p 343, paragraph [25]) the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.*
>
> [Emphasis added]

[85.] While I did find **Gibson v AG** helpful on the issue of these two heads of damages, I have found the facts distinguishable from the instant case. The common feature of both cases, however, was the charge of attempted rape in the instant action, and rape in **Gibson v AG**. The delay was seven (7) years however, during an approximate five (4) year period, Gibson periodically made inquiries both personally and through his counsel regarding the status of the matter thereby asserting his rights. Gibson had a long distinguished career as a police officer who was denied the ability to obtain a promotion, had been placed on administrative leave, interdicted and placed on half pay and had been unable to obtain steady gainful employment while the matter was still pending and had a wife and three minor children. In the instant case, the majority of the prejudice suffered by the Applicant was due primarily to having surrendered his passport as a condition of his bail. He remained gainfully employed and save for his inability to earn additional income as a Police Reservist which income he was did not provide any proof of, he did not allege any additional prejudice. Further, unlike Gibson, during the nineteen (19) year delay, he waited for fourteen (14) years before he took action or "asserted his rights" per **Barker v Wingo**.

[86.] Therefore, for the purposes of an award of damages, I will only consider the period where the Applicant "asserted his rights", viz., from 2019 to 2023, the date he commenced this action. The Respondents were forced to act on their promise to discharge the matter pursuant to section 125 of the Criminal Procedure Code **only after** the instant action had been filed. [Emphasis added]

[87.] I award the Applicant vindicatory damages of $10,000. I do not find that the circumstances of this case warrant an additional award for suffering, distress, anxiety and humiliation.

Conclusion

[88.] The Court grants the following reliefs as claimed in the Originating Notice of Motion:

(i) Article 20(1) of the Bahamas Constitution which affords the Applicant the right to a fair hearing within a reasonable time by an independent tribunal established by law has been infringed;

(ii) Vindicatory damages of $10,000.

(iii) Costs to the Applicant to be paid by the Respondents such costs to be fixed, if not otherwise agreed.

Dated this 9th day of August, A. D., 2024

Camille Darville Gomez
Justice