

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2003/0985

IN THE MATTER of the
Constitution of Saint Lucia
contained in the Saint Lucia
Constitution Order S.I. No. 1901
of 1978

AND

IN THE MATTER of an
application of **SHARMAN
ROSEMOND** (Person alleging
that certain provisions of said
Constitution to wit: section 1 (a)
(c); 3 (i) (e); 3 (3) (b); (3 (5); 5, 7
(1), 8 (1); 8 (2) (c) and 12 (i) and
(2) have been, are being or are
likely to be contravened in
relation to him) for redress in
accordance with section 16 (i) of
said Constitution

BETWEEN

SHARMAN ROSEMOND

Claimant

And

- (1) POLICE CONSTABLE CHARLES # 190
- (2) ATTORNEY GENERAL OF SAINT LUCIA (SUED
HEREIN BY CROWN PROCEEDINGS ORDINANCE

- CHAPTER 13 OF THE REVISED LAWS OF SAINT
LUCIA)
(3) THE DIRECTOR OF PUBLIC PROSECUTIONS
(4) HIS WORSHIP THE HONOURABLE MISTER HORACE
FRASER
(5) COMMISSIONER OF POLICE
(6) SUPERINTENDENT OF PRISONS

Defendants

Appearances:

Mr. Bryan Stephen for Claimant
Mr. Raulston Glasgow and Mr. Deale Lee for Defendant

2004: January 27
June 16

JUDGEMENT

Introduction

- [1] **EDWARDS J:** By Fixed Date Claim filed on the 31st December 2003 Mr. Sharman Rosemond who is presently incarcerated at the Bordelais Correctional Facility Claims the following:
- [1] A **DECLARATION** that the continued detention of the Claimant constitutes a breach of his constitutional right to be released pending the hearing and determination of the preliminary inquiry pursuant to Section 3 (5) of the Constitution.
- [2] A **DECLARATION** that Article 733 (1) of the Criminal Code does not operate so as to prevent a Judge of the High Court, the D.P.P or the Presiding Magistrate from releasing the Claimant only because he is charged with murder. Nor does the provision authorize a continued incarceration pending trial or matters preliminary to trial.
- [3] **AN ORDER** that the Claimant be released forthwith either unconditionally or upon reasonable conditions which may include bail.

- [4] **A DECLARATION** that the decision of the Learned Magistrate to remand the Claimant for a period in excess of 8 days constitutes a violation of the Claimant's constitutional right to the protection of the Law.
- [5] **A DECLARATION** that the failure of the D.P.P to prosecute the matter or to provide reasonable explanation for such failure constitutes a breach of the Claimant's right under the Constitution to a fair hearing within a reasonable time.
- [6] **A DECLARATION** that the failure of the prosecution to disclose to the Claimant material upon which they rely to prosecute him constitutes a breach of his rights to the protection of the Law and a violation of his rights to be provided with adequate facilities for the preparation of his defence.
- [7] **A DECLARATION** that the decision of the learned Magistrate to permit Mr. Marcus Foster to seek an adjournment and to address the Court were contrary to the Claimant's rights to a fair hearing by an independent and impartial tribunal established by Law.
- [8] **AN ORDER** that a Writ of Habeas Corpus be issued compelling the release of the Claimant.
- [9] **A DECLARATION** that the decision of the Superintendent of Prisons to place the Claimant in the Delta Division as opposed to placing him in the Gulf Division constitutes a violation of his fundamental right to the security of the person and the protection of the Law and the right not to be subjected to torture or to inhumane or degrading punishment or other treatment.
- [10] **A DECLARATION** that the Claimant's prolonged unlawful detention is inconsistent with and in contravention of the Claimant's freedom of movement guaranteed by the Constitution.
- [11] **A DECLARATION** that the searching of the Claimant's person amounts to a contravention of Claimant's right not to be subjected to the search of Claimant's person as provided for by the said Constitution.
- [12] **AN ORDER** that Police Constable Charles # 190 immediately disclose to Claimant the entire police docket in his possession.

Facts

- [2] Mr. Wilberforce Norville was murdered on the 9th November 2003.
- [3] On the 10th November 2003 Mr. Rosemond was arrested and charged with his Murder.
- [4] On the 14th November 2003 Mr. Rosemond was brought before Magistrate Horace Fraser at the Gros Islet Magistrate Court. He had no legal representation.

- [5] The Police Prosecutor was not ready to proceed with the hearing of the Preliminary Inquiry. The file had been sent to the D.P.P for advice. The Police Prosecutor also needed time to complete the preparation of the material gathered during the investigations for disclosure to Mr. Rosemond.
- [6] Counsel Mr. Marcus Foster who was in the process of requesting a fiat from the D.P.P was present. He informed the Court that he was awaiting the D.P.P's fiat to appear in the matter as Prosecutor.
- [7] The Police Prosecutor informed the Magistrate that he was not ready. The Magistrate adjourned the case to Monday 15th December 2003 without Mr. Rosemond's consent. Mr. Rosemond was remanded in custody.
- [8] I propose to deal with the issues raised from the claim, the evidence, submissions of Counsel and the Law under 3 headings. They are:
- A. The Right to Personal Liberty and Freedom of Movement (Declarations 1, 2, 10 and Order 3 and 8) (Paragraphs 9-89);
 - B. The Right to the Protection of Law and the Magistrate's Powers to Remand (Declarations 4, 5, 6, 7 and 12) (Paragraphs 90-125);
 - C. The Right to Protection from Inhuman Treatment and Arbitrary Search (Declarations 9 and 11) (Paragraphs 126-139).

A - Personal Liberty and Freedom of Movement

- [9] The Magistrate did not consider the question of bail at the time he remanded Mr. Rosemond on the 14th November 2003.
- [10] He had no power to do so. Article 733 (1) of the Criminal Code 1992 prohibits the Magistrate from doing this. It states that "A Magistrate shall not admit to bail any person charged with . . . Murder".
- [11] Mr. Rosemond contends through his Counsel Mr. Stephen that the Magistrate ought to have considered releasing him unconditionally or upon reasonable conditions excluding bail since the Constitution of St. Lucia mandates such a release.
- [12] Section 3 (5) of the Constitution provides :-

"If any person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him he shall be released unconditionally or upon reasonable conditions including. . .such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail so long as it is not excessive".

[13] Section 3 (3) (b) states:-

“ Any person who is arrested or detained –

(a). . .

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under law and who is not released, shall be brought before a Court without undue delay and in any case not later than seventy-two hours after such arrest or detention”.

[14] Mr. Stephen canvassed, that though Article 733 (c) of the Criminal Code purports to place restrictions on the release of a person charged with Murder, in effect it does not, since the Constitution provides for his unconditional release.

[15] Counsel canvassed further that where a Statute prohibits the granting of bail by the Magistrate, it merely removes from the hands of that authority bail as a condition for ensuring the release of the accused, leaving untouched the power to release unconditionally or upon conditions not including bail.

[16] That unless Parliament legislated to amend the Constitution so as to make bail the only condition upon which an accused person could be released pending trial, the Constitution operates to make bail a discretionary condition, and not the only *“reasonable condition”* for securing the attendance of the accused.

[17] Mr. Stephen questioned whether Parliament has the power to abrogate, abridge, infringe or authorize the abrogation, infringement or abuse of Mr. Rosemond’s rights.

[18] This cannot be so he argued, since there can be no implied amendment, and there is no legislation passed in accordance with Section 41 of the Constitution to amend Section 3 (5) of the Constitution.

[19] Section 41 (1) of the Constitution enacts that Parliament may alter any of the provisions of the Constitution in the manner specified in the following provisions of Section 41. Pursuant to Section 41 (2), the Fundamental Rights and Freedoms provisions under Chapter I in the Constitution may only be altered if $\frac{3}{4}$ of all elected members of the House of Assembly support the amendment and the Bill is approved on referendum by the majority of the voters.

[20] In the absence of any such amendment of Section 3 (5) of the Constitution, Mr. Stephen argued that the operative word in Section 3 (5) is **“RELEASE”**, so where the conditions for release are modified without altering the right to be released, then the release as of right stands to afford the accused a remedy.

[21] I hope that I have accurately stated the substance of Counsel’s wide ranging submissions so far.

[22] In his submissions, Mr. Stephen alluded to the precursory condition in Section 3 (5) of the Constitution, regarding the arrested person not being tried within a reasonable time, by arguing thus:-

At para 3.10 *“Upon careful examination, the Constitution mandates the release of an accused person by using the words “shall” and not “may” be released”. In doing so the liberty, fundamental right and the “reasonable time” protection guaranteed by the Constitution are buttressed”.*

At para 3.18 *“. . . [that] there is a right to a fair trial within a reasonable time is the underlying rationale for the mandatory release whether unconditionally or upon reasonable condition”.*

[23] Learned Counsel forcefully argued that release is an absolute right under the Constitution, and conditions to release are designed to impose obligations on accused persons. Murder he argued, is an offence for which an accused person should not be remanded in custody under the Constitution.

[24] I did not grasp from Mr. Stephen’s submissions that he appreciated fully that the presumption in favour of unconditional release or release upon reasonable conditions under the Constitution depends on facts which show the existence of unreasonable delay in commencing the trial of Mr. Rosemond. If he appreciates this, then it seems to me that he deliberately ignored this precursory condition in his attempt to formulate an ingenious argument.

[25] Counsel Mr. Glasgow countered, by focusing on this precursory condition in Section 3 (5) of the Constitution. Arguing that the right to release must be exercised in accordance with the terms of Section 3 (5), Mr. Glasgow emphasized the approach of the Privy Council to the interpretation of an identical provision in the Gambian Constitution: (**Attorney General of Gambia –vs- Jobe** [1984] 3 W.L.R. 174).

[26] The Privy Council had to determine whether Section 7 of the Gambian Special Criminal Court Act 1979 was in conflict with Section 15 (5) of the Constitution of Gambia (which is identical to Section 3 (5) of the Constitution of St. Lucia).

[27] Section 7 of the 1970 Act provided: “ (1) Any person who is brought to trial before the Court shall not be granted bail unless the Magistrate is satisfied that there are special circumstances warranting the grant of bail”.

[28] Section 7 (2) of this Act stated the amount and form in which bail should be ordered as a condition of release pending trial, where the Magistrate was satisfied that exceptional circumstances existed.

[29] Mr. Jobe was charged with stealing public funds and false accounting, and on being brought before the Magistrate of the Special Criminal Court established under the 1979 Act, he was remanded in custody pursuant to Section 7 of the Act.

- [30] Having considered the relevant provisions of the Gambia Constitution relating to remand in custody and release on bail, which were to be found in Section 15 of the Constitution, Lord Diplock declared: *"There is thus nothing in the Constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence provided that he is brought to trial within a reasonable time after he has been arrested."* Attorney General –vs- Jobe [1984] 3 W.L.R. at page 179 paragraph H.
- [31] However, in my opinion, the Law in Article 733 (c) of the St. Lucia Criminal Code does not impose a total prohibition on the release on bail of a person charged with Murder. It prohibits the Magistrate from granting bail in murder cases. It is a matter of jurisdiction.
- [32] As learned Counsel Mr. Glasgow argued, and I agree with him, where Magistrates refuse bail, the usual approach should be to apply to a Judge in Chambers for bail. Article 737 of the Criminal Code States that. . . *"whenever a prisoner considers himself aggrieved by the refusal of the Magistrate to admit him to bail. . .it shall be competent to such prisoner to apply to the Supreme Court, or the Judge thereof, who shall make such order thereon after hearing from the Magistrate as to it or him, in the circumstances of the case, shall seem just"*.
- [33] PART 58 of the Eastern Caribbean Civil Procedure Rules 2000 deals with applications to the High Court to review a decision by a Magistrate about bail.
- [34] The door to bail is not shut for an accused charged with Murder. In my opinion, where there is no unreasonable delay in bringing an accused to trial, the High Court has jurisdiction to consider bail since the Criminal Code or any other Law in St. Lucia does not prohibit this.
- [35] The High Court has always had this power at Common Law. Counsel Mr. Stephen referred to the case R –vs- Spillsbury as authority for saying this: ([1898] 2 QB. 615).
- [36] In the Spillsbury case Lord Russel C.J. at page 620 of his Judgment stated that *"The Court of King's Bench or any Judge thereof. . . in the plenitude of that power which they enjoy at Common Law, may, in their discretion, admit persons to bail in all cases whatsoever, though committed by justice of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the only exception to their discretionary authority is, where the commitment is for contempt, or in execution. Thus they may bail for high treason, murder, manslaughter, forgery, rapes. . .and for all felonies and offences whatever"*.
- [37] Article 736 of the Criminal Code has not only enacted this Common Law, but it has expanded the category of authorities who can grant bail for murder. It states that *"The Supreme Court, or the Judge, or the Director of Public Prosecution may at any time order any person charged with any indictable offence to be admitted to bail"*.

- [39] Furthermore, as Mr. Glasgow rightly argued, since it is the Constitution which provides for unconditional release or release upon reasonable conditions where the accused is not tried within a reasonable time, the Magistrate has no jurisdiction to decide whether an accused person charged with murder should be so released.
- [40] This is so because Section 16 of the Constitution has vested the High Court with Original jurisdiction to hear and determine any application made by a person who claims that his right to personal liberty and or freedom of movement has been, is being or is likely to be contravened.
- [41] It seems to me therefore that there are 2 fallacies behind learned Counsel Mr. Stephen's arguments. The first fallacy is his assumption that the Magistrate has jurisdiction to release Mr. Rosemond unconditionally or upon reasonable conditions excluding bail. His second fallacy is to treat Article 733 (c) as a provision which restricts the release of a person charged with murder, when all it does is limit the jurisdiction of a Magistrate in such matters.
- [42] It is trite law that the Magistrate is a creature of Statute and the jurisdiction of the Magistrate must be contained in Statute.
- [43] It is interesting to note that the Magistrate in effect, does have jurisdiction to release persons charged with summary offences unconditionally or upon reasonable conditions, apart from granting them bail. Article 1068 of the Criminal Code provides for the Magistrate on adjourning complaints to "*suffer the defendant to go at large*" or "*commit him to prison or to such safe custody as the Courts thinks fit*", or "*discharge him upon his entering into a recognizance. . .conditioned for his appearance at the time and place to which such hearing or further hearing is adjourned*".
- [44] Article 1069 provides – "*The Court, may in any case where it shall judge it expedient, and whether or not the accused is in custody, instead of fixing bail, appoint the accused to attend at any Adjourned sitting under a penalty not exceeding two hundred and fifty dollars, in case he shall fail to appear*".
- [45] Mr. Rosemond is seeking an Order that he be released forthwith either unconditionally or upon reasonable conditions which may include bail. I shall therefore now move on to consider the factors that I should take into account under the Constitution.
- [46] It is clear to me that Section 3 (5) of the Constitution comes into operation only where Mr. Rosemond is not tried within a reasonable time. At the time of filing this Administrative action Mr. Rosemond had been in custody for 1 month and 20 days.
- [47] The question therefore for determination is whether 1 month and 20 days delay constitutes unreasonable delay under Section 3 (5) of the Constitution. What is a reasonable time between arrest and trial must depend upon the circumstances of each case.

- [48] Learned Counsel Mr. Glasgow relied on 4 decisions in advancing his submissions that there has been no unreasonable delay in the circumstances: (1.- Attorney General v Jobe [1984] 3 WLR 174; 2.- Sandiford v D.P.P. [1979] 28 W.I.R. 152; 3.- Bell v D.P.P. and Another [1986] L.R.C. (Const) 392; 4.- Flowers v D.P.P. [2000] 1 W.L.R. 2396).
- [49] In the 3rd and 4th cases, the Privy Council approved the approach applied by Courts in the U.S.A. when determining whether the 6th Amendment to the American Constitution has been infringed. The 6th Amendment guarantees the right to a speedy and public trial by an impartial jury. This approach is reflected in the Judgments of the Supreme Court of the U.S.A. in Barker v Wingo (1972) 407 U.S. 514.
- [50] From the Judgment of Powell J. the Privy Council extracted a number of factors to be taken into account when considering the issue of the accused's Constitutional Right to a fair hearing within a reasonable time: (Flowers v D.P.P. [2000] 1 W.L.R. 2396 at pages 2410 to 2412)
- [51] The factors include (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of or failure to assert his right to (speedy trial) a fair hearing with a reasonable time, and (4) the prejudice to the Accused which is to be assessed in light of the interests that the guaranteed right was designed to protect.
- [52] Regarding the Prejudice to the accused, the guaranteed right was designed to protect 3 interests–
- (a) To prevent oppressive pretrial incarceration,
 - (b) To minimize the accused's anxiety and concern, and
 - (c) To limit the possibility that the defence will be impaired.
- [53] The most serious of the interests that the guaranteed right seeks to protect is the third interest (c). It is paramount because " *the inability of a defendant adequately to prepare his case skews the fairness of the entire system. 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*": (Powell J in Barker v Wingo Supra).
- [54] The Prison Conditions under which the Accused is incarcerated is a relevant consideration when determining whether the Accused is suffering prejudice. This affects his suffering and anxiety: (Flowers v D.P.P. [2000] 1 W.L.R 2396 at page 2412 paragraph B to F).
- [55] Mr. Rosemond has deponed that he has been placed in the Delta Division instead of the Gulf Division at Bordelais. He stated that he has been denied the privileges of recreation, has only "1 hour airing per day", and he is housed with dangerous and seasoned criminals with horrific behaviour.
- [56] The fact that a Claimant has not led evidence of specific prejudice does not mean that the possibility of prejudice should be wholly discounted. The Court may be satisfied that the guaranteed rights of an accused has been infringed even though he is unable to point to any specific prejudice: (Per Lord Templeman in Bell v D.P.P. [1986] L.R.C. (Const) 392).

- [57] Before embarking on an inquiry into the factors mentioned at paragraph 51 of this Judgment, I am enjoined to first determine whether the delay is "*presumptively prejudicial*". Powell J in Barker v Wingo stated that "*The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into other factors that go into the balance*": (Approved and Reproduced in the Judgment of Lord Hutton in Flowers v D.P.P. [2000] 1 W.L.R 2396 at page 2410 paragraph G to H).
- [58] "*The right of a speedy trial [or the right to a fair hearing within a reasonable time] is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice*": (Powell J in Barker v Wingo, 407 U.S. 514, 522 approved in Flowers v D.P.P. [2000] 1 W.L.R at page 2413).
- [59] In Flowers v D.P.P. (Supra) the Privy Council had to consider the ground of appeal relating to the long delay of 6 years between the date on which Flowers was charged with Murder on the 6th April 1991, and the date of the commencement of his third trial on 13th January 1997, under Section 20 (1) of the Jamaican Constitution which guarantees the right to a fair hearing within a reasonable time. The Privy Council substantially discounted the possibility of prejudice to the defence from the 6 years period of delay, and took into account the fact that Flowers had been proved on strong evidence to be guilty of murder in the course of a robbery, a prevalent offence, posing serious threats to the lives of innocent people in Jamaica. The conviction of Flowers was not quashed because of the delay, having regard to the other relevant factors.
- [60] In considering whether a reasonable time has elapsed, I should also take into account the past and current problems which affect the Administration of Justice in St. Lucia: (Per Lord Templeman in Bell v D.P.P. [1988] LRC (Const.) at page 398).
- [61] I am exhorted to balance the fundamental right of Mr. Rosemond to a 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 St. Lucia: (Per Lord Templeman in Bell v D.P.P. supra at page 401 to 402).
- [62] I should "*seek to prevent exploitation of the right conferred by the Constitution and to weigh the rights of the accused [Mr. Rosemond] to be freed, against the public interest, in ensuring that the trial should only take place when the guilt or innocence of the accused [Mr. Rosemond] can fairly be established by all the relevant evidence*": (Per Lord Templeman in Bell v D.P.P. supra at page 402 paragraph g to i).
- [63] The Public Interest is also an important consideration when determining whether Mr. Rosemond's right to freedom of movement has been abrogated and whether or not he should be granted bail.

[64] Though Section 12 (1) of the Constitution guarantees that a person shall not be deprived of his freedom of movement throughout St. Lucia, Section 12 (2) states that where the person is lawfully detained, this is not an infringement of the person's right to freedom of movement.

[65] Section 12 (3) provides:-

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(c) for the imposition of restrictions, by order of a court, on the movement ... of any person ... for the purpose of ensuring that he appears before a court at a later date for trial of ... a criminal offence or for proceedings preliminary to trial ...

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society".

[66] The fact that there has been procedural irregularities concerning his remand, and an acknowledged contravention of Mr. Rosemond's Constitutional Right to be brought before a Court within 72 hours of his arrest, pursuant to Section 3 (3) of the Constitution, this does not make his detention unlawful in my view.

[67] Section 1 of the Constitution which is a preamble and declaratory provision, declares that the guaranteed rights and freedoms, including the right to personal liberty and the right to freedom of movement, are *"subject to the respect for rights and freedoms of others and for the public interest ..."*

[68] There is no statutory criteria for granting bail in St. Lucia, though the Court has a discretion to refuse bail.

[69] However, as I understand it, the Courts apply the criteria set by the Bail Act 1976 U.K. when considering Bail.

[70] For imprisonable offences including murder, the criteria include whether there are substantial grounds for believing that **(a) the accused if released would fail to surrender to custody, (b) he would commit an offence if released, (c) he would interfere with witnesses or otherwise obstruct the course of Justice, and (d) he will not make himself available for the purpose of enabling inquiries for a report to be made to assist the Court in dealing with the offence.**

[71] If potential prosecution witnesses have received threats and are known to the accused and could easily be contacted by him if he were released, this is a good cause for denying release on bail.

[72] The Court has to take into account the nature and seriousness of the offence, and the probable method of dealing with the accused for it.

- [73] The Character antecedents association and community ties of the accused, his record for having answered bail in the past if any, and the strength of the evidence against him are all important considerations for granting bail to an accused charged with Murder.
- [74] The more serious the offence, the more likely a severe sentence will be imposed as punishment. This forms the basis for any belief that the accused will be tempted to abscond rather than run the risk of being convicted or sentenced.
- [75] In my opinion the above stated criteria are all very important considerations for any Court or the Director of Public Prosecutions in deciding the matter of bail for Mr. Rosemond.
- [76] I remind myself of the approach I should have when interpreting the Constitution. I have borne in mind that "***A Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction***": (Per Lord Diplock in **Attorney General v Jobe** [1984] 3 W.L.R 174 at page 183).
- [77] The Affidavit of Crown Counsel Mr. Leslie Mondesir sworn to and filed on the 12th January 2004 has explained that in his experience, given the seriousness of the offence for which Mr. Rosemond has been charged, the manner of commission, and the limited police resources available, it is not unusual for the police investigation to exceed one month.
- [78] At the hearing of this Claim on the 27th January 2004, the Court was informed that the case was then ready for the Preliminary Inquiry Hearing to commence on the 30th January 2004, and that disclosure to Mr. Rosemond had taken place.
- [79] In deciding whether there has been unreasonable delay, I have taken into account the burdens imposed on the Courts, the Director of Public Prosecution's workload and dire shortage of Crown Counsel, the lack of adequate scientific and other resources to assist the Police in their investigations and in solving crimes, and the weight of the large volume of Criminal cases among other things.
- [80] However; in applying the law discussed to Mr. Rosemond's circumstances, I find that 1 month and 20 days is not a period of delay to justify an inference of prejudice. It is not a period of delay that would operate as a "*triggering mechanism*". It is not a "*presumptively prejudicial*" delay.
- [81] Applying the approach of Powell J, stated at paragraph 57 of this Judgment, in my view there is no need to state any further findings regarding the factors mentioned at paragraph 51 of this Judgment.
- [82] In **Attorney General v Jobe** Lord Diplock, speaking of Section 15 (5) of the Gambian Constitution (which is identical to Section 3 (5) of the St. Lucia Constitution) had this to say—
"Section 15 (5) of the Constitution does not come into operation unless the person who has been arrested upon reasonable suspicion is not tried within a reasonable time ..." ([1984] 3 W.L.R 174 at page 180 paragraph E)

- [83] Consequently I conclude that Section 3 (5) of the St. Lucia Constitution cannot come into operation since Mr. Rosemond who is charged with Murder has not been awaiting his trial, including the Preliminary Inquiry hearing, for an unreasonable time. Acknowledging further that the unfortunate delay in delivering this Judgment may have contributed to a further delay in the commencement of the Preliminary Inquiry, which may have increased Mr. Rosemond's anxiety and concern, nevertheless in the absence of any evidence as to prejudice he may have suffered from this; a 6 months period of delay is not unreasonable delay in all the relevant circumstances in my opinion.
- [84] Regarding Mr. Rosemond's right to freedom of movement, based on Section 12 (3) (c) of the Constitution, in my judgment, it is reasonably justifiable for Mr. Rosemond to be remanded in custody for now, for the purpose of ensuring that he appears before the Court for the Preliminary Inquiry and at a later date for trial if he is committed to stand his trial, having regard to the general public's welfare and safety and the nature of the crime.
- [85] The discretion of the Court to grant bail in Murder cases must be exercised responsibly. This is a very serious crime and it is in the public interest that a person alleged to have committed such a crime, and whose guilt may be proved, should be available to stand trial within a reasonable time.
- [86] Where there is substantial grounds for believing that Mr. Rosemond would abscond and not attend Court for the Preliminary Inquiry and Trial within a reasonable time, this alone is sufficient cause for refusing him bail. Let me hasten to state however that there is no evidence before me, for me to consider whether or not he should be bailed. I therefore make no pronouncements on this.
- [87] In the circumstances therefore the Declaration sought at paragraph 1 and 10 and the Orders Requested at paragraphs 3 and 8 of the Claim are refused.
- [88] Regarding the Declaration sought at paragraph 2, the Court declares that Article 733 (c) of the Criminal Code does not operate so as to prevent a Judge of the High Court or the D.P.P. from considering bail for the accused who is charged with Murder. This provision does not authorize a continued incarceration pending trial or matters preliminary to trial.
- [89] I move on now to consider the issues under the second heading.

B – Protection of Law and Magistrate's Powers to Remand

- [90] There is no debate that Mr. Rosemond was remanded in custody on the 14th November; and that the Preliminary Inquiry was adjourned to the 15th December, 2003 without Mr. Rosemond's consent.
- [91] Mr. Rosemond alleges that he never saw a Magistrate every 8 days during this period.

- [92] I have read the Affidavits of Magistrate Horace Fraser who was the presiding Magistrate on the 14th November, 2003, Senior Magistrate Floreta Nicholas and Magistrate Harold Gayle.
- [93] Magistrate Fraser was of the view that the Consent of Mr. Rosemond was not necessary for his remand in custody over 8 days since Article 750 (1) of the Criminal Code allows the Magistrate to adjourn the hearing and remand the accused among other things.
- [94] Counsel Mr. Stephen contended that in those circumstances the Magistrate exceeded the Statutory limit within which Mr. Rosemond should have been remanded which is 8 days under Article 750 (1) (a) of the Criminal Code.
- [95] It is necessary therefore to quote this Article: –

“750 (1) ... the Magistrate holding a preliminary inquiry may in his discretion,-

(a) adjourn the hearing of the case from time to time ... if, from the absence of a witness, the inability of a witness who is too ill to attend at the place where the Magistrate usually sits, or any other reasonable cause, it appears desirable so to do, and may remand the accused if required. But, unless the person remanded and the prosecutor consent, no such remand shall be for more than eight days, the day following that on which the remand is made being counted as the first day;”

- [96] It seems very clear to me that the Magistrate contravened Article 750 (1) (a) and committed an illegality by remanding Mr. Rosemond for a period in excess of 8 days without his consent. However, this is a Constitutional motion and not a claim for Judicial Review. Mr. Rosemond has to show how this noncompliance with the procedure stated in Article 750 (1) (a) affected his constitutional right, and how he was prejudiced: (Sinan v The State [1992] 44 WIR 359 PER BERNARD C.J. at page 375).
- [97] There seems to be some confusion among Magistrates as to whether it is necessary to bring the accused in custody every 8 days before a Magistrate.
- [98] My answer is yes, it is necessary to do this because the power to remand is a power to commit the Accused person to custody to be brought before the Court at the end of the period of remand, or at some earlier period as the Court may require.
- [99] Article 716 provides that where the accused person who is remanded is unable to appear personally before the Court, because of illness or accident the Court may in his absence order him to be further remanded.
- [100] Article 717 states that *“Whenever the Court is unable to sit the proper officer of the Court may remand the accused for such time as may be directed or necessary”*.

- [101] The "*proper officer*" under Article 7 is defined to include the Registrar, Clerk of the District Court, or other officers or persons appointed or deputed to perform any particular act or duty.
- [102] That act or duty to remand involves seeing the accused every 8 days unless he is ill or has an accident.
- [103] Article 741 (2) states that where the Magistrate postpones the preliminary inquiry and remands the accused for more than 3 days, such remand shall be by warrant.
- [104] The Magistrates should not regard their statutory duty as merely an administrative duty, it is not. The law contemplates that the Magistrate or proper officer will see the accused every 8 days to inquire into his welfare while he is in custody and to make sure that there is an avenue open for him to complain about any abuse or concern he has.
- [105] In the event circumstances have changed since the last remand date, the Magistrate or proper officer may become aware of it, and can address it in a timely manner only where he sees the accused every 8 days. This is of paramount importance to the accused person, particularly where there is a long period of adjournment before the next scheduled Court date.
- [106] The consent of the accused should be obtained where the matter is adjourned for a period over 8 days. It is a good practice to note on the Complaint and on the Remand Warrant that the accused consented or has withheld his consent to the adjournment in excess of 8 days.
- [107] Regardless of whether or not he has consented, he should be brought before a Magistrate or proper officer every 8 days or before 8 days have expired.
- [108] The current practice obtaining is for a Magistrate to go to Bordelais every 8 days to remand persons in custody. This is a good practice. I wish to emphasize that where a Magistrate is unable to go to Bordelais, then the "*proper officer*" should go so as to ensure compliance with the law.
- [109] I hope that these guidelines will assist Magistrates in future and that they will adhere to them.
- [110] Counsel Mr. Stephen has argued that the Magistrate adjourned the preliminary inquiry and remanded Mr. Rosemond without informing him of his right to apply to a judge in Chambers for bail; and that this is an illegal adjournment.
- [111] While there is no statutory obligation under the Criminal Code or the Constitution for a Magistrate to do this, in my opinion it is a good practice which commends itself. This is required by Statute in England and it is a practice worth adopting. The Magistrate can inform the accused person remanded in custody of his entitlement to apply to the High Court for bail in keeping with Article 737 of the Criminal Code (which is reproduced at paragraph 32 of this Judgment).

- [112] As to what effect the Magistrate's procedural illegality has on the present remand status of Mr. Rosemond, in my opinion that illegality has been cured by the subsequent further remands made by a Magistrate in full compliance with the law. Mr. Rosemond was in lawful custody on the 27th January, 2004 when I heard this claim.
- [113] None of the provisions under Section 8 of the Constitution, dealing with the right to the protection of law apply to the present issue in my opinion. Neither has Mr. Rosemond demonstrated how he has been prejudiced by it.
- [114] Consequently I refuse to make a Declaration in terms of the Declaration at paragraph 4 of the Claim.
- [115] In light of the testimony in the Affidavits of Crown Counsel Mr. Mondesir and Magistrate Horace Fraser, it seems clear to me that the allegations that the Magistrate permitted Mr. Marcus Foster to seek an adjournment have no merit. I therefore refuse to make the Declaration sought in paragraph 7 of the Claim.
- [116] Crown Counsel Mr. Mondesir and Magistrate Fraser explained in their Affidavits the reason why the preliminary inquiry was adjourned on the 15th November, 2003. I have already concluded that there was no unreasonable delay by the Prosecution to prosecute the matter. I therefore deny the Declaration sought at paragraph 5 of the Claim.
- [117] Concerning the allegations of Non-disclosure and the Declarations at paragraph 6 and 12 of the Claim, Section 8 (2) (c) and (e) of the Constitution encompasses Mr. Rosemond's right to have all of the Witness Statements and other material gathered by the Police while investigating the Murder case.
- [118] Section 8 (2) (c) and (e) state that "*Every person who is charged with a criminal offence –*
(c) *shall be given adequate time and facilities for the preparation of his defence;*
(e) *shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the Court on the same conditions as these approximating to witnesses called by the prosecution;*"
- [119] I do not consider it necessary to mention or review the numerous cases decided on Disclosure that both Counsel referred to and relied on in their able submissions. Suffice it to say that in my opinion the law is now settled that Mr. Rosemond is entitled to such materials that are in the possession of the Police.
- [120] However, the rights of Mr. Rosemond have to be balanced with the public interest in my view. I consider the demands for instant disclosure unreasonable, given the nature of the crime, the limited facilities available to the police to comply with this demand, and

the investigating process normally used by the police in collecting witness statements and other necessary and relevant material to prosecute the case against Mr. Rosemond. It is in the public interest that the police are accorded sufficient time to complete their investigation and prepare a file.

[121] In addition to this, the Police are required to submit the completed file to the Director of Public Prosecutions. I see nothing wrong with the disclosure being carried out after the file has been collated, rather than doing the disclosure in a piecemeal fashion. In any event disclosure is a continuing duty.

[122] For all these reasons therefore in my opinion a delay in excess of 1 month and 20 days for Disclosure was not unreasonable.

[123] In the circumstances, I find no merit in the complaint, particularly when at the date of the hearing of this claim the Court was informed that full disclosure had taken place. I refuse to make the Declarations sought at paragraph 6 and 12 of the Claim.

[124] I finally move on to consider the issues under the third heading relating to Declarations 9 and 11.

C-The Right to Protection from Inhuman Treatment and Arbitrary Search

[125] In addition to Mr. Rosemond's complaint mentioned at paragraph 55 of this Judgment, he alleges that he was subjected to the searching of his person both at the Gros Islet Police Station and at Bordelais.

[126] The Deputy Director of the Bordelais Correctional Facility Mr. Augustus Small deponed in his Affidavit, explaining why it was necessary to place Mr. Rosemond in the Delta Division of the Prison.

[127] Mr. Small testified that Mr. Rosemond was placed in the Delta Division for his own safety, given the circumstances surrounding the death of Burt Norville was widely covered by the media. In such circumstances it was deemed prudent to seek to protect Mr. Rosemond from possible revenge attacks from other inmates. So he was placed in a single occupancy cell in the Delta Division for his own safety.

[128] Section 5 of the Constitution states that "*No person shall be subjected to torture or to inhuman or degrading punishment or other treatment*".

[129] Section 7 (1) of the Constitution states that "*Except with his own consent, a person shall not be subjected to the search of his person ...*".

[130] Section 7 (2) states –

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) that is reasonably required in the interest of defence, public safety, ..

(b) that is reasonably required for the purpose of protecting the rights and freedoms of other persons."

[131] It is clear to me that Mr. Rosemond does not fall within any of the classes of inmates that Section 28 of The Correctional Services Act 2003 requires to be assigned to specific sections in the Bordelais Prison.

[132] There is a decided case from St. Lucia on Section 5 of the Constitution of St. Lucia. Our Court of Appeal **HELD** that punishment or treatment which was not deliberate, and not intended to cause great pain and suffering, or which does not result in the deprivation of the necessities of life, does not amount to cruel and unusual punishment under Section 5 of the Constitution: (Harding v Superintendent of Prisons and the Attorney General) (St. Lucia Civil Appeal No. 13 of 2000 at page 10).

[133] Mr. Rosemond has not discharged his burden of proving that the Prison Authority, through its officers intended to punish him, and that they acted in bad faith, were arrogant and vindictive, and were being deliberately cruel to him.

[134] I find that his complaint has no merit. I therefore will not make the Declaration sought at paragraph 9 of the Claim.

[135] Regarding the right to protection from arbitrary search, Section 697 (1) of the Criminal Code states that *"Whenever any person is arrested by the police officer. . .under the provisions of the Criminal Code, the officer making the arrest may search and place in safe custody all articles other than necessary wearing apparel found on him"*.

[136] Section 12 of The Correctional Services Act provides that Correctional officers while on duty have the power, authority, protection and privileges of Police officers. This includes the power to search persons.

[137] These Statutory provisions are reasonably required in the interest of public safety and protecting the rights and freedoms of other persons.

[138] I therefore find that there has been no violation of Mr. Rosemond's constitutional rights. I refuse to make the Declaration sought at paragraph 11 of the Claim.

Conclusion

[139] All of the Declarations and Orders claimed except for the Declaration at paragraph 2 of the Claim are refused.

[140] **THE COURT HEREBY DECLARES** that Article 733 (1) of the Criminal Code does not operate so as to prevent a Judge of the High Court or the Director of Public Prosecutions from releasing Mr. Rosemond on bail only because he is charged with murder. Nor does the provision authorize a continued incarceration pending trial or matters preliminary to trial.

[141] I wish to commend both Counsel for their scholarly industry and research in presenting their submissions with copious authorities to the Court. Most of their authorities were useful, though not reflected in this Judgment.

[142] There will be no order made as to costs.

.....
OLA MAE EDWARDS
High Court Judge

Dated this 16th day of June, 2004