IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Public Law Division

2023/PUB/con/0008

IN THE MATTER OF Article 20 of the Constitution of the Commonwealth of The Bahamas (hereinafter "the Constitution")

BETWEEN

RENO BETHEL

Applicant

AND

THE ATTORNEY GENERAL

1st Respondent

AND

COMMISSIONER OF POLICE

2nd Respondent

Before: The Honorable Madam Justice Carla Card-Stubbs

Appearances: Mr. Ryszard Humes for the Applicant
Ms. Janessa Murray for the 1st and 2nd Respondent

Hearing date: 16 October 2023, 17 October 2023

JUDGMENT

Article 20 (1) Constitution of The Commonwealth of The Bahamas— Human rights and fundamental freedoms — Fair hearing within reasonable time — Delay in trial — Delayed resumption of trial - Whether infringement of applicant's right to fair hearing within reasonable time – Whether permanent stay is an appropriate remedy.

CARD-STUBBS, J

Introduction

[1.] The Applicant by Originating Notice of Motion filed 24 February 2023 alleged breaches of his constitutional rights pursuant to Article 20 of the Constitution of the Commonwealth of The Bahamas.

[2.] The Application is supported by the Affidavit of Reno Bethel also filed 24 February 2023.

[3.] The reliefs sought by the Applicant are as follows:

a. A Declaration that the failure to try the Applicant within a reasonable time is a contravention of Article 20 of the Constitution of The Commonwealth of The Bahamas;
b. An Order staying the trial against the Applicant on the basis of undue delay;
c. Such further or other relief that the Court may deem necessary;
d. Relief which prevents any further breaches of the Applicant's rights afforded by the Constitution; and
e. That the Respondent pays the Applicant's cost of and occasioned by this application.

Background

[4.] The Applicant was arraigned on 4 September 2017 along with four (4) other persons on several charges including " Fraud by False pretenses, Conspiracy to Commit Fraud by False Pretenses and Receiving." The Applicant was re-arraigned 14 November 2017 and was then also charged with money laundering offences. The Applicant pled not guilty to the offences and was released on bail.

[5.] The Applicant's trial commenced on 20 June 2018 with the taking of evidence from the Prosecution witnesses. Trial proceeded and continued until 22 June 2018 when the matter was adjourned.

[6.] The matter was subsequently called up on several occasions in 2018. The Applicant was present on most, if not all, occasions. On this point, the evidence is unclear as to the totality of mention dates in 2018. Several adjournments were given in the matter for various reasons.

[7.] On 13 September 2019, the trial was scheduled to continue and the Prosecution had 18 witnesses present at court in anticipation of the trial proceeding. The trial did not continue on that day because counsel for one of the co-accused was absent due to illness and another co-accused was unrepresented, having been previously represented by counsel.

[8.] It is unclear whether the Applicant was present on 13 September 2019. The Affidavit of the Applicant does not reflect his attendance at court on any date subsequent to March 2019 and the Affidavit of the Respondent is silent on this point.

[9.] Six counsel were on record for the various accused persons in the matter. The trial was adjourned to 7 February 2020, which was said to be a convenient date for all counsel. However, on that date, the trial did not proceed due to the unavailability of counsel for one accused or another, and changes in legal representation.

[10.] The trial was adjourned to August 2020.

[11.] The courts closed in March 2020 due to the Global Covid-19 pandemic. The court did not sit for trials in August 2020. The court reopened in December 2020.

[12.] The following year, in February 2021, the learned Magistrate who had conduct of the trial, demitted office.

[13.] As at the date of the filing of the Applicant's suit, viz 24 February 2023, the trial had not proceeded.

Issues to be decided

[14.] The issues to be determined are whether the Applicant's right to a trial within a reasonable time has been breached in contravention of Article 20 (1) of The Constitution and, if so, whether to grant the relief sought.

The Applicant's Case

[15.] The Applicant claims that the delay in his trial from 22 June 2018 breaches his constitutional rights accorded him by virtue of Article 20 (1) which entitles him to a trial within a reasonable time. He further asserts that by this delay, he has suffered mental, emotional and financial damage. He asserts that he has been unable to find suitable employment and that he lost opportunities presented to him because of the outstanding matter i.e. the unconcluded trial. His evidence, by affidavit, is that he has had to deplete

his savings and sell some of his real estate to support his family. He also avers that he went into a state of depression and that resulted in the dissolution of his marriage.

[16.] The Applicant avers that he and his family had relocated to Canada in 2016 and claims that he had incurred travel and accommodation expenses of over $50,000 to date to attend court. The Applicant also avers that "the Canadian Government cancelled my Electronic Travel Authorization due to non-completion of my trial."

[17.] The Applicant's case is that the trial had been pending for over 5 years (2018 to 2023) and constituted a breach of Article 20.

[18.] The Applicant submitted that the court could find that the Applicant's right was breached even if the court finds that he was not prejudiced by the delay.

[19.] The Applicant relied on the cases of **Seriozha Mckenzie v The Director of Public Prosecutions** 2011/VBI/213/2011**, Kinglsey Adderley v The Director of Public Prosecutions** SCCrApp No. 212 of 2018 and **Boolell v State** [2007] 2 LRC 483 in support of their submissions.

The Respondents' Case

[20.] The Respondents submitted that in the Applicant's trial, the Prosecution was near completion of their case and that any delay in the trial was not due to fault of the Respondents.

[21.] They further submitted that the delay was to be attributed to the Applicant's co-accused, illness of counsel and the unavailability of other counsel for other co-accused. One accused was also left unrepresented by counsel due to his appointment as an officer at the Office of the Attorney General.

[22.] It is the Respondents' position that on September 13, 2019, the Prosecution had 18 witnesses ready to proceed with the matter. They submitted that at the date set for the continuation of the trial, the Courts were closed due to the Covid-19 pandemic. They submitted that when the Courts re-opened in December the Applicant did nothing to advance his case. They further submitted that in September 2021 lead counsel for the Applicant was elected to parliament and that junior counsel for the Applicant did nothing to advance the Applicant's case.

[23.] It is the Respondents' submission that the relevant period of delay ought to commence from the date when the learned Magistrate demitted office in 2021.

[24.] The Respondent further submitted that this matter is a complex one and that the reasons for the delay stemmed largely from the actions and circumstances surrounding the Applicant, his co-accused and their counsel. The Respondent submitted that they have managed the Applicant's case efficiently and to the best of their ability.

[25.] Relying on the case of **Bell v Director of Public Prosecution and another [1985] 1 AC 937,** they submit that the Court must consider the length of delay, the responsibility of the accused to assert his rights, the prejudice suffered by the accused and the reasons given by the prosecution.

[26.] The Respondents further submitted that the Applicant has not shown on a balance of probability that he had been prejudiced by the delay and can no longer have a fair trial. They also submitted that a stay should only be granted in exceptional cases and should not be imposed if the delay was due to some complexity of the case or caused by the Defendant himself.

[27.] The Respondents submitted that the Court ought not to grant the stay if the prejudice or unfairness could be dealt with in the course of trial.

[28.] The Respondents also relied on the cases of **Boolell v State** [2007] 2 LRC 483, **Attorney General's Reference (No 1 of 1990)** [1992] 3 All ER 169 and **Attorney General's Reference (No. 2 of 2001)** [2003] UKHL 68 in support of their submissions.

Law and Analysis

[29.] The Constitution of the Commonwealth of The Bahamas provides for fair and impartial hearings in a reasonable time for individuals charged with criminal offences. 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."

[30.] This Court has the jurisdiction to hear and decide matters where individuals allege that their basic and fundamental rights have been infringed. Article 28 of the Constitution deals with the Enforcement of Fundamental Rights. Article 28 (1) and (2) provide:

28. (1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction —

(a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

[31.] The complaint in this case concerns the element of delay. By the constitution, a person is entitled to a "**fair hearing … by an independent and impartial court established by law"** and that fair hearing must take place **"within a reasonable time".** This right is enshrined in the Constitution and protects a person, over whose head criminal charges loom, from being left in an indeterminate condition of uncertainty while the criminal process drags on. It is not fair for a person to be the subject of a criminal charge and subject to the consequences of so being charged (such as the restriction of freedom of movement, continuing legal costs and anxiety) with no end in sight. A person is entitled to have a charge brought against him by the State to be resolved in a reasonable time. Therefore, if the charge is not withdrawn, the matter is to proceed to trial within a reasonable time.

[32.] "Within a reasonable time" is not defined in the Constitution with good reason. What is reasonable must depend on the prevailing context. That prevailing context is to be assessed within objective, clear and consistent guidelines. Any other approach can lead to rigidity and harsh inequities in results. Therefore, any attempt to lay down rigid timelines ought to be resisted. "Within a reasonable time" ought to be tested and determined on a case-by-case basis.

[33.] Several cases have set out the factors that a court must consider in determining whether the Applicant's right to a fair and impartial hearing in a reasonable time has been infringed.

[34.] **Bell v Director of Public Prosecution and another** [1985] 1 AC 937 was an appeal arising out of a case from Jamaica. Section 20 of the Constitution of Jamaica provides:

> "(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The Privy Council held that in determining whether an accused had been deprived of his right to a fair hearing within a reasonable time, there were four factors to be assessed. These four factors are (i) length of delay, (ii) the reasons given by the prosecution to justify the delay, (iii) the responsibility of the accused for asserting his rights, and (iv) prejudice to the accused.

[35.] In **Bell v Director of Public Prosecutions and another**, the appellant was arrested in May 1977 and charged with firearm and other offences. He was convicted in the Gun Court in October 1977, but in March 1979 his appeal against conviction was allowed by the Court of Appeal of Jamaica and a retrial was ordered. In November 1981, Crown witnesses were unavailable and the Appellant was discharged by the judge. He was rearrested in February 1982 for the same offences and a retrial date set for May 1982. His application to the Full Court for a declaration that section 20(1) of the Constitution had been infringed was dismissed. He appealed to the Court of Appeal which upheld that decision. In considering the circumstances, the Board took into account that a retrial had been ordered in 1979 and that there ought to have been some sense of urgency attendant

on the retrial. The Board found that further delay would be be unfair to the Appellant. The Privy Council allowed the appeal. They granted the declaration sought.

[36.] The Board considered that the "operative period of delay began on 7 March 1979 when the Court of Appeal ordered a retrial." The law lords considered that the Court of Appeal having ordered a retrial, the possibility of an acquittal must have been considered by the Court of Appeal. The Board considered that there was "an urgency about the retrial which did not apply to the first trial." The Board also noted that "the Full Court and the Court of Appeal not only overlooked the significance of the fact that the applicant was complaining of delay in the context of a retrial, but also overlooked the significance of the fact that on 10 November 1981 the applicant had been discharged."

[37.] The judgment of the Court was delivered by Lord Templeton. In coming to its decision, Lord Templeton placed reliance on the US case of **Barker v Wingo** (1972) 407 U.S. 514, and found that a court must take into account four factors in determining whether the constitutional right has been infringed. At pages 951 to 953, *Lord Templeton* set out, and considered the four factors as they concerned the case before the board.

> "Some guidance is provided by the judgments of the Supreme Court of the United States in *Barker v. Wingo* (1972) 407 U.S. 514. The sixth amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury …" Powell J. pointed out, at pp. 521-522:
>
> "the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate … The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried."
>
> Powell J. then identified four factors which in his view the court should assess in determining whether a particular defendant has been deprived of his right. They are (1) length of delay:
>
> "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the

imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge" (pp. 530-531).

In the present case it cannot be denied that the length of time which has elapsed since the applicant was arrested is at any rate presumptively prejudicial.

(2) The reasons given by the prosecution to justify the delay:

"A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay"

In the present case part of the delay after arrest was due to overcrowded courts, part to negligence by the authorities, and part to the unavailability of witnesses.

(3) The responsibility of the accused for asserting his rights:

"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" (p. 531).

Their Lordships do not consider this factor can have any weight in the present case. The applicant and his counsel no doubt took the view that strenuous opposition to an application sought by the prosecution from time to time for an adjournment or an appeal from an order granting an adjournment would be a waste of time. The applicant's complaint is that he was discharged and told to go free and was subsequently in 1982 rearrested for the offences for which he had first been arrested in 1977. The applicant raised that complaint as soon as he was rearrested.

(4) Prejudice to the accused:

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense 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 defense 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" (p. 532).

The applicant did not allege the death or disappearance of a witness. Where, as in Jamaica, for a variety of reasons, there are in many cases extensive periods of delay between arrest and trial, the possibility of loss of memory which may prejudice the prosecution as much as the defence, must be accepted if criminals are not to escape. Nevertheless in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed, the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the eventual date of retrial cannot be left out of account. The fact that the applicant in the present case did not lead evidence of specific prejudice does not mean that the possibility of prejudice should be wholly discounted….

[38.] The Board confirmed in **Bell v Director of Public Prosecution and another** [1985] 1 AC 937 that it was the duty of "those charged with the administration of justice to ensure that the order for a retrial was obeyed without avoidable delay."

[39.] The Board in **Bell v Director of Public Prosecution and another** also recognized that a court is engaged in a balancing exercise in the context of the relevant jurisdiction (at page 953):

Their Lordships accept the submission of the respondents that, in giving effect to the rights granted by sections 13 and 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system

> of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica.

[40.] Another helpful decision is the case of **Boolell v State** [2007] 2 LRC 483**,** a case relied on by the Applicant. In that case, the Appellant was charged in 1992 with swindling, having given a caution statement in 1991. A trial was fixed for October 1993 but for various reasons, due largely to the actions of the Appellant and his counsel, there were a number of adjournments. Trial commenced in 1996 and the accused changed his plea to a guilty plea in relation to one count. After the continuation of the trial, the prosecution entered a nolle prosequi in January 1998 and, at the same time, filed a new charge of swindling against the appellant. The trial on the new charge commenced in 1999. At the conclusion of the trial which saw a number of adjournments, the Appellant was convicted in March 2003 and sentenced to six months' imprisonment. The Appellant's appeal against conviction on sentence was dismissed by the Supreme Court. He appealed to the Privy Council on the question of delay. The Appeal was allowed and a fine substituted for the sentence of imprisonment.

[41.] The judgment of the Board was delivered by *Lord Carswell*. Considering a '12 year trial process', the Board concluded that (at paragraph 37):

> [37] It is not in dispute that the time taken overall, between February 1991 and March 2003, gives grounds for real concern and is prima facie unreasonable, even setting the threshold at the appropriate height. There has been no material before the Board which would suggest that the case was unusually complex for a prosecution of this type, which is confirmed by the relatively small number of witnesses called for the prosecution and the fairly limited nature of the issue which the Intermediate Court had to decide. The conduct of the defendant was altogether reprehensible and contributed very largely to the lapse of time. The Board is willing to accept that the court lists in Mauritius were congested and that it was not easy or straightforward to arrange speedy trial of such a case before the Intermediate Court. Their Lordships consider, however, that when it became clear that time was dragging on and that the appellant was bent on dislocating the course of the trial and prolonging the proceedings by every means within his power, it was incumbent on the court to take such steps as it could to expedite matters and reach a conclusion. This should have led to the injection of an element of urgency after the nolle prosequi was entered and the

> trial had to begin afresh. Certainly from that point onwards, the court should have explored more effectively ways of conducting the trial without gaps between sitting days and of moving it quickly on after the disposal of attempts by the appellant to delay it. Their Lordships are impelled to the view that much more could have been done to hasten matters between the commencement of the second trial in March 1998 and its completion in March 2003. They accordingly cannot escape the conclusion that, however reprehensible the conduct of the appellant, the trial was not completed within a reasonable time and that there was in that respect a breach of s 10(1) of the Constitution.

[42.] In coming to its decision in **Boolell v State**, the Board conducted a useful review of some of the cases decided since *Bell v DPP* and clarified the nature of the constitutional breach and the factors to be considered by the court. That court considered the ***Darmalingum v State*** [2000] 5 LRC 522 line of cases which provide that the various (similar) constitutional provisions contain "three separate guarantees, namely (1) a right to a fair hearing (2) within a reasonable time (3) by an independent and impartial court established by law". In ***Darmalingum v State*** the appellant was arrested in 1985, charged in 1992 and convicted in 1993. The delay between 1985 and 1993, which was said to be unexplained, was held to be a breach of the appellant's constitutional rights.

[43.] The Board in **Boolell** (at paragraph 30) considered that any difference between the precedents was sufficiently resolved by the determination of the House of Lords in **A-G's Reference (No 2 of 2001)** [2003] UKHL 68, [2004] 5 LRC 88:

> [30] The House sat in an Appellate Committee of nine members and decided by a majority that although through the lapse of time in itself there was a breach of art 6(1), the appropriate remedy would not necessarily be a stay but would depend on all the circumstances of the case. Lord Bingham of Cornhill, who gave the leading opinion for the majority, set out as two of the fundamental first principles applying to art 6(1), that (a) the core right guaranteed by the article is to a fair trial (at [10]) and (b) the article creates rights which though related are separate and distinct (at [12]). It does not follow that the consequences of a breach of each of these rights is necessarily the same.

[44.] The Applicant relied on the case of **Seriozha Mckenzie v The Director of Public Prosecutions** 2011/VBI/213/2011 which cites the case of *Kinglsey Adderley v The Director of Public Prosecutions* SCCrApp No. 212 of 2018. Those cases reaffirm that it is a breach of Article 20(1) where a "criminal case was not heard and completed within a

reasonable time, whether or not the defendant was prejudiced by the delay." I note that as it relates to remedies, **Kinglsey Adderley** also determined that "permanent stays should be the exception rather than the rule".

[45.] Therefore, it seems to me that the cases, as reconciled, support the following propositions of law which are to be applied in the case before me:

1. A person is entitled, by virtue of Article 20, to a cohesive right but with 3 distinct elements within its provisions: 1) a right to a fair hearing (2) within a reasonable time (3) by an independent and impartial court established by law. The breach of any element is a breach of the provision. However, the resultant appropriate remedies may vary.

2. The core right is a right to a fair hearing.

3. Delay by itself, where it is excessive and inordinate or otherwise unreasonable, may ipso facto prejudice that fair hearing.

4. The rights provided by Article 20(1) are a cohesive whole and may be infringed even in the absence of proof of specific prejudice to the applicant.

5. Where the delay has not reached the threshold of unreasonable, it must be explained and any prejudice to the person charged ought to be taken into account.

6. The right is to a fair trial without undue delay and not the right to a fair trial after undue delay.

7. If a breach due to delay is established, an appropriate remedy is to be applied. There is no automatic entitlement to a dismissal of the charges. There is a public interest element in having criminal charges determined in a court of law.

8. If the delay is such that any subsequent trial will be unfair, then the trial ought to be stayed and/or the charges dismissed.

9. If the breach is established before the hearing and the continuation of the trial will not be unfair, then an appropriate remedy may be a public acknowledgement of the breach and court directions to expedite the hearing. A court may also pre-emptively order a stay if its directions for an expedited hearing are not complied with in timely fashion.

The Delay

[46.] In weighing the matters under consideration, one has to bear in mind the public interest in having criminal matters determined by a court of law as well as the public interest in certainty and justice where justice delayed is justice denied. It is in that context that a person charged by the state ought to have some conclusion of his matter within a reasonable time. He ought not to be held in jeopardy for an indeterminate time. One must also bear in mind that an applicant ought to make out his case of delay. He ought to give evidence of prejudice that he has suffered, if any. This requirement serves to dissuade and sift those whose motivation is to avoid trial. At the same time, the delay itself may be sufficiently prejudicial given the length of the delay and the circumstances attendant the particular trial process. The consideration of the delay must be undertaken in light of jurisdictional context although context such as bureaucratic bungling and inefficiencies cannot displace the right to a fair hearing within a reasonable time.

[47.] **Boolell v State,** relied upon by both parties, cites the case of **Dyer v Watson** [2002] UKPDC D1, [2004] 1 AC 379, a case out of Scotland which considered complaints of delay under s. 6(1) of the European Convention of the Protection of Human Rights and Fundamental Freedoms. Article 6 deals with the right to a fair trial and Article 6(1) provides in part that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." That section is similar to Article 20(1) under review here.

[48.] In **Dyer v Watson,** the court offered the following guidance in analyzing the reasons for the delay. At paragraphs 52 to 55 of that judgment, *Lord Bingham* of Cornhill opined:

> [52] In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic

human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.

[53] The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.

[54] The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.

[55] The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their

> lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise, or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit under section 22(3)(b) of the Prosecution of Offences Act 1985, to show that he has acted "with all due diligence and expedition." But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter.

[49.] In the case before me, I must necessarily consider the complexity of the case against the Applicant, the conduct of the Applicant and the manner in which the case is being dealt with by those responsible for its advancement. The ultimate question is the reason for the delay and the prejudicial effect that such delay may have on the Applicant's case.

[50.] The evidence before me is that the Applicant, and others, were arraigned on September 2017 and again in November 2017 on various fraud and money laundering offences. The trial commenced on June 2018. On one resumption of trial in 2019, the Respondent avers that it had "over" 18 witnesses ready for trial. There were several adjournments as a result of the non-availability of counsel for one or other of the co-accused. There were five accused persons, six counsel at one time and the evidence was heavily document based. This was a complex case. I consider that given the nature of the charges, number of accused persons, number of witnesses and the reliance on documentation, that a longer time than usual would be required to get the case ready for trial.

[51.] I bear in mind that the Applicant only accounted for his attendance up to March 2019. He had previously attended the mention dates. The Respondents' answer is that the Applicant's appearance on some of the dates in question came about as a condition of bail and that, as such, he was mandated to be present. There is some evidence that some of the delays were caused by the failure of counsel to appear for one or other of the accused,

including the Applicant. However there is no suggestion of deliberate delaying strategies on the part of this Applicant or of spurious applications that would have contributed to the delay. It seems to me that the nature of the case is one with several accused persons and several counsel and thus the opportunity for the unavailability of any one of the *dramatis personae* significantly increases. This significantly increases the likelihood of delay. Nevertheless it is the duty of the Prosecution to advance matters to trial.

[52.] The Respondents have submitted that they have been ready to proceed with the trial of this matter on each occasion and the delay was not due to acts of the Respondents but that of the Applicant, his co-accused counsels and Acts of God. They submit that the relevant timeline for the consideration of delay should start subsequent to the pandemic and at the point of the Magistrate demitting office. That would amount to a period of 3 years.

[53.] I do not accept that as the relevant calculation nor is that supported by the cases. The relevant starting period ought to be from the date the charge is laid. Article 20 (1) concerns a person charged. That person ought to have a fair hearing within a reasonable time. The starting point is the date of the charge. This position was confirmed in the case of **A.G. reference (No. 2 of 2001)** [2003] UKHL (at paragraph 26).

[54.] However, the matters raised by the Respondent are relevant for the explanation of the delay and a consideration of whether the delay is inordinate and for a determination of an appropriate remedy, if in fact the delay is unreasonable.

[55.] Nor do I accept the Applicant's submission that this being a summary jurisdiction matter that it ought to determine in less than 5 years. The enquiry into delay is not a mere mathematical calculation. The evidence before is that this is a complex case. That was not refuted. Complexity of the case is a factor that this court ought to take into account. A complex prosecution is nonetheless complex whether it is pursued in the summary jurisdiction or not.

[56.] It is the Applicant's submission that he cannot be faulted for the unavailability of his co-accused counsel when he has always been ready to proceed. The Applicant also submitted that there has been no valid reason for the delay on part of the Respondents and that the Respondents had only recently tried to advance the trial subsequent to the current application on part of the Applicant to stay proceedings.

[57.] The evidence before me is that by letter dated the 27 April 2023, the Respondent requested that the matter be placed before another Magistrate and given a Case Management date so that the trial could proceed. At the date of hearing, no response had been received.

[58.] What has been unexplained is the failure to advance the matter with some urgency since the March 2021 date advanced by the Respondent as the relevant date for considering the delay, a proposition which I have rejected. The evidence before me is a letter from the Respondent going to the court, subsequent to the date of this current application – some 2 years after the learned Magistrate with carriage of the matter demitted office.

[59.] In the premises, the trial process commenced in 2017 and was brought to a halt by an Act of God in 2020. In 2021, the learned Magistrate with conduct of the matter demitted office. That is where matters seemed to rest until the Respondents were spurred into action by the filing of this suit.

[60.] As indicated before, in this case there were a myrid of reasons for the delay including the failure (and/or inability) of counsel for the Applicant and for the co-accused to appear or to find an early convenient date. There was the intervening global pandemic and subsequently, the magistrate demitted office.

[61.] While I bear in mind the complexity of the matter, the number of accused involved and the various causes of delay, some not attributable to either party, it seems to me that a 6-year trial process in a matter of this sort is unduly long.

[62.] In considering the jurisdiction and the context of the delay, it seems to me that more than a jurisdictional context is the inaction of the Respondents' in advancing the matter to trial. It may be that securing a fixture before another magistrate and coordinating the schedule of changing counsel have added to the burden of the Respondents and lengthened the time to trial.

[63.] However, all things considered, I find that the delay to date, of the filing of the application and the continuing delay up to the date of hearing, constitutes an unreasonable delay in this context.

Responsibility of the Applicant in asserting his rights

[64.] The Applicant asserted that he has shown up to every Court date inferring the dates to be those set for trial. The Respondent's answer is that the Applicant's appearance on some of the dates in question came about as a condition of bail and that, as such, he was mandated to be present.

[65.] The Applicant submits that the institution of this suit is an assertion of his right. To my mind, that is a misconstruction of the principle. The remedy sought in this suit is to stay the proceedings. There is no evidence before me of steps taken by the Applicant to advance his case to trial and to have the charges against him so resolved. On the other hand, the Respondent cannot rely on this as a justification for any failure to move the matter forward. It is they that have charged the Applicant.

Prejudice to the Applicant

[66.] One of the factors to be taken into account in considering delay is the prejudice to the accused. Given my finding on delay, it is also a factor to be taken into account in considering an appropriate remedy in this case.

[67.] The Applicant relies on the dicta in **Kinglsey Adderley v The Director of Public Prosecutions** SCCrApp No. 212 of 2018 as cited in **Seriozha Mckenzie v The Director of Public Prosecutions** 2011/VBI/213/2011:

> "The issue of prejudice is the most serious. In considering the effect of the prejudice the judge ought to have regard to the impact of the delay on the fairness of the trial…."

[68.] I find it worth repeating the formulation of prejudice as set out in **Bell v DPP**:

> Prejudice to the accused:
>
> "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense 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 defense 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" (p. 532).

[69.] The Applicant relies on the case of **Seriozha Mckenzie v The Director of Public Prosecutions** 2011/VBI/213/2011. In that case, the Applicants had been re-arraigned on 8 August 8 2011. At the time of the hearing of the application for constitutional declarations and a stay, 10 years had passed and the trial had not commenced. One of the co-accused had been killed and another had been incarcerated in Sandilands. The bail of the Third Applicant had been cancelled. The judge also noted potential difficulties with the evidence and the late provision of the transcript of the preliminary inquiry.

[70.] **Seriozha Mckenzie v The Director of Public Prosecutions** is distinctly different from the matter before me.

[71.] The Applicant submits that due to the delay in his trial, he is unable to see his children whom lives in Canada as his Electronic Travel Authorization visa has been cancelled as a result of this case. The Applicant further submitted that his children are unable to travel to The Bahamas and that at the commencement of this matter the Applicant travelled back and forth to Canada at his expense. The Respondents asserted that the Applicant and his family's relocation to Canada, was his decision and that it could not be considered as hardship caused by the Respondents.

[72.] I note that the Applicant averred by affidavit that "my family and I relocated to Canada in 2016". It seems to me that much hinges on this fact because the Applicant has had to incur travel expenses and loss of family life. He has also averred that because the matter against him has not been determined, his Electronic Travel Authorization to Canada has been cancelled. A letter dated 8 February 2023 has been exhibited in support of that allegation. I note that the Applicant made a positive averment that he and his family relocated to Canada in 2016. The cancellation of authorization to travel, which is consistent with authorization to visit, is, to my mind, incongruous with a positive averment that the Applicant relocated to Canada in 2016 (and has lived). There does not seem to be much store that can be placed on that averment.

[73.] The prejudice outlined by the Applicant do not touch and concern the element of a fair trial – even if one were to accept and construe the separation of family as anxiety and cause for concern. There is no positive evidence that the circumstances in which the Applicant has voluntarily placed himself will impact a fair trial.

An appropriate remedy

[74.] *Lord Bingham* in **A.G. reference (No. 2 of 2001)** had to consider the appropriateness of s remedy. His articulation of the principles involved were adopted and cited with approval in **Bell v Director of Public Prosecution and another.** Lord Bingham stated at paragraphs 24 to 25:

> [24] 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 art 6(1). For such breach there must be afforded such remedy as may be just and appropriate (s 8(1)) 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 be 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. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention

right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.

[25] The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by *Bennett v Horseferry Road Magistrates' Court* [1993] 3 LRC 94, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which *Darmalingum v State* [2000] 5 LRC 522 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (*Martin v Tauranga DC* [1995] 2 LRC 788 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear**.** Such cases will, however, be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right.'

[Emphasis added]

[75.] In this matter, the Applicant has sought a stay of the trial. This is resisted by the Respondents.

[76.] A remedy must be just and appropriate. I consider that the trial is en train. For me to find in favour of the relief sought, I would have to find that **(**a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant.

[77.] As a starting point, I return to the question of prejudice. I find that in this case, there is no prejudice that will adversely impact a fair trial. There is no assertion that the witnesses are unavailable. The evidence is that much of the case depends on documentary evidence. The relevance of this is that there is likely to be less reliance on the fading memories of witnesses. Documentary evidence over time is often more reliable than mere recall by a witness and is not subject to arbitrary change with the passage of time.

[78.] It appears that the Applicant in fact has not “relocated” to Canada and so travel to attend his trial is not a concern.

[79.] This is not an instance where the trial has not commenced such that the possibility of now commencing and concluding within a reasonable time is unlikely. A court must take into account the public interest that a person charged with criminal offences should be brought to trial. This especially so for what may be termed "serious offences". I consider fraud and money laundering offences to be serious offences. Permanent stays ought to be the exception rather than the rule.

[80.] It is usually the case that the greater the prejudice to a Defendant, the greater the assertion of his right to trial. In this case, the Defendant did not attend any fixture after March 2019. He now appears before this court on an application to stay the trial after a lapse of time during which neither party, it appears, sought to hasten the conclusion of this matter. On an examination of the application, the complaint is the lapse of time. There is nothing from the conduct of either party, or form the circumstances, that would cause this court to think that an ensuing trial would be unfair.

[81.] I bear in mind that the Applicant was not incarcerated over the period and, is not now incarcerated, which is a relevant consideration in the determination of an appropriate remedy. The Applicant will not have to suffer incarceration pending the determination of the charges.

[82.] I find that the Applicant can still have a fair hearing and that there is no before me that would cause it to be unfair to now try the Applicant.

[83.] In these circumstances, I refuse the Applicant's application for a permanent stay and will, instead, order that the trial take place within a set time frame, failing which the charges will be stayed.

Damages

[84.] The Applicant has applied for "such further and other relief. By submission, Counsel for the Applicant sought "damages against the Defendants for breach of the Plaintiff's constitutional rights".

[85.] The Applicant alleged, without more, that he spent some $50,000 travel costs from Canada to The Bahamas for attending his matter. Beyond the bare allegation in the affidavit, there is no evidence in support of that, or of any other, figure. What is more, the complaint is that his travel authorization to Canada has been cancelled pending outcome of this matter. The Affiant would need to explain how it is that he relocated to Canada but currently has no authorization (or right) to travel to his choice of relocation.

[86.] The cancellation of the Applicant's travel authorization is within the discretion of the relevant authority. The Applicant has produced correspondence which asks for information requiring a court record for previous offences and court decisions in relation to same. The Applicant avers that the incomplete trial is the reason for the cancellation of his travel authorization and that because he cannot travel to visit his family then damages should flow. There is no proof before me that an incomplete trial, and therefore no conviction recorded for the Applicant, is the cause of the Applicant's travel woes.

[87.] There is no cogent evidence to support the award of damages in that amount or of any special damages and I make none.

[88.] While I accept the proposition of Counsel for the Applicant that one ought to anticipate that trial of a summary jurisdiction offence would proceed expeditiously, I consider the nature of the offences and the factors in delaying the trial. I do think that some weight ought to be given to that period where it was not in the power of the Prosecution or the court to proceed with trials. I refer to the global pandemic. That was an unusual circumstance. I also consider the number of witnesses involved and the number of counsel involved and, therefore, the layer of difficulty that such circumstances add to managing the case. This is not to say that the case ought not to have proceeded faster. However, that is not the test.

[89.] I have also found that while the delay has been unreasonable, there is nothing before me which suggests that the Applicant cannot still receive a fair hearing. It is for that reason that I find that an appropriate remedy is to order that the trial proceed within a certain time frame. Therefore, while the delay is unreasonable it is not so egregious as to prejudice any ensuing trial or to warrant substantive damages. The Applicant was not incarcerated or being held behind bars pending trial.

[90.] To the extent that the Applicant's constitutional right has been breached, there ought to be an acknowledgement of that. It seems to me that no more than nominal damages are appropriate in this case as a public acknowledgement of the breach. Nominal damages are awarded in the sum of $1000.

Costs

[91.] The Applicant has been successful on his application. Costs follow the event. Costs of the Application are awarded to the Applicant.

Conclusion

[92.] For the foregoing reasons, I find that the delay up to the date of the filing of the application and the continuing delay up to the date of hearing, constitutes an unreasonable delay in this case.

[93.] I find that the Applicant's constitutional right under Article 20(1) has been breached.

[94.] I find that the Applicant will still be able to have a fair trial in this matter. A permanent stay is denied. This court will order that unless the trial takes place, and is concluded by December 30, 2025, then the charges against the Applicant are stayed.

[95.] No special damages are proven. No substantive damages are warranted. Damages for the recognition of the breach are awarded to the Applicant in the sum of $1000.

ORDER

[96.] The Order and directions of this Court are as follow:

a. It is DECLARED that Article 20(1) of the Constitution of The Commonwealth of The Bahamas which afforded the Applicant the right to a fair hearing within a reasonable time by an independent and impartial court established by law has been infringed.
b. It is ORDERED that unless the trial takes place and is concluded by December 30, 2025, then the charges against the Applicant are stayed.
c. Damages are awarded to the Applicant in the sum of $1000.
d. Costs of this Application are awarded to the Applicant to be fixed by a Registrar, if such costs are not agreed.

Dated this 21st Day February 2025

Carla D. Card-Stubbs

Justice