THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2007/0423

IN THE MATTER OF AN APPLICATION FOR AN ADMINISTRATIVE ORDER

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 18 OF THE ANTIGUA AND BARBUDA CONSTITUTION ORDER 1981

BETWEEN:

CARLTON BEDMINISTER
CAREEM BEDMINISTER

Claimants

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS
THE ATTORNEY GENERAL

Defendants

Appearances:
Mr. Hugh Marshall and Mrs. Cherissa Roberts-Thomas for the Claimants
Mr. Anthony Armstrong and Ms. Bridgette Nelson for the Defendants

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2008: April 21 May 07
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JUDGMENT

[1] **Harris J:** This is a claim for certain Administrative Orders pursuant to Part 56.7 of the Civil Procedure Rules 2000 (CPR 2000). The applicants apply for the criminal charges laid against them on the 21st October 2005 and the 30th day of January, 2007 to be "quashed stayed or otherwise set aside for reason of the contravention of the applicants fundamental human rights as provided for by section 15 of the Constitutional Orders of Antigua and

Barbuda in that the Respondent has unduly delayed in the prosecution of the aforesaid offences against the Applicants."

[2] The applicants apply further, for a stay of proceeding pending the hearing of this application; that they be compensated for the contravention of their rights; and that the several criminal charges laid against the applicants be dismissed.

[3] The applicants filed a joint affidavit in support of their fixed date claim form together with various exhibits.

[4] At this time, the Director of Public Prosecutions was the lone named Defendant and filed an affidavit in reply and a Supplemental Affidavit thereto (25/1/08). An affidavit by Adlai Smith in reply, was also filed in February 2008 (Feb 4/08).

[5] The Attorney General was joined as a party in this matter by Court Order of 18th January, 2008.

[6] By order of the Court, directions were given in the matter including that the affidavits were to be treated as evidence in chief.

[7] On the 9th day of October 2007 at the hearing counsel for the applicants indicated to the Presiding Magistrate his intention to make a no case submission in relation to the charge before that court. The court directed that he make his submission in writing. The submission was subsequently considered and determined on the 12th November, 2008.

[8] On the 12th day of November, 2007 by way of a paper committal the two applicants were committed to stand Trial in the January 2008 Criminal Assizes where they were subsequently tried convicted and sentenced.

[9] At the High Court civil trial on the 21st day of April, 2008, Counsel for the Claimant rested his case on the filed affidavits and written submissions. Both counsel for the 1st and 2nd Defendants respectively relied on their Affidavits filed in the matter together with their filed written submissions .The court called upon counsel for brief oral submissions.

[10] Some two (2) years and four (4) months had elapsed between the commission of the offence and trial. The present application is now being considered after the trial, conviction and sentence of the claimants herein.

[11] The only claim left to be considered now is for an order that the Claimants be "given compensation for the contravention of their rights under the constitution" (see fixed date claim form) the other issues now moot.

[12] Before I can consider the remaining claim of the applicants for compensation for breach of their rights under the constitution, it must be established that there has been a breach of those rights in the first place. The applicants claim that their right to a trial within a reasonable time under S.15 of the Constitution of Antigua and Barbuda has been breached.

[13] I set out the relevant subsection of the constitution here for convenience:

> **"S.15 (1) If any person is charged with a criminal offence then, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."**

[14] In support of the case for the Claimants and that of the two defendants, several authorities have been submitted to the court in the written submissions. At trial the following cases were referred to in argument; Bell v Director of Public Prosecution and Another[1], Flowers (Alfred) v R[2] , Nazereus Andrew v The Attorney General[3] , HM Advocate and Another v R.[4]

[1] (1980) 32 WIR 317 PC
[2] [2000] 1 W.L.R. 2396
[3] Claim No. SLUHCV2005/0090 (High Court of St. Lucia.) – Shanks J.
[4] [2003] 2 W.L.R. 317

[15] It is not in dispute that some two (2) years and four (4) months has elapsed between the commission of the offence and Trial of the applicants.

[16] Counsel for the Claimants submits that the 2 years 4 months is an undue delay and that further, the applicants need not prove prejudice by this delay in order to establish their right to a remedy.

[17] Counsel submits further that undue delay is a separate consideration than; whether the applicants were afforded a fair hearing.

[18] The starting point in determining whether there has been an undue delay and if so what remedy applies is, as I see it , with the four (4) factors adopted by Lord Templeman in the Privy Council case of ***Bell*** v DPP[1] .

[19] The ***first* factor** to be considered is the length of the delay. The length of the delay considered improper is peculiar to the circumstances of the particular case. The *Bell* case goes further and says that "unless there is some delay which is *presumptively prejudicial* there is no necessity for enquiring into the other factors that go into the balance. The matter ends right there. For this reason[2] and those given below this is the fate of the claimants claim in the case at bar.

[20] Counsel for the applicants relying on and accepting the estimation of Olivetti J. in the case of Dwayne Samuel, Jamal Browne, Timothy Henry v Director of Public Prosecutions that in 2004 in Antigua and Barbuda the period of two (2) years is the average time it would take for a case to come to trial from the commission of the offence, argued that the 2 years and 4 months that the case, the subject of these proceedings took, exceeded the average period and the applicants are entitled to a remedy. The learned Director of Public Prosecutions and Counsel for the Attorney General in effect submit that the 2 years 4 months is within the reasonable time contemplated by the constitution, and in any event is

[1] [1985] A.C. 937
[2] The absence of presumptive prejudice.

sufficiently proximate to the two year 'average' period referred to by Olivetti J. The Defendants submit that the two year trial period referred to is not fixed and varies depending on the circumstances[1] of each case and in this case, the 2yrs. 4mnths period does not amount to an undue delay.

[21] The **second factor** to be considered (in determining undue delay) is that of; the "*reasons given by the prosecution to justify the delay*". I take this '*delay*' to refer to the passage of time beyond the time that in a normal course of things, a matter would come to trial. In this case counsel for the applicant in his oral submissions before the court accepted that such *delay* was the 4 months over and above the 'average' time of two (2) years that he submits it takes to bring a criminal matter to trial from the commission of the offence.

[22] Whatever that delay might be calculated to be, the Defendants argue that there is firstly, no undue delay in this case and secondly, that in any event there were good reasons for the passage of time which included the Presiding Magistrate being out of state, for good reason, for a period of time in 2006-2007. Further, submit the Defendants, the High Court of Justice in Antigua and Barbuda delivered a Judgment in February 2007 declaring that the legislation creating the "Paper Committal Procedure", a procedure which was utilized in the subject case, was unconstitutional. The decision from the Court of Appeal overruling that decision of the High Court was not heard and delivered until the Court of Appeal's usual itinerant sitting in Antigua and Barbuda four (4) months later, in July of that year. Thereafter submits the D.P.P, the matter moved ahead apace, until October 9th 2007 when counsel for the applicants indicated to the Presiding Magistrate that he intended to make a submission before the said magistrate with a view to staying the proceedings, thereby delaying the matter. The evidence is that the Magistrate directed that the submissions of both the Defendant/Claimant and the prosecution be reduced to writing and submitted to the Court. The Claimant's/Defendant's application was determined at the next adjournment date in November 2007, when the claimants/Defendants were committed by the Magistrate to stand trial at the very next criminal assizes commencing January 2008.

[1] See Flowers v R at pp 328 per Lord Hutton.

[23] The **third factor** to be considered is the responsibility of the accused for asserting his rights. The Defendants argue that the applicants did not assert their claim of 'delay' before the Magistrates Court prior to Oct-Nov of 2007 and did not take the point at their trial at the assizes in 2008. In this case counsel for the claimants no doubt took the view that taking such a point was pointless, it already being before this Court as a constitutional matter.

[24] The **fourth factor** is that of prejudice to the accused. In this case the applicants at paragraph 7 and 22 of their joint affidavit in support of their Fixed Date Claim , say that the "…inordinate delay has lead to a fading away of memories as to the facts pertaining to the incidents leading to and on the day in question…" No details of the loss of memory have been provided, difficult as this may be to provide, nor other evidence of any prejudice.

[25] The Board in the ***Bell*** case acknowledged the inevitability of delays and accepted the submission in that case, that the courts "*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 …"* (pp 327, Bell v Director of Public Prosecutions (1985) 32 WIR.

[26] Let me say that in relation to the first factor above – length of delay – having regard to all the circumstances of this case there is no delay in this matter which is *presumptively prejudicial*. Further, the time taken from the commission of the offence to trial, having regard to the prevailing system of legal administration, was within a reasonable time (See para 25 above and the ***Bell*** factors discussed earlier).

[27] I accept the reasons given by the prosecution for the delay. I do not accept that in this case – no sufficient details being provided by the Defendants – that the absence of the Magistrate from the jurisdiction in a multi-Magisterial jurisdiction is a justifiable reason for the delay. However, I do accept the delay, if that is what it is, in waiting for the determination of the appeal from the high court decision as a sufficient and additional explanation for the further passage of time. Further, I accept that the applicant's

application for a *stay* contributed albeit in a small way, to prolonging the conclusion to the committal proceedings.

[28] Although the applicants in their affidavits allege prejudice, no evidence of specific prejudice was lead. I accept that where the prejudice alleged is that of "fading memories", by virtue of the type of prejudice alleged, one would hardly be able to recall matters out of the reach of "fading memories". However, there is no evidence of whose memory might have faded, what type of evidence might have been lost and how it has prejudiced the claimants. Importantly, I acknowledge that the fact that it has not been led does not rule out the possibility of prejudice to the claimants. In the circumstances of this case however, I find I am unable to infer nor does the law require me to impute, any prejudice resulting merely from the length of time passing between the commission of the offence and the claimants trial.

[29] The claimants contend that they are not required to prove prejudice and in support of this contention ask the court to, among others, consider the ***Nazereus Andrew*** case, the ***A.G's Reference*** case and ***HM Advocate*** case and I have done so.

[30] The ***Andrews*** case is a High Court Judgment out of St. Lucia which considers the Privy Council case out of Jamaica[1] referred to above and goes on to consider Darmarlingum v The State (Privy Council, 10 July 2000) an appeal concerning the constitution of Mauritius and several other cases in the U.K. which concern the construction of Article 6 (1) of the European Convention and the Human Rights Act of 1998.

[31] I am inclined to the view, the traditional view if you will on the question of delay, which is; whether the delay was such so as to prejudice the applicant's prospects of a fair trial. If it was so prejudicial, the trial should have been stayed at the very least. The fact of undue delay does not necessarily render a trial unfair nor does it necessarily attract the draconian remedy of a stay or an order quashing the conviction in a completed criminal trial. In Martin v Tauranga District Court [1995] 2 NZLR 419 (432), a case referred to in all the

[1] Flowers v R ; Bell v DPP.

cited authorities herein ,in defining the constitutional right to which a person is entitled the Court held; "*The right is to a trial without undue delay, it is not a right not to be tried after undue delay".*

[32] In considering what remedy the court should apply to a case of delay, Article 6 (1) of the European Convention is relevant to those territories that are subject to it. Obviously, Antigua and Barbuda are not subject to that convention.

[33] Lord Steyn in HM Advocate and Another v R [2002] UKPC D3 a case out of Scotland, describes the "convention right" and how domestic courts apply the convention rights. It appears that consideration of the convention right under Article 6 (1) is relevant to and circumscribes, the remedy applicable to the breach of the right of the party under the convention to a trial within a reasonable time.

[34] Article 6 (1) of the Convention reads as follows:

> **"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. Judgment shall be pronounced publicly but the ..."(emphasis added)**

[35] In the House of Lords decision in the Attorney General's Reference No. 2 of 2001 [2003] UKHL 68 Lord Bingham of Cornwall identified further that Section 6 (1) of the 1998 Human rights Act (as opposed to Article 6(1) of the of the convention) lies at the heart of that reference. It provides that:

> **"It is unlawful for a public authority to act in a way which is incompatible with a Convention right".**

[36] The section in the Human Rights Act goes on to define a "public authority" to include a court. Further sections of the Human Rights Act provide for judicial remedies.

[37] The European Convention Article 6 and the Human Rights Act 1998 (including S.6 and S.8) work in tandem to circumscribe certain rights and remedies available to persons including the right to a trial "within a reasonable time". The result of the interpretation of

those two (2) acts, their interface and their application, is that a trial not within a reasonable time is unlawful. A prosecution after that time has elapsed is unlawful.

[38] However, in the Attorney General's Reference No.2 at para. 24 Lord Bingham of Cornwall observed that a breach of the "trial within a reasonable time" right, does not, except in very exceptional cases preclude the prosecution from proceeding to its full conclusion. The breach for the most part can be met with various sanctions other than a stay or quashing.

[39] This Article 6 (1) Convention consideration is not applicable to us in Antigua and Barbuda. I set out below that portion of Lord Steyn's judgment in the ***H.M Advocate case*** that in my view best distills the Article 6 (1) considerations and its distinguishing features. I have provided emphasis by the underline.

> **"8. although article 6 (1) is well trodden ground, it is necessary to summarize its essential features. Article ^ (1) contains three separate, distinct, and independent guarantees: viz (i) a right to a fair and public hearing, (ii) a right to a hearing by an independent and impartial tribunal and (ii) a right to a hearing within a reasonable time: *Porter v Magill* [2002] 2 AC 357, *Dyer v Watson* [2002] 3 WLR 1488 and *Mills v HM Advocate* [2002] 3 WLR 1597. Pertinent to the present case is the fact that there are qualitative differences between, on the one hand, the first two rights and, on the other hand, the third right. The position in regard to breaches of the first two rights is clear. The only remedies available in the Strasbourg court are declaratory judgments and awards of damages: Republic of Ireland v United v United Kingdom (1978) 2 EHRR 25. On the other hand, it is well established in domestic law by decisions of high authority that once it has been established that a defendant has not had a fair hearing at trial the conviction must be quashed: *Brown v Stott* [2001] 2 WLR 817 *R v Forbes* [2001] 1 AC 473 and *Mills v HM Advocate* [2002] 3 WLR 1597. Similarly, it is settled by decisions of the house of Lords and Privy Council that once it has been established that there was a breach of the guarantee of independence and impartiality the conviction must be quashed: *Millar v Dickson* [2002] 1 WLR 1615 and *Porter v Magilll* [2002] 2 AC 357. It is further clear that the court has a power to order a retrial in such cases.**
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> **9. The position under the reasonable time guarantee must now be considered. The background is that <u>in England the common law principle is that the court is not empowered to stay a prosecution unless the defendant can show that unless a stay is granted he would suffer serious prejudice in the sense that no fair trial could be held: *Attorney General's Reference* (No 1 of 1990) [1992] QB 630. My understanding is that before the Scotland Act 1998 came into force the position in Scotland was similar. Thus in *McFadyen v Annan* 1992 JC 53 it was held that on a plea in bar on the grounds of delay the question is whether there was significant prejudice to the prospects of a fair trial: if there was, the plea succeeded; if not, it failed. Under both systems a stay of a prosecution where a fair trial is still possible, is regarded as a draconian remedy.</u>**
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> **10. <u>Under the reasonable time guarantee contained in article 6 (1) the position is altogether different. The starting point is that prejudice, although a relevant factor, need not be established. It is not necessary to show that a fair trial is no longer possible. The scope of the guarantee is wider</u>: *Mills v HM Advocate* [2002] 3 WLR 1597, 1603-1604, paras 13-14 and *Emmerson & Ashworth, Human Rights and Criminal Justice* (2001), pp 353-354, para 14-45.**

> **11. The width of the reasonable time guarantee is relevant to the separate question of the remedies available for a breach. There is no automatic remedy. In this case too the role of the Strasbourg court is a residuary one. In the Strasbourg court the only remedies available are therefore declaratory judgments and award of damages. But domestic courts have available a range of remedies for breach of the reasonable time guarantee. In a post conviction case the remedies may be a declaration, an order for compensation, reduction of sentence, or a quashing of the conviction: see *Mills v HM Advocate* [2002] 3 WLR 1597, 1604, para 16. In a pre-conviction case the remedies may include a declaration, an order for a speedy trial, compensation to be assessed after the conclusion of the criminal proceedings, or a stay of the proceedings. Where there has been a breach of the reasonable time guarantee, but a fair trial is still possible, the granting of a stay would be an exceptional remedy. In marked contrast to the fair trial and independence guarantees there is therefore no automatic consequence in respect of the breach of a reasonable time guarantee."**

[40] In the matter at bar, in any event, applying the ***Bell*** factors, undue delay has not been established by the claimants. Further, even if it were established that the delay was undue, the Applicants have failed to show any prejudice in the sense that no fair trial could have been held. I venture to suggest, for what it is worth, that even applying the European convention law on the facts of this case, the claimants would not be entitled to the relief sought and certainly not entitled to have the conviction quashed.

[41] The upshot of the learning on the working of the European Convention Article 6 and the Human Rights Act is that neither is applicable to this jurisdiction. The law in the ***Bell*** line of cases is still the applicable law. In any event, I find that the prosecution was not concluded outside of a "reasonable time" in Antigua and Barbuda and does not attract any sanction or remedy.

[42] The applicants/Claimants have failed to show that their rights under S.15 of the Constitution has been breached and that they are entitled to the remaining remedies claimed; compensation. The claim is hereby dismissed.

[43] Judgment for the Defendants with prescribed costs if quantum not otherwise agreed within 21days of this order.

DAVID C. HARRIS
Judge
The High
Court of Justice
Antigua and Barbuda