

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA

CASES ANUCHR 2015/0090, 2015/0093, 2016/0075, 2017/0022, 2017/0050

REGINA V LARRYDOW JACOBS

REGINA V KENNETH HUGHES

REGINA V JAHMALIER GRANT

REGINNA V PAUL JACOBS & SEMORLY JACOBS

REGINA V ALPHONSO RYAN

APPEARANCES

Variously, Mrs Shannon Jones- Gittens, Ms Rilys Adams, and Mr Curtis Cornelius, for the Office of the Director of Public Prosecutions.

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2019: JANUARY 18, 28, 31, APRIL 8, 10, 15

MAY 20

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RULING

On staying proceedings for abuse of process by reason of delay in filing indictments

- 1 Morley J: I have stayed the proceedings in the above listed cases. The reason is I have found it would be an abuse of the process of the court, in the sense it would bring the criminal justice process into disrepute to the mind of a reasonable third party observer, to continue the cases in light of the delay by the prosecution in the filing of the indictments.

- 2 My decision in each case was delivered briefly and orally, and that none was to be proceeded with further without leave of this court or then from the Court of Appeal. However on 10.05.19, I learned from the Criminal Registrar Kayode O'Marde **the ODPP has** appealed each stay to the Court of Appeal in two groups: notice of appeal in Ryan, LJacobs and Hughes was filed on 01.03.19 and in Grant and P&SJacobs<sup>1</sup> on 08.05.19. I had expected any application to resurrect any case would first come to me. The reason is the explanation given for the delay in the indictments was perfunctory, with no more forthcoming despite invitation, as merely due to **'admin backlog'**, meaning the ODPP had not got round to assessing the cases owing to there being other cases to consider, and I had expected any serious effort to resurrect any case to present more in-depth reasoning, which would then merit further reflection.
- 3 There is a danger the Court of Appeal will be told by the ODPP there has been insufficient attention paid by the court to each file, which would not be correct, as what has been considered has been limited to what has been presented.
- 4 Concerning LJacobs, his case was received at the High Court from the Magistrates Court on 16.06.15, and not indicted until 16.01.19, alleging one count of fraudulent conversion of \$6900ec in 2014. The indictment delay was 42 months. I listed it on 18.01.19, and when told the only explanation for the delay would be **'admin backlog'** I put it back for more information, and was later told none would be forthcoming.
- 5 Concerning Hughes, his case was received at the High Court from the Magistrates Court on 16.06.15, and not indicted until 25.01.19, alleging one count of obtaining \$430000ec by false pretence, being a dispute over the sale of land in 2008. The indictment delay was 42 months. I listed it on 31.01.19, and was told the explanation was again **limited merely to 'admin backlog'**.
- 6 Concerning Grant, his case was received at the High Court from the Magistrates Court on 28.04.16, and it was still not indicted on 08.04.19 when, being seized of it, I had it first listed. The case concerned a cook wrongly cashing her employer's cheques in 2014. On 10.04.19, I was told the indictment had been sitting on the desk of the DPP for five weeks, still unsigned, and in

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<sup>1</sup> The defendants and their cases will be so referred for ease of reading, with no disrespect intended if not writing out whole names and case files in the narrative.

any event delayed 36 months, for which the explanation was again limited to 'admin backlog'. It was still unfiled on 15.04.19 at which point I stayed the proceedings.

7 Concerning P&SJacobs, their case was received at the High Court from the Magistrates Court on 23.03.17, and it was still not indicted on 08.04.19 when , being seized of it, I had it first listed. The case concerned stealing copper in 2015. I was told the file could not be found, repeated on **15.04.19, with no explanation for the delay other than 'admin backlog'**, at which point I stayed the proceedings.

8 Concerning Ryan, his case was received at the High Court from the Magistrates Court on 29.06.17, and not indicted until 21.01.19, alleging one count of obtaining \$16902.98ec by false pretence in 2014. The indictment delay was 19 months. I listed it on 28.01.19, put it back for there to be a fuller explanation, and was told the only explanation for the **delay would be 'admin backlog', and so I stayed the proceedings.**

9 A number of features were troubling.

a. As I understood it, all the defendants were on bail with restrictions on their liberty, requiring reporting to police stations and inability to travel off-island, while sureties remained at risk of their bond being seized if there was a non-attendance. The effect of drawing out the proceedings was that persons innocent until proven guilty, and their supporters, were held in uncertainty, with the threat of criminal justice proceedings hanging like a sword overlong above their heads.

b. In reality, it could not strictly **be true that the cases had taken so long to indict owing to 'admin backlog' as plenty of other cases from the same timeframes, and later, had been indicted and tried in the same delay period, suggesting these cases had been put to one side.** Moreover, the **delayed cases were simple to indict. In this context, the explanation of 'admin backlog' seemed** manifestly unreasonable.

c. The picture unhappily emerged that as these cases involved offences of dishonesty there seemed to be little sense of urgency or priority, perhaps as being less serious than offences of violence or sexual offences, but nonetheless which concerned affected citizens as witnesses, and defendants as above, about whom there seemed to be reduced regard.

10 Under s16(1) Criminal Procedure Act cap 117, first promulgated as long ago as 1873, it states: *'...every indictment shall be filed in the Registry of the Supreme Court five days at least before the day of trial of the accused person charged in the indictment'*. It may be that to justify delay reliance might be placed by the ODPP on this section. However, the indictment should be 'at least' five days before the trial, which contemplates that is the latest it could ever be, not as late as it ordinarily can or should be.

11 Moreover, the recent Statutory Instrument, number 4 of 2019, concerning the sexual offences case management procedure rules, at rule 5(3) states: *'Notwithstanding any other provision in any law for the time being in force, the DPP...as a matter of good practice, shall prefer the indictment in a case on the sexual offences case list, unless reasonably impracticable, within 28 days of the case being formally received at the High Court Registry following committal of the defendant from the Magistrates Court to the jurisdiction of the High Court'*. This rule clearly contemplates that it is 'good practice' to file an indictment in sexual offence cases within 28 days as described, and by extrapolation, it cannot be that the instant offences of dishonesty can be placed in so different a category it is acceptable they should wait over a year or more.

12 In short, in my judgement it seems irresistible that it is wholly bad practice to take more than a year to file any indictment, unless there are intelligent impracticalities clearly enunciated, which has not occurred in these cases.

13 The power to stay proceedings as an abuse of process is explored from D3.66 in Blackstones 2017, where inter alia it says:

At D3.67:.....**the constitutional principle which underlies** the jurisdiction to stay proceedings is that the courts have the power and the duty to protect the law by **protecting its own purposes and function...the courts have an inescapable duty to secure fair treatment for those who come or are brought before them...**It is well established that the court has power to stay proceedings in two categories of cases, namely (i) where it will be impossible to give the accused a fair trial, and (ii) **where it offends the court's sense of justice and propriety.**

At D3.70: Two key questions run through many of the authorities: (1) to what extent is the accused prejudiced? (2) To what degree are the rule of law and the **administration of justice undermined by the behaviour of the...prosecution?**

At D3.72: ...the defence bear the burden of establishing abuse on the balance of probabilities.

At D3.74: ...**the defence may ....apply for the proceedings to be stayed on the ground of abuse of process if (a) there has been inordinate and unconscionable delay due to prosecution inefficiency...**

14 Addressing these fundamentals, and borrowing their words, I am of the **view that 'on balance' 'the administration of justice is undermined' by the prosecution taking so very long to file these** simple indictments, being matters of lesser seriousness, so that **the delay is 'inordinate and unconscionable due to prosecution inefficiency'**, prolonging exposure of witnesses to proceedings, during which the liberty of defendants has been infringed, so much so that this **inefficiency 'offends the courts sense of justice and propriety', 'having an inescapable duty to secure fair treatment for those brought before' the court.**

15 Put in another way, in my judgment the reasonable third party observer would be aghast at such delay and inefficiency, so that she or he would likely think to tolerate it brings the administration of justice into disrepute.

16 Further, if there is no sanction on the prosecution for such inefficiency, such as a stay, there will likely be no improvement.

17 The power to stay sits alongside, as above, the duty to protect the law by protecting its own purposes and function, remembering the courts have an inescapable duty to secure fair treatment for those who come or are brought before them. In this context, there is no need for an application to be made by **defence counsel, where of the court's own motion**, alive to its inherent powers to guard its procedures, it pursues this duty. Moreover, it may reasonably be said the Latin maxim *res ipsa loquitur* is of application (that a thing speaks for itself), spurring the

court to act *proprio motu* (of its own motion), namely, that the administration of justice is here palpably falling into disrepute speaks for itself in the teeth of such indictment delays with explanation **being no more detailed than questionably to assert 'backlog'**.

18 The question on appeal may arise whether any defendant has been prejudiced in the presentation of their defence by the delay. Inherent in any undue delay there may be prejudice, simply because memories may fade. However, this has not been argued. Indeed, no researched argument at all has been offered by the prosecution on whether abuse of process is applicable to the instant cases, (hence they were supposed to come back to me for deeper consideration if resurrection was sought).

19 Considering prejudice, it may be arguable no defendant in each case is prejudiced in the presentation of their defence simply by delay in indictment filing, and therefore there should be no stay. At D3.75 supra, there is reference to Lord **Lane's judgment in AG ref (No1 of 1990) 1992 QB630**, where he said: *'Stays imposed on the grounds of delay or for any other reason should only be imposed in exceptional circumstances. In principle, therefore, even where the delay can be said to be unjustifiable the imposition of a permanent stay should be the exception rather than the rule....No stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words the continuance of the prosecution amount to a misuse of the process of the court.'* Borrowing this language, the circumstances of these cases is exceptional because so many other cases have been processed, making each an exception.

20 I note the decision of Lord Lane predates the Human Rights Act 1998 (HRA) coming into force in the UK, to which I will turn shortly, so that it might be thought now superseded.

21 First however, I remind myself there is a Constitution on Antigua & Barbuda, from 1981, which says at s15(1): *'If any person is charged with a criminal offence...he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.'* The **key feature here is that it is a constitutional right a fair hearing shall be within a 'reasonable time'**. This begs whether delays in filing an indictment of more than a year are reasonable, absent complexity or some other specific feature fully addressed, and in such absence it might be said

*res ipsa loquitur* as ipso facto unreasonable. And if so, the unreasonable infringement of a constitutional right is intelligent ground to be concerned the administration of justice is being **'undermined'** (to use the earlier language), so that a stay might arise.

22 Though the UK does not have a Constitution, there is some learning on the application of article 6(1) European Convention of Human Rights (ECHR), which is in similar language, requiring trial within a reasonable time, having been put into domestic effect by the *HRA* supra.

a. In AGs Ref (No.2 of 2001) 2AC72, the House of Lords ruled that criminal proceedings may be stayed on the ground that there had been a violation of the reasonable time requirement of article 6 only if (a) there can no longer be a fair hearing, or (b) it would otherwise be unfair to try the defendant.

b. However, dealing with (b), at D3.76, there is reference to how in *Burns v HM Advocate* 2009 1AC720, coming from Scotland, it was held that the reasonable time requirement must be interpreted and applied in a way that will then achieve its purpose, which is to avoid **'undue uncertainty'** on the part of a person charged, and so the matter ought to be examined from the perspective of the individual concerned.

c. In *Dyer v Watson* 2004 1AC379, in the Privy Council Lord Bingham said that the threshold of proving that a trial has not taken place within a reasonable time is a high one, not easily crossed, but added that if the period which has elapsed is one which on its face gives ground for real concern, it is necessary to look into the detailed facts and circumstances of the particular case and it must be possible to explain and justify any lapse of time which appears to be excessive. While there may be no general obligation on a prosecutor to act with all due expedition and diligence, a marked lack of expedition, if unjustified, would point towards a breach of the reasonable time requirement.

23 With the dicta of *Burns* and *Dyer* in mind, supra, it seems inescapable the delays here create **'undue uncertainty' for a defendant, and no 'detailed facts and circumstances to explain and justify any lapse of time' have been offered.**

24 In sum, while there can always be intelligent exploration of whether any prejudice arises, nevertheless, in my analysis arising from the Constitution undue delay can stand apart in

appropriate circumstances, as without more I have judged here, as a ground for staying proceedings.

- 25 It remains my view the application to the Court of Appeal is premature, and argument to lift any stay should first be heard by me. Failing this being correct, this ruling stands as reasoning for the original stays.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

20 May 2019