

EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2016/0399

**In the matter of sections 15(1) and 18 of The Antigua and Barbuda Constitution Order
1981**

In the matter of an application for an Administrative Order

BETWEEN

CHARLES JOSEPH

Claimant

-and-

[1] THE ATTORNEY GENERAL

[2] THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendants

Appearances:

Dr. David Dorsett for the Claimant

Ms. Carla Brookes Harris for the Attorney General and the Director of Public Prosecution

2016: November 28

2017: January 30, May 18

Constitutional Law- Originating Motion - Right to a fair hearing within a reasonable time - Unreasonable delay - some of the delay attributable to the applicant - Some delay attributable to Administrative challenges - No Deliberate delay by State - Question whether fair trial possible - Burden of proof on State - Burden discharged - Ongoing breach of right to fair trial within reasonable time - Order that applicant be tried within current assizes.

JUDGMENT

[1] **RAMDHANI J. (Ag.)** This is a constitutional claim for remedies under section 18 of the Antigua Constitution for breach of the right to a fair trial within a reasonable time. This matter was heard on the 28th November 2016. On the 30th January 2017, the court gave its ruling that there is likely to be a breach of the claimant's right to a fair trial within a reasonable time and has ordered that the trial be brought on within the present criminal sessions. An indication was given that written reasons would be provided. This fulfills that indication.

The Fixed Date Claim for Constitution Redress

[2] The claim was filed on the 8th August 2016 and sought as a substantive remedy, a declaration pursuant to section 18 of the Antigua and Barbuda Constitution Order 1981 that the Applicant's right to fair hearing within a reasonable time as guaranteed by section 15 of the Constitution was being contravened with respect to certain offences with which he has been charged. He also sought a stay and or a dismissal of the pending criminal proceedings as well as damages and costs. The claim also contained a plea for bail pending the determination of this matter. At the first hearing of the fixed date claim, the court granted the applicant bail with conditions.

[3] In support of the fixed date claim the applicant filed an affidavit sworn to on the 8th August 2016. Mr. Adlai Smith, Crown Counsel swore to two affidavits on behalf of the respondents, one on the 7th October 2016 and a supplemental later that same day. This prompted an affidavit in reply from the applicant sworn to on the 24th October 2016. Both sides were content to allow all of the affidavits to be treated as evidence at the hearing. There was no cross examination of any of the deponents.

[4] The applicant's first affidavit sets out the basis of his claim. He states that on or about June 2012 he was arrested on allegations of several offences. He was then charged with serious indecency, indecent assault and soliciting for an immoral purpose. In 2013, he was committed to stand trial in the high court. Since his arrest he had been on remand for these offences as it was originally considered that he was likely to commit further offences if released. One of the factors

which led to this finding was that it was accepted that this applicant had been a recently deported from the United States after he had served prison time for similar offences.

[5] At the date of the hearing of this fixed date claim, he has been awaiting his trial for more than four months. For this reason, on the first hearing, this court gave active consideration to the question of bail. The respondents were prepared to take a new stance, and offered no objection to the grant of bail with conditions to the applicant. .

[6] As regards the rest of the fixed date claim, the respondents vigorously opposed the reliefs sought. By the several affidavits, the respondents sought to provide the court with various 'reasons' to explain the 'delay' and submitted that there was no unreasonable delay, and that in any event there was nothing which stood in the way of a fair trial.

The Issues

[7] The questions therefore for the court was simply first, whether the passage of time since his original arrest amounted to such a delay to breach the reasonable time requirement of section 15(1) of the Constitution, and second, whether in any event this passage of time has meant that the applicant can no longer have a fair trial. The third question which arises if any of the first two questions is answered in the affirmative is what remedy is relevant.

[8] Having regards to the answers given by the court to these questions, the court saw no need to address any other issues such as damages.

The Law, Analysis and Findings

[9] Section 15 of the Constitution of Antigua and Barbuda provides for the right to a fair trial within a reasonable time. It states:

"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."

[10] The equivalent of this provision has been the subject of many judicial pronouncements. There are several components of this, namely, (1) a fair trial (2) within a reasonable time; and (3) by an independent and impartial court. It has been accepted that the breach of each of these components may result in a different remedy. For the purposes of this judgment, this court will first address whether there has been such a delay in the trial of the criminal charges which contravene the reasonable time requirement of section 15 of the Constitution.

[11] . The principles make it clear that if a criminal case is not heard and disposed of within a reasonable time, that by itself will breach the reasonable time guarantee of section 15 of the Constitution and this is so whether or not the applicant has suffered prejudice. A court should always be prepared to provide an appropriate remedy for such breach but again the authorities make it clear that delay alone will not justify a dismissal or a permanent stay of the criminal charge unless a fair trial is no longer possible.

[12] The guiding principles on the issue of delay have been the subject of considerable judicial attention and analysis. Our Court of Appeal in **Rashid A. Pigott v The Queen [2015] ECSCJ No. 80** has not so long ago reaffirmed the views expressed by the Privy Council in a series of decisions including *Prakash Boole/I v The State* [2006] UKPC 46 applied; *Joseph Stewart Celine v The State of Mauritius* [2012] UKPC 32 applied.

[13] In **Boolell** the Board reaffirmed that the relevant approach when deciding the delay issue was well set out in **Dyer v Watson** when the Board held:

"In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.

[14] Where the period by itself gives cause for real concern, the court must pay particular attention to three main things, namely

(i) the complexity of the case;

(ii) the conduct of the accused/appellant; and (iii) the conduct of the administrative and judicial authorities.

[15] In this case there has been a delay of nearly four years and six months. In the view of this court, such a period gives rise to real concern and it compels this court to examine those areas in considering whether the reasonable time requirement has been breached.

[16] **The complexity of the case** - Both sides have agreed that this is not a complex case. There is no huge bundle of documentary evidence, nor are the witnesses numerous. That takes us to the next factor, the conduct of the applicant.

[17] **The conduct of the applicant** - the respondents have contended that the applicant, through his attorney have led to some of the delay in this matter. They contend further that he has never made an application to have his matter heard expeditiously.

[18] The respondents rely on Mr. Smith's affidavit where he states at paragraph 23 that: "Also during this period, counsel for the applicant was constantly out of the jurisdiction attending to other court matters, making it difficult to set a firm date for hearing of this matter. Neither has counsel written to the office of the DPP indicating a convenient time when he would be present in the jurisdiction to deal with his matter."

[19] The applicant has denied this in his affidavit evidence. In his affidavit of the 24th October 2016, he states that "...it is completely inaccurate for Mr. Smith to state that my lawyer was 'constantly out of the jurisdiction'. This is not right because during the period of my detention at Her Majesty's Prison, my lawyer visited me numerous times. My lawyer resides and practices in Antigua. I can say with conviction that my lawyer has been fully attentive to my matter and to my plight. Whenever my lawyer was out he would make a point of duty to inform the OPP. He attached a number of letters to prove this point.

[20] These letters were instructive. The first letter is dated 20th August 2014 and it actually shows that the applicant, through his attorney was asking that his matter be heard soonest. That letter notes that several assizes had gone by without the applicant's matter being listed for trial. The court saw no evidence of a response. Here the applicant was clearly pursuing his matter. The second letter is dated 25th September 2015. This one however, shows a different mode. It is apparent from the face of the letter that the matter had been 'fixed to be heard' before Justice Redhead on the 28th September 2015 and that the applicant attorney was seeking an adjournment as he was 'appearing before the high court of Montserrat' that same day. The third letter dated the 27th November 2015 switches the mode and is a letter requesting that the matter be heard earliest and no later than the January 2016 assizes. This is a bit curious as only a few months earlier the applicant's attorney was asking for an adjournment. It is even more curious when one considers the last letter in this string. It is dated the 19th January 2016 and it is clear from its face that there had been some discussion between the attorney and the DPP's office about a fixture date and some agreement about this. This letter now indicated that the attorney could not be present for the week of the 22nd February 2016 as indicated as the attorney was compelled to be in Nevis for a judicial review matter which had been rescheduled.

[21] These letters taken together does show that some of the adjournments of this matter is to be laid at the feet of the applicant through the unavailability of his attorney who was on those occasions engaged in matters in other jurisdictions. I so find. I turn to the last factor.

[22] **The conduct of the administrative and judicial authorities** - The unchallenged evidence of the state shows that prior to 2014, there was only one criminal court functioning in Antigua. This in turn led to a significant backlog of criminal cases. The Director took active steps to have a second criminal judge assigned to Antigua and this became a reality in September 2014. Retired Judge Albert Redhead brought on in short term contracts was that second judge. During that first stint, however, he was only in Antigua for one and half months as he was also assigned to Montserrat.

[23] The unchallenged evidence of the state also shows that between 2013 and 2015 there were four bomb scares at the high- court and this caused disruption to matters set for trial. During that period the permanent criminal judge assigned to the criminal court, 'suddenly' resigned and this also led to a break in trials as it took some time for a replacement to arrive. All of this led to a backlog. This was further affected by several re-trials which had to be done between 2010 and 2015. The ability of the court to itself bring on matters for trials was further affected by the paucity of trial lawyers at the criminal bars.

[24] The respondents state that they did have some difficulties in 2016, with one of the complainants in the cases against the applicant and that later the trial judge was ill and 'out of commission for about three weeks' during which time the other complainant left the jurisdiction.

[25] This affected the DPP's ability to set the matter for the April 2016 assizes. They further presented evidence that two older matters, each having in excess of 12 witnesses were tried in the June 2016 assizes. They state that they are ready to go ahead and that even though the witness is overseas (as evidence can be taken by video link).

[26] The respondents say all of this meant that the delay in this matter cannot be viewed as unreasonable and that more significantly it has not been deliberate on the part of the prosecution.

Conclusion and Order

[27] In the view of this Court, there has been delay. For years in this jurisdiction there has been one criminal court, and this affected the speed at which matters could be tried. This affected this matter. This matter has been in these courts since June 2012. In my view it is at that point where it is likely to breach the claimant's right to be tried within a reasonable time. That however, does not mean that he cannot be tried at all and that such trial could not be a fair one. This court has considered a fair trial is still possible having regards to the evidence on this claim. In these circumstances, the order which was made in January 2017 was considered appropriate. It is now repeated in this judgment. The Order of the Court is as follows:

1. A declaration is hereby granted pursuant to section 18(2) of the Constitution of Antigua and Barbuda that the section 15(1) of the Constitution is likely to be breached by reason of the delay in the trial of the applicant Charles Joseph on the charges the subject of this claim.

2. That Charles Joseph be tried on the charges the subject of this claim during the current assizes.

3. There shall be no order as to costs.

[28] The Court's gratitude goes to counsel for their assistance in this matter.

Darshan Ramdhani

High Judge (Ag.)

By the Court