EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2012/0027

IN THE MATTER of the Constitution of Saint Lucia contained in the Saint Lucia Constitution Order Cap. 1.01 of the Revised Laws of Saint Lucia 2001

and

IN THE MATTER of an application by URBAN ST. BRICE alleging that certain of the fundamental rights and freedoms enshrined, guaranteed and secured to him by virtue of Sections 8 – (1), 8 – (2) (a), 5 and 3 – (5) of the said Constitution have been, are being or likely to be contravened in relation to him, and applying or redress in accordance with Section 16 – (1) of the said Constitution

BETWEEN:

URBAN ST. BRICE

Appellant

and

THE ATTORNEY GENERAL

Respondent

Before:

The Hon. Dame Janice Pereira, DBE — Chief Justice
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Martinus Francois for the Appellant
Mr. Dwight Lay for the Respondent

_____

2016: May 19.
Written reasons delivered 31st October 2016.

_____

Civil appeal – Constitutional motion – Fundamental rights and freedoms guaranteed under section 8 of Constitution of Saint Lucia Cap 1.01, Revised Laws of Saint Lucia 2013 – Right to fair hearing within reasonable time – Whether delay in bringing appellant to trial inordinate – Whether appellant's fundamental rights and freedoms have been or are likely to be contravened – Power of Court under section 16 (1) of Constitution to redress contraventions of fundamental rights and freedoms – Whether originating motion appropriate procedure for approaching Court for relief

The appellant was arrested for murder on 6th November 2002 and has been in custody since. He was charged for said offence on 13th November 2002 and committed to trial on an indictment dated 21st May 2005. The proceedings which led to this appeal were protracted commencing with the first trial on 9th November 2005, three years after the appellant was arrested. That trial resulted in a retrial. The retrial or second trial took place in January 2006 and the appellant was convicted and sentenced to life imprisonment. On 29th October 2007, the conviction and sentence were set aside by the Court of Appeal. The Court left the matter of a retrial to the discretion of the Director of Public Prosecutions. The third trial commenced on 14th October 2008 but a mistrial and further retrial was ordered on account of newspaper publications of details of the trial. Between 14th October 2008 and 10th May 2011 the matter was adjourned "a staggering thirty three times" for a variety of reasons including absences by defence counsel with and without explanation; changes of defence counsel; two applications by the appellant to stay the proceedings; applications by the defence to exclude evidence and to secure a psychiatric evaluation of the appellant; unavailability of transcripts and the failure by the defence to file a consolidated applications bundle. On 10th May 2011, a new counsel appeared for the appellant. He filed a constitutional motion for a stay of the trial of the appellant that was set for hearing on 21st July 2011. The learned judge dismissed the motion and found that the appellant had not shown why he had not appealed any of the decisions on his previous applications in the trial to stay the trial, nor why he had not pursued the current application in the trial (as opposed to a separate pre-trial constitutional motion). She also found that the greater responsibility for the delay in concluding the trial lay with the appellant and as such his constitutional rights had not been contravened. The appellant, dissatisfied with the decision appealed to this Court.

Held: dismissing the appeal, that:

1. Where there is an alleged breach of a specific provision of the Constitution, for example the right to a fair hearing within a reasonable time in section 8(1) of the Constitution of Saint Lucia, the courts will be more inclined to allow a constitutional motion to proceed because the applicant should not have to prepare for a trial, or retrial, that will take place after an unreasonable delay. However, the right to use the constitutional procedure is not automatic and the judge retains his or her discretion under section 16 of the Constitution to decline to hear the complaint as a pre-trial application. It is clear from the proviso to the section that the power is discretionary. Thus, the Court may decline to hear a motion if adequate means of redress are or have been available to the applicant. In the case at bar, the appellant's previous attempts to stay the trial following the common law

procedures were unsuccessful and the current application appears to be an attempt by a different procedure to achieve the result that he failed to get in the previous applications. The learned judge was therefore correct to strike out the appellant's motion on this basis.

Bell v Director of Public Prosecutions of Jamaica and another [1985] 32 WIR 317 applied; Director of Public Prosecutions and another others v Jaikaran Tokai and others [1996] UKPC 19 applied.

2. In determining whether the overall delay is so great that the guarantee of a trial within a reasonable time has been breached, much will turn on the length of and reasons for the delay, and the resulting impact on the trial of the applicant. Where the applicant's contribution to the delay is attributable to his or her pursuit of relief before the trial judge or another court or tribunal, the court may be minded to view the delay with some sympathy notwithstanding the applicant's contribution. However, where the applicant's contribution to the delay is so significant and some of the delay was brought about by unsatisfactory reasons, the court will be less likely to find that even a long delay breaches the applicant's constitutional rights. Further, the point has not been reached in this case, where the overall delay is so great, irrespective of who caused it, that the appellant's guarantee to a right to a trial within a reasonable time has been breached. The appellant is therefore not entitled to be considered under section 3(1) of the Constitution for release from custody pending retrial.

   Bell v Director of Public Prosecutions of Jamaica and another [1985] 32 WIR 317 applied; Frank Errol Gibson v Attorney General of Barbados [2010] CCJ 3 applied.

3. A breach of the right to a trial within a reasonable time is not fatal to the continuation of the trial if the appellant can still receive a fair trial. The appellant in this case has not produced any evidence that he will not receive a fair trial.

   Frank Errol Gibson v Attorney General of Barbados [2010] CCJ 3 applied.

REASONS FOR DECISION

[1] WEBSTER JA [AG.]: This is an appeal by Mr. Urban S. Brice ("the appellant"), against the judgment and order of the learned judge striking out and dismissing his originating notice of motion seeking declarations that his fundamental rights and freedoms guaranteed to him under the Constitution of Saint Lucia [1] have been

[1] Cap. 1.01 Revised Laws of Saint Lucia 2013.

or are likely to be contravened. On 19th May 2016, we heard and dismissed the appeal and promised to give our reasons in writing. We now do so.

Background

[2] The factual background to the appellant's application is set out in detail in paragraphs 6–55 of the judgment of the learned judge and we are indebted to her for her careful account of what transpired between the arrest of the appellant and the filing of his originating motion. The judge's account is especially important because the appellant had applied to treat this appeal as a summary appeal but did not pursue the application. As a result there is no record of appeal and, by agreement between counsel for the parties, the appeal was conducted on the basis of the affidavit filed by the appellant in support of the application, the affidavit of the Director of Public Prosecutions ("DPP"), Mrs. Victoria Charles-Clarke, opposing the application, and the skeleton arguments and authorities filed by both parties. The appellant did not file any evidence in response to the DPP's affidavit. At the commencement of the hearing before the judge in the lower court both counsel agreed that there would be no cross-examination of the deponents, and during the hearing Mr. Martinus Francois who appeared for the appellant accepted all the facts in the DPP's affidavit. Before this Court he repeated his acceptance of the facts and said that he could not dispute the reasons for the delays given by the DPP.

[3] As a result of the procedures agreed by the parties for prosecuting this appeal this Court has not had the benefit of perusing the notice of motion itself and the various applications filed in the trial of the appellant in the court below and the rulings on these applications. Insofar as we comment on these matters we rely on the documents that have been filed in the appeal and the concessions made by counsel for the appellant in relation to the documents. The following is a brief summary of the facts that are material to this Court's consideration of the appeal.

[4] On 22nd October 2002, Dwain Andrew was shot and killed at Bois D'Orange, Gros Islet, Saint Lucia. The appellant was arrested for the murder on 6th November 2002 and he has been in custody since. He was charged on 13th November 2002 and committed to trial on an indictment dated 21st May 2005 for the murder.

[5] The first trial commenced on 9th November 2005, three years after the appellant was arrested. The trial was aborted on the second day and a re-trial was ordered.

[6] The second trial took place in January 2006. The appellant was convicted and sentenced to life imprisonment. The conviction and sentence were set aside by the Court of Appeal on 29th October 2007. The Court of Appeal left the matter of a retrial to the discretion of the DPP.

[7] The third trial commenced on 14th October 2008 but a mistrial was ordered on account of newspaper publications of details of the trial. A further retrial was ordered.

[8] The fourth trial was scheduled to commence on 2nd March 2009 but was adjourned to 4th March 2009 and then to 30th March 2009 on account of the absences of defence counsel due to illness. On the resumption on 30th March 2009 new counsel, Mr. Shawn Innocent, appeared for the appellant. Mr. Innocent requested time to prepare for the trial and to file an application in limine. He later requested transcripts of the previous trial which were not immediately forthcoming and on 10th June 2009 the judge ordered that he be supplied with the transcripts. He applied to stay the trial and quash the indictment. It is not clear whether the application was written or oral. However, written submissions were filed by both parties. Following several adjournments and an oral hearing, the judge dismissed the application on 30th July 2009.

[9] The trial was scheduled to commence on 9th November 2009 but was twice adjourned on account of Mr. Innocent's absence. A jury was empanelled on

7th December 2009. Mr. Innocent sought a further adjournment which was denied. The trial commenced but Mr. Innocent did not appear on the second day. He caused a medical certificate to be submitted to the court. On 10th December 2009, the judge discharged the jury and ordered a new trial.

[10] New counsel, Mr. Leon Gokool and Mrs. Andra Gokool-Foster, appeared for the appellant on 1st March 2010. The proceedings were adjourned at their request on several occasions to allow them to prepare for trial and file a pre-trial application. During the adjournments they filed another application to stay the trial of the appellant. The application was heard on 9th June 2010. The ruling was deferred to 22nd June 2010. On that date Mr. Gokool was absent and the ruling was adjourned to 29th June 2010 when the judge dismissed the application.

[11] The re-trial was set for 5th October 2010 but on that date the appellant's counsel filed an application to exclude certain evidence and indicated an intention to apply for a psychiatric evaluation of the appellant. The latter application was made on 27th October 2010. This and counsel's failure to file a consolidated bundle of his applications as requested by the judge resulted in a further adjournment to 9th November 2010. Between November 2010 and March 2011 there were six adjournments due variously to non-appearances by Mr. Gokool because of illness and other unspecified reasons, and new applications for non-disclosure and exclusion of evidence.

[12] On 10th May 2011 new counsel, Mr. Martinus Francois, appeared for the appellant. He informed the court that he had filed a constitutional motion for a stay of the trial of the appellant that was set for hearing on 21st July 2011. The trial was adjourned to 26th July 2011 for report.

Proceedings before the learned judge

[13] The appellant commenced the proceedings in the High Court by originating notice of motion. The learned judge noted that this was not the correct form for bringing

a claim for relief under the Constitution and that the appellant should have proceeded by fixed date claim form as required by Part 56.7(1) of the Civil Procedure Rules 2000 ("CPR 2000"). However, she said that based on precedent this should not be a hindrance to the application and proceeded to hear it. There is no reason to interfere with this ruling.

[14] The appellant's motion alleges breaches of sections 3(1), 3(5), 5, 8(1) and 8(2) of the Constitution. However, in his written and oral submissions Mr. Francois, pursued only the breach of section 8 (1) dealing with unreasonable delay. This brings into play the following provisions of the Constitution:

(a) Section 8(1) which guarantees a right to a fair hearing within a reasonable time:

> "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."

(b) Section 3(5) which deals with one of the consequences of not bringing a detained person to trial within a reasonable time:

> "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 either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she 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."

(c) Finally, section 16 which gives the court power to redress contraventions of the fundamental rights and freedoms guaranteed in sections 2 to 15:

> (1) If any person alleges that any of the provisions of sections 2 to 15 inclusive has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or

that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

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

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

and may make such declarations and 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 sections 2 to 15 (inclusive):.

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

More will be said about these provisions below.

[15] Early in her judgment the learned judge set out the two issues to be resolved:

> "1. Whether the Claimant ought to have exercised his common law rights before the trial Judge including the filing of appeals against any decision of that Court and having failed to do so [whether] his originating motion is an abuse of process. ["the preliminary issue"]
>
> 2. Should the Court find that there has not been an abuse of process whether Claimant has adduced sufficient evidence to show, that the State delayed his trial, and as a result of that delay his stated constitutional rights have been contravened or were likely to be contravened ["the delay issue"]."[2]

[16] On the preliminary issue the judge found that the appellant had not shown why he had not appealed any of the decisions on his previous applications in the trial to stay the trial, nor why he had not pursued the current application in the trial (as opposed to a separate pre-trial constitutional motion). She dismissed the motion,

[2] Para. 6 of lower court judgment.

and, out of an abundance of caution, also dealt with the second issue of delay. She found that the greater responsibility for the delay in concluding the trial lay with the appellant and as such his constitutional right had not been contravened. This was a further ground for striking out the motion. I will now deal with the two issues.

The Preliminary Issue

[17] The preliminary issue engages the question, whether a person in Saint Lucia who is charged with the offence of murder and claims that his constitutional rights have been violated by an unreasonable delay in bringing him to trial must apply in the trial for a stay of the trial, or can apply under section 16 of the Constitution for relief before the trial. The appellant submitted that the right to apply for relief on the basis of delay is now entrenched in section 8(1) of the Constitution and can be exercised at any time before trial. The respondent submitted that the right to apply continues to exist at common law and that right must be exercised at the trial unless there are urgent or other exceptional circumstances requiring a pre-trial hearing. Before considering the position in Saint Lucia under section 8(1) of the Constitution, it is helpful to look at the similar but not identical position in other Caribbean states such as the Republic of Trinidad & Tobago, Jamaica and Barbados.

[18] The Constitution of the Republic of Trinidad and Tobago[3] does not guarantee a "fair hearing within a reasonable time" as in section 8(1) in the Constitution of Saint Lucia and section 20(1) of the Constitution of Jamaica.[4] The Trinidad and Tobago Constitution only protects a person's right to "a fair hearing in accordance with principles of fundamental justice".[5] A fair hearing is secured by procedures available to the trial judge at common law such as a stay of the criminal trial if there is unreasonable delay in completing the trial. If there is no equivalent to section 8(1) (Saint Lucia) the cases suggest that the appropriate procedure for

[3] Cap. 1:01 Laws of Trinidad and Tobago.
[4] The Jamaica (Constitution) Order in Council 1962.
[5] Section 5(2)(e) of the Constitution of Trinidad and Tobago.

challenging an alleged breach of one's constitutional right to a trial within a reasonable time is to apply to the trial judge for a stay, and not to use the procedure in section 16 of the Constitution which is reserved for urgent or exceptional cases.

[19] It is not always easy to decide what is an appropriate case for relief under section 16 of the Saint Lucia Constitution or its equivalent in other States. The cases seem to fall into three categories. At one extreme are cases like Kemrajh Harrikissoon v Attorney-General[6] where the applicant, a teacher, was transferred by the Teaching Service Commission of Trinidad and Tobago to another school allegedly in breach of the Teaching Service Commission Regulations. The applicant thought the transfer was a punishment for previous behavior by him and brought a motion under section 6 of the Constitution of Trinidad and Tobago for a declaration that his human rights and fundamental freedoms guaranteed to him by Chapter 1 of the Constitution had been violated. His application was dismissed at all levels as being misconceived. He had a remedy for the alleged breach under regulation 135 of the Teaching Service Commission Regulations and it was an abuse of process for him to ask for relief under the Constitution when his constitutional rights were not violated and he had an alternative remedy.

[20] The second category of cases is illustrated by Jaroo v Attorney General of Trinidad & Tobago.[7] The applicant's motor vehicle was taken from him and detained by the police as part of an ongoing investigation. He sought redress under section 14(1) of the Constitution of Trinidad and Tobago (the equivalent of section 16 Saint Lucia Constitution) alleging that his rights under section 4 of the Constitution to the enjoyment of his property and the right not to be deprived thereof except by due process had been violated. Whilst he had a constitutional right to the use and enjoyment of his property it was obvious that he had a parallel

[6] [1980] AC 265
[7] [2002] UKPC 5.

remedy in tort against the police in detinue. On appeal to the Privy Council Lord Hope writing for the Board rejected counsel's submission that once a breach of a constitutional guarantee was established the choice of remedy was a matter for the applicant.[8] Lord Hope continued at paragraph 39 –

> "Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either at common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of process to resort to it."

The case illustrates that having a constitutional claim does not guarantee a right to bring a constitutional motion under the equivalent of section 16 if there is a parallel right at common law or by statute.

[21] The third category of cases is illustrated by Bell v Director of Public Prosecutions of Jamaica and another,[9] Frank Errol Gibson v Attorney General of Barbados[10] and Director of Public Prosecutions and another others v Jaikaran Tokai and others.[11]

[22] Bell v DPP involved a delay in the retrial of the applicant for illegal possession of a firearm, wounding, shooting with intent, burglary and robbery with aggravation. The applicant brought a constitutional motion under section 25 of the Constitution of Jamaica, the equivalent of section 16 of the Saint Lucia Constitution, alleging that his fundamental right to a fair trial within a reasonable time guaranteed by section 20(1) of the Jamaica constitution (section 8(1) in Saint Lucia) had been contravened. In allowing the applicant's appeal and ordering that his right to a fair hearing within a reasonable time by an independent and impartial court had been infringed, the Privy Council had no difficulty with the fact that the appellant had

[8] Ibid at para. 38.
[9] [1985] 32 WIR 317.
[10] [2010] CCJ 3.
[11] [1996] UKPC 19.

applied prior to the re-trial by a constitutional motion as opposed to waiting for the re-trial to address his concerns about the fairness of the re-trial. On this issue Lord Templeman said -

> "It was argued on behalf of the respondents, the Director of Public Prosecutions and the Attorney-General, that the applicant was able to obtain redress by waiting until his retrial, ordered for 11th May 1982, and then submitting to the Gun Court at the commencement of the retrial that the proceeding should be dismissed on the grounds that in the event which had happened a retrial would be an abuse of the process of the court. Their Lordships cannot accept this submission. If the constitutional rights of the appellant had been infringed by failing to try him within a reasonable time, he should not be obliged to prepare for a retrial which must necessarily be convened to take place after an unreasonable time."[12]

[23] In Gibson v Attorney General, a decision of the Caribbean Court of Justice from the Court of Appeal of Barbados, the applicant applied by motion before trial for relief on grounds that his right to fair trial had been infringed by the State's failure to provide him with an odontologist at the State's expense and by the unreasonable delay of his trial, both in breach of his right to a fair trial guaranteed by section 18(2) of the Constitution of Barbados. On the issue of procedure Saunders J noted at paragraph 34 of the unanimous judgment of the Caribbean Court of Justice that

> "Since the Constitution permits him to complain of threatened infringements of his fundamental rights he was not obliged to wait and make this allegation at the trial. In a case like this one, the complaint should ideally be made as early as possible by way of a constitutional application brought in a timely manner."

In making this observation Saunders, J was dealing with the breach relating to the failure to provide the appellant with the services of an odontologist, but he did not suggest that the breach relating to unreasonable delay should have been dealt with by a different procedure.

[12] [1985] 32 WIR 317 at p. 321.

[24] Saunders J also referred to the fact that the right to a trial within a reasonable time is now in section 18(1) of the Constitution puts it on a different level to the common law right to trial within a reasonable time. At paragraph 49 he said:

> "By deliberately elevating to the status of a constitutional imperative the right to trial within a reasonable time, a right which already existed at common law, the framers of the Constitution ascribed significance to this right that is too often under-appreciated, if not misunderstood."

This is an indication that Saunders J did not think that the common law right to a speedy trial was a parallel right to the right conferred by the Constitution.

[25] Finally, DPP v Tokai concerned a delay of 12 years in bringing the applicant to trial on a charge of wounding. As noted above the Constitution of Trinidad and Tobago does not have a specific guarantee of a right to trial within a reasonable time. The right to a fair hearing within a reasonable time in Trinidad and Tobago is guaranteed by the more general right to a fair hearing combined with the common law right to a trial within a reasonable time. The applicant in this case had applied by motion for a stay of the trial under the fair hearing provisions of the constitution on account of the delay. The Privy Council found that there were no exceptional circumstances and the alleged breach could be dealt with by the procedures available to the trial judge at the trial and dismissed the motion. It is obvious that this case did not involve a breach of a specific provision of the constitution dealing with delay as in Bell v DPP and Gibson v Attorney General but I deal with it in this third category of cases because of the observations made by the Privy Council regarding the difference between the pure constitutional right and the common law right to a trial within a reasonable time. In delivering the advice of the Board in the Tokai Case Lord Keith of Kinkel referred to the passage of Lord Templeman in Bell v DPP set out above and continued:

> "This passage highlights the distinction between the constitutional right to trial within a reasonable time and the constitutional right only to a fair trial. The latter right is to be secured by the procedures exercised by the trial judge, which in an exceptional case involving delay may include the grant

> of a stay. The former right, however, may be invoked by constitutional motion in advance of any trial."[13]

And later at paragraph 16 Lord Keith said –

> "Their Lordships consider that the difference between the common law position and that where there is an express constitutional right to trial without undue delay or within a reasonable time is that in the latter case complaint by way of constitutional motion can more readily be regarded as the appropriate remedy."

[26] In my opinion, these passages should not be taken to mean that if an application involves an alleged infringement of a specific constitutional provision (such as section 8(1) in Saint Lucia Constitution) the right to apply before trial by motion is automatic. Such allegations are as Lord Keith said 'more readily appropriate' to the motion procedure.

[27] The conclusions that I deduce from the cases are as follows:

(a) Where there is an alleged breach of a constitutional right but the right is not set out in the Constitution, and the applicant has a parallel right at common law or by statute, the bringing of a constitutional motion is misconceived and will be struck out. Harrikssoon v Attorney General[14] is an example of this principle.

(b) Where the allegation involves a breach of a specific provision of the Constitution but there is a parallel right at common law the applicant is still expected to challenge the breach at his criminal trial and not by a constitutional motion: Jaroo v Attorney General.[15] A constitutional motion is possible for this type of breach if the matter is urgent or otherwise exceptional.

(c) Finally, where there is an alleged breach of a specific provision of the Constitution, for example the right to a fair hearing within a reasonable

[13] Supra at para.13.
[14] [1996] UKPC 19 at para 13.
[15] [2002] UKPC 5.at 29 and 32.

time in section 8(1) of the Constitution of Saint Lucia and its equivalent in Barbados and Jamaica, the courts will be more inclined to allow a constitutional motion to proceed because the applicant should not have to prepare for a trial, or retrial, that will take place after an unreasonable delay.[16] However, the right to use the constitutional procedure is not automatic and the judge retains his or her discretion under section 16[17] of the Constitution to decline to hear the complaint as a pre-trial application.

Applying the principles

[28] The court's powers to hear a constitutional motion are contained in section 16 of the Constitution of Saint Lucia and it is clear from the proviso to the section that the power is discretionary and the court may decline to hear the motion if adequate means of redress are or have been available to the applicant. In my opinion nothing in the cases cited above diminishes this power. They simply give guidance as to how or when the power should be exercised. Each case must be decided on its own facts.

[29] Mr. Francois submitted that because Mr. St. Brice's application asserted a pure breach of the Constitution and not a breach of any common law principle the applicant was entitled to apply under the Constitution before the trial. Mr. Dwight Lay for the respondent submitted that this was not an appropriate case for a pre-trial application and the applicant's complaints could have been dealt with by the trial judge at the trial.

[30] The learned judge in the court below noted at paragraph 69 of her judgment, that Mr. St. Brice had applied to the trial judge for a stay of the trial, the application was denied and he did not appeal the judge's decision. In fact there were two applications for stays and both were denied. The judge went on to consider all the circumstances and found that the appellant had not shown any reason why he had

[16] Per Lord Templeman in Bell v DPP at p. 321 and Lord Keith in DPP v Tokai at paragraphs 13 and 16.
[17] Section 16 is set out in full in para.14 above.

not pursued the current application before the judge at trial and exercised her discretion under section 16(2) of the Constitution by declining to hear the motion. She struck out the motion.

[31] I cannot find any reason for disturbing the judge's decision to strike out the motion. The appellant's previous attempts to stay the trial following the common law procedures were unsuccessful and the current application appears to be an attempt by a different procedure to achieve the result that he failed to get in the previous applications. I would confirm the judge's decision to strike out of the appellant's motion on this basis.

Delay

[32] The appellant was arrested in November 2002 and his first trial commenced three years later on 10th November 2005. The first trial resulted in a mistrial. He was retried and convicted in February 2006. His appeal against his conviction and sentence was allowed on 29th October 2007. The second re-trial commenced on 14th October 2008. The judge referred in paragraph 72 of her judgment to the backlog of cases and the workload of the criminal courts in Saint Lucia. There was no evidence disputing this and I would not have expected any dispute about the state of the calendar of the criminal courts in Saint Lucia. In the circumstances there was no unreasonable delay up to this point.

[33] The real delays set in during and after the third trial. The judge noted in paragraph 77 of her judgment that between 14th October 2008 and 10th May 2011 the matter was adjourned "a staggering thirty-three times" and she took the trouble to describe the reasons for the adjournments. In summary, she found that the appellant bore the greater responsibility for the delays,[18] that no negligence was alleged against the State,[19] and there was no evidence that at any time when the matter came on the State was not ready to proceed.[20]

[18] Para. 87 of lower court judgment.
[19] Para. 79 of lower court judgment.
[20] Para. 80 of lower court judgment.

[34] The judge went on to apply the facts of the case to the four elements of a plea of unreasonable delay in Barker v Wingo[21] which were adopted and followed by the Privy Council in Bell v DPP[22] namely; length of delay; reasons given by the prosecution to justify the delay; responsibility of the applicant for asserting his rights; and prejudice to the applicant. The judge found in favour of the State on all four elements, and concluded, correctly in my opinion, that the appellant bore the greater part of the responsibility for the delays of his trial. On the facts of this case I do not think the appellant can now seek to rely on his own conduct to secure a permanent stay of his trial. In saying this, I am mindful of the guidance from the Caribbean Court of Justice in the Gibson case where Saunders J reminded us that:

> "Even where an accused person causes or contributes to the delay, a time could eventually be reached where a court may be obliged to conclude that notwithstanding the conduct of the accused the overall delay has been too great to resist a finding that there has been a breach of the guarantee.[23].

Saunders J did not elaborate on how a court should determine when the overall delay is so great that the guarantee of a trial within a reasonable time has been breached even though the applicant caused or contributed to the delay. This is not surprising because each case must be decided on its own facts and much will turn on the length of and reasons for the delay, and the resulting impact on the trial of the applicant. In a case where the applicant's contribution to the delay is attributable to his or her pursuit of relief before the trial judge or before another court or tribunal, the court may be minded to view the delay with some sympathy notwithstanding the applicant's contribution. Where, as in this case, the appellant's contribution to the delay is significant and some of the delay was brought about by unsatisfactory reasons such as his counsel not showing up for scheduled court hearings, the court will be less likely to find that even a long delay breaches the applicant's constitutional rights.

---

[21] 407 U.S. 514 (1972).
[22] At pp. 324 - 326
[23] Ibid at para 58

[35] Another consideration in this case is that there is no suggestion of any negligence or dilatory tactics by the State and no evidence that the witnesses for the State or the defence are no longer available. In my opinion the point has not been reached where the overall delay is so great, irrespective of who caused it, that the appellant's guarantee of a right to a trial within a reasonable time has been breached, and I so find.

[36] I agree with the judge that the appellant has failed to establish that there was an unreasonable delay in bringing him to trial and that his constitutional right to a fair trial within a reasonable time has been breached. As such he is not entitled to be considered under section 3(5) of the Constitution for release from custody pending the re-trial.[24]

[37] But even if I am wrong and there was unreasonable delay and a breach of section 8(1) of the Constitution, the cases are consistent in showing that a breach of the right to a trial within a reasonable time is not fatal to the continuation of the trial. For example Saunders J said in the Gibson case that –

> "A permanent stay or dismissal of the charge cannot be regarded as the inevitable or even the normal remedy for cases of unreasonable delay where a fair trial is still possible."[25]

He continued at paragraph 63 –

> "Given the high level of public interest in the determination of very serious crimes, however, it will only be in exceptional circumstances that a person accused of such a crime will be able to obtain the remedy of a permanent stay or dismissal for the breach only of the reasonable time guarantee. Of course, such a remedy will be readily granted in cases where the delay has rendered it impossible to hold a fair trial."

[38] The appellant is accused of the very serious crime of murder. The public and the victim's family have a deep and abiding interest in his trial. The trial has been delayed for a long time for the reasons set out above but the appellant bears the

[24] Section 3(5) is set out in full in para. 14 above.
[25] Ibid at para. 62

majority of the responsibility for the delays. Further, he has not produced any evidence that he will not receive a fair trial.

Conclusion

[39] For all the above reasons, the appeal was dismissed and the judge's order striking out the originating motion on the ground that it was not the appropriate procedure for approaching the court for relief was confirmed. The judge's finding that there was no breach of the appellant's constitutional right to a fair trial within a reasonable time was also confirmed.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Dame Janice Pereira, DBE
Chief Justice

I concur.

Mario Michel
Justice of Appeal