In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 061

IN THE MATTER OF ORDER 114 OF THE RULES OF THE SUPREME COURT OF BERMUDA

BETWEEN:

DENNIS ROBINSON	1st Plaintiff
REBECCA WALLINGTON	2nd Plaintiff
-and-	
THE DIRECTOR OF PUBLIC PROSECUTIONS	1st Defendant
THE ATTORNEY GENERAL	2nd Defendant

Before: **The Hon. Assistant Justice Delroy Duncan**

Appearances: **Mr Mark Pettingill and Ms Victoria Greening, Chancery Legal Limited, for the Plaintiffs**
Ms Tanaya Tucker, The Attorney General's Chambers, for the Defendants

Dates of Hearing: **16th and 22nd May 2019; 24th July 2019**

Date of Judgment: **13 September 2019**

JUDGMENT

Constitutional right to be tried within a reasonable time section 6 (1) of the Bermuda Constitution - Delay between charge and conclusion of retrial - calculation of delay - relevance of complexity of the case - conduct of the defence and the judicial and

Introduction

1. In this case, both Plaintiffs complain that the criminal justice system in Bermuda has taken too long to hear and determine the charges they face in the Magistrates' Court. They claim that being subjected to a retrial following their aborted first trial is an abuse of process of the court. They seek a permanent stay of the criminal charges.

2. The facts of this case are unusual in so far as they concern the First Plaintiff. The First Plaintiff seeks a stay preventing his retrial because even though he was granted bail for the charge he faces, that charge led to the Parole Board revoking his parole. His counsel Mr Pettingill and Ms Greening allege the consequence of the revocation of his parole is that the First Plaintiff has served and continues to serve more time in custody awaiting retrial than he would serve if he were convicted of the offence for which he has been charged.

3. The position the First Plaintiff finds himself in is unusual. However, in the case *of Shane McCoy Smith v The Minister of Health and Social Services and The Commissioner of Prisons (2 April 1996) Civil Jurisdiction 1996 No.19*, former Chief Justice Richard Ground anticipated the problem the First Plaintiff now faces when he made the following prescient remark:

> *"When the reason for recall is pending criminal charges in respect of some offence alleged to be committed while on licence, I do not think the Minister need wait until the Court has disposed of those charges. To do so might well defeat the whole process if the trial is delayed as it often maybe."*

Chief Justice Ground repeated the same caution in the case of *Trott v The Parole Board, The Commissioner of Prisons and the Minister of Health and Social Services [2004] Bda L.R. 54* at page 3.

The Constitutional Application

4. The Plaintiffs filed their Originating Motion under section 15(1) of the schedule to the Constitution of Bermuda ("the Constitution"). Both Plaintiffs claim that the Defendants are in contravention of section 6(1) of schedule 2 of Chapter 1 of the Constitution. They seek an order declaring criminal case 17CR00039 unconstitutional and dismissal of the case.

5. In paragraph 9 of the Originating Motion, the Plaintiffs contend they have a right to be heard “within a reasonable time", and there has been a contravention of this fundamental and Constitutional right. And in paragraph 10, the First Plaintiff contends he has been in custody waiting to be tried for a longer period than he would serve if he were convicted of the offence for which he has been charged.

6. The Defendants, represented by Miss Tucker, roundly reject the Plaintiffs’ claim to have their retrial dismissed. First, they contend that the period of time which has elapsed before the conclusion of the criminal trial should not give the Court grounds for real concern. However, if the Court does have real concerns that the period of time is excessive, then the court should look into the detailed facts and circumstances of the case by considering the procedural history of the matter and the nature and extent of the delay. The Defendants contend such an examination will establish the delay was not caused by the Crown and in some instances was caused by the Plaintiffs’ counsel. Consequently, the application should be refused.

Factual Background and Procedural History

7. The parties agreed the relevant factual background set out in the affidavit of Senior Crown Counsel Alan J. Richards sworn on 4 April 2019, and repeated in their respective skeleton arguments. I set out the full extensive chronology of events here which will be relevant to the points of law I am required to address in this application:

15 November 2016	Plaintiffs arrested together. Both Plaintiffs charged with possession with intent to supply 418.7 grams of cannabis. Plaintiff Rebecca Wallington charged with simple possession of 4.93 grams of cannabis.
16 November 2016	Plaintiff Dennis Robinson, having been released on license by the Parole Board, was recalled and has been in custody awaiting the outcome of this case since his arrest.
2 February 2017	Defendants due to appear in Plea Court. Wallington appeared, entered a plea of not guilty and elected to have a summary trial. Robinson was not produced by the Westgate Correctional Facility. Trial Date fixed for 13th April 2017
9 February 2017	Mentioned to allow Defendant Robinson to enter a plea. Robinson entered plea of not guilty and consented to summary trial. Both Plaintiffs granted bail.
28 February 2017	Mention in Magistrates' Court for additional disclosure and directions hearing. Counsel for Defendants sought to have trial date of 13th April 2017 changed due to medical leave requested by Shawn Crockwell. New date set for 9th June 2017 and 12th June 2017.
6 June 2017	Shawn Crockwell, Counsel for Defendants Wallington and Robinson submitted written request for adjournment as he was due to be in the House of Assembly on 9th June 2017 and off island thereafter attending to an urgent matter.
9 June 2017	Trial due to commence. Counsel for Defendants not present. Counsel from firm held to seek an adjournment.

	Worshipful Warner not sitting on fixed trial date. Listed matter for 4th July 2017.
30 June 2017	Victoria Greening wrote to advise she was new counsel for Wallington and had only just received the papers from former Counsel that afternoon. Indicated she would be seeking an adjournment on next occasion. Victoria Greening was not in receipt of full disclosure and files from the DPP and contends the Police had taken Shawn Crockwell's files and requests the file from the DPP.
4 July 2017	Counsel for all parties appeared in Court. Counsel for Wallington informed the Court that she had not yet received all of the material from Chancery Legal. Court ordered that Defence Statement be provided by 14 August 2017. Counsel for Robinson informed the Court that some of the material for Wallington is at the home of Shawn Crockwell, and accepted responsibility for not completing the disclosure to Ms Greening. Court listed matter for trial on 17 and 18 October 2017.
31 July 2017	While still employed by Wakefield Quin, Victoria Greening writes to the Department of Public Prosecutions on behalf of Rebecca Wallington seeking a full set of disclosure, including all interview discs and body cam evidence.
17 October 2017	Trial did not proceed. Adjourned for Mention on 31 October 2017.
31 October 2017	Set for trial on 24 January 2018. Mr Richard Horseman held for Ms Greening.

15 November 2017	Chancery Legal write to the Parole Board on behalf of Dennis Robinson asserting their client was recalled because he was charged with a criminal offence despite the co-accused Wallington acknowledging responsibility in Court. The letter complains Robinson has been granted bail, but is imprisoned as a result of the recall and invites the Parole Board to release Robinson on license so he can remain on bail until completion of trial.
24 January 2018	Trial unable to proceed because Counsel for Robinson and Crown Counsel Richards were in a jury trial before the Supreme Court.
31 May 2018	Trial commenced before Worshipful Warner in Magistrates' Court. Matter did not complete and was adjourned overnight.
1 June 2018	Evidence complete and trial adjourned for closing submissions.
28 June 2018	Matter listed for closing submissions. Both Defence Counsel unavailable for this date. Matter was relisted.
11 July 2018	Matter listed for closing arguments. Unheard due to Counsel for Robinson and Crown Counsel Richards before Supreme Court for jury trial. Matter adjourned to 18 July 2018.
18 July 2018	Closing submissions heard. Listed for Judgment on 17 August 2018.
17 August 2018	Worshipful Magistrate Warner indicated that Judgment was

	not yet ready. Matter adjourned until 28 September 2018.
28 September 2018	Worshipful Magistrate Warner indicated that Judgment was not yet ready. Matter adjourned until 11 October 2018.
5 October 2018	Worshipful Magistrate Warner formally advised Court that he had become aware of a conflict (previously explicitly notified to all Counsel in private) and recused himself from the proceedings.
23 October 2018	Crown Counsel Richards wrote to Senior Magistrate to explain history of proceedings and requested that the matter be mentioned before another Magistrate so that a fresh trial counsel be listed.
6 December 2018	Matter mentioned before Magistrate Tokunbo. Trial date fixed for 29 January 2019.
28 January 2019	Court and Department of Public Prosecution sent a copy of draft Originating Summons regarding Constitution motion.
29 January 2019	Matter listed for trial before Senior Magistrate. Ms Greening (now of Chancery Legal) holding matter for Mr Pettingill who was said to be unwell. Matter adjourned until 15 March 2019 for update regarding Originating Summons.
28 February 2019	Justice Subair Williams makes an Order for Directions in the Originating Summons/Constitutional motion.
15 March 2019	Listed for mention before Magistrate Anderson. Court adjourned again to await outcome of Supreme Court

	proceedings. Listed for mention on 14 June 2019.
21 March 2019	Counsel for the Defendants in these proceedings seek a 14 day extension to file documents on or before 4 April 2019. Counsel for the Plaintiffs consent to the request for the extension.
16 May 2019	Plaintiffs commence hearing of these proceedings in the Supreme Court due to inadequate time agreed by partes/set aside for the hearing the application is adjourned part heard to 22 May 2019.
22 May 2019	Counsel conclude submissions on the Constitutional application.
7 June 2019	Registrar of Supreme Court sends an email to counsel for the parties seeking confirmation first that the First and Second Defendants received a copy of the letter from Chancery Legal to the Parole Board dated 15 November 2017 and that they accept/reject the contents of that letter. Second whether the Parole Board is on notice of these proceedings and third seeking a written response/ affidavit from the Parole Board. The letter also asked the parties to review and comment on legislation and legal authorities concerning revocation of parole.
22 July 2019	The Parole Board write to Crown Counsel in response to letter from Chancery Legal dated 15 November 2017 and the (4) questions from the Supreme Court in the email dated 7 June 2019.
24 July 2019	Counsel appear before the Supreme Court to argue points raised in the email dated 7 June 2019.

The Issues in the Application

I. Delay

8. The Plaintiffs seek relief under Section 6(1) of the Constitution which provides:

> *"Provisions to secure protection of law*
> *(1) 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".*

9. Both the Court of Appeal and the Supreme Court of Bermuda have authoritatively confirmed the right of an accused person to trial within a reasonable time. In *Giles and the Attorney General v Hall* [2004] Bda. L.R. 26 on pages 3 and 4, Lord Justice Evans said:

> *"Equivalent provisions relating to the right of an accused person to trial "within a reasonable time" are found in Articles 5 and 6 of the European Convention in Human Rights:*
>
> *5. (3) Everyone arrested or detained in accordance with the provisions of Paragraph 1(c) of this article shall be brought promptly before a judge … and shall be entitled to trial within a reasonable time or to release pending trial …*
>
> *6. (1) In the determination 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.*

The European Convention on Human Rights applies to Bermuda by Declaration of the United Kingdom: see The Bermuda Human Rights Act 1981.

Neither party to the appeal suggested that the phrase "within a reasonable time" in Section 6 of the Constitution of Bermuda should be interpreted differently from the same words in the European Convention on Human Rights. Both parties referred us to authorities decided under the Convention, Articles 5 and 6.

Mr. Diel, counsel for the applicant, relied upon the judgment of the European Court of Human Rights ("ECHR") in Abdoella v. the Netherlands [1992] ECHR 12728187. This was quoted by the learned judge, as follows:

> *"24 ... Likewise, this Court has repeatedly held, in the context of Article 5(3), that persons held in detention pending trial are entitled to "special diligence" on the part of the competent authorities."*

The authorities were reviewed by the Judicial Committee of the Privy Council, Lord Bingham of Cornhill presiding, in Dyer (Procurator Fiscal, Linlithgow) v. Watson and Another [2002] UKPC D1 [2002] 4 LRC 577 ("Dyer"). In Paragraph 52 of his judgment, with which Lord Hutton, Lord Millett and Lord Rodgers agreed, Lord Bingham stated the Court's approach as follows:

> *"[52] 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."

Lord Bingham continued:
"[53] The Court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case …

[54] The second matter … is the conduct of the defendant … A defendant cannot properly complain of delay of which he is the author.

[55] The third matter … is the manner in which the case has been dealt with by the administrative and judicial authorities … It is, generally speaking, incumbent on contracting states so to organize their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organized legal system …"

We respectfully adopt this passage as the correct approach for the court to adopt."

10. The Supreme Court of Bermuda subsequently adopted the same approach to applications to stay criminal prosecutions in *Angela Cox (Police Sergeant) V Jahkeil Samuels* [2005] Bda LR 24 and *Hayward v The Attorney General and Minister of Legal Affairs* [2017] SC (Bda) 102 Civ.

11. In *Dyer* at paras 156 and 157, Lord Bingham explained the purpose of the right contained in Article 6(1) of the ECHR:

"156. In the case of article 6(1), its principal purpose at least is to prevent an accused being left too long in a state of uncertainty about his fate. Such a protection is, of course, of very real interest to an innocent person who has been charged with an offence or even to a person who has in fact committed an offence but whose guilt the prosecution cannot establish. The accused's whole life, both private and professional, may be thrown into turmoil, doubt and confusion until he is acquitted. Especially for the innocent and for their families the time spent awaiting trial must indeed be "exquisite agony" (R v Askov [1990] 2 SCR 1199, 1219 per Cory J).

157. That is not, however, the whole story. The reality is that, especially when they are on bail, many accused who are in fact guilty may prefer to dwell in the interim state of uncertainty rather than to march steadily to the end of their case where that state of uncertainty may well be replaced with a considerably more agonising state of prolonged imprisonment. Delay may indeed bring positive advantages to such persons: prosecution witnesses may die, leave the country, lose interest or forget. The right conferred by article 6 is therefore somewhat unusual. Not infrequently, accused persons may appear to have an interest in invoking it not in order to benefit from its fulfilment but rather in the hope of benefiting from its breach."

12. In a case in which it is said that the reasonable time requirement has been violated under section 6(1) of the Constitution, the first step is to consider the period of time which has elapsed. Does the period of time give grounds for real concern?

13. The starting point is that there is no period of time, which is determinative on an application to stay a prosecution on the grounds of delay. In *Regina v Derek Hooper* [2003] EWCA Crim 2427 at paragraphs 71 and 72, Lord Justice Rose referred to counsel's submission regarding a delay of 30 years in an earlier authority and said:

"71. We find no statement of principle in the judgment given by that court that that period, or any other period, should be regarded as being determinative of a decision in relation to a stay on the grounds of abuse of process by reason of delay."

72. Indeed, it is apparent, from the many authorities in this area, that the length of delay is but one of the factors to be considered in the exercise of the trial judge's discretion as to whether or not to grant a stay."

14. Helpful guidance on this question is found in the Privy Council case *Bell v DPP* [1985] AC 937, which concerned section 20(1) of the Constitution of Jamaica. That provision provides that a person charged with a criminal offence must be afforded a fair hearing within a reasonable time.

15. In *Bell v DPP*, their Lordships expressly acknowledged the relevance and importance to their inquiry of the criteria laid down by the US Supreme Court in the case of *Barker V Wingo* 407 US 514 (1972). At pages 951-955, Lord Templeman, citing *Barker V Wingo* said:

"the length of the delay is dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."

16. Counsel for the Plaintiffs and the Defendants acknowledge and accept the Court has jurisdiction to stay a criminal prosecution on the grounds of delay relying on section 6(1) of the Constitution and the case of Dyer.

17. Mr Pettingill argued that the First Plaintiff has been in custody in relation to this matter for two years, six months, which at the time of this judgment will be two years ten months, waiting for this matter to be determined. The Second Plaintiff, was charged on 6 January 2019. The period the Second Plaintiff has been waiting to conclude this matter would be calculated from that date. Although on bail, she

has been unable to travel to visit her young daughter in the UK or have surgery overseas on her back. Miss Tucker responded that the time which has elapsed for both Plaintiffs does not pass the threshold test on its face and should not give the Court grounds for real concern.

18. I accept the admonition of Sopkina J in the Canadian case of *R v Smith* [1992] 2 SCR 1120 at 1131, where he commented *"It is axiomatic that some delay is inevitable. The question is, at what point the delay becomes unreasonable"*. However, in this case, the delay is more than two years between the date the Plaintiffs were charged and the filing of their Constitutional motion to dismiss the charges. Such a delay is, in my view, one which on its face gives grounds for real concern. It is, therefore, necessary for me to examine the detailed facts and circumstances to explain the lapse of time.

II. Calculation of Delay

19. In the case of the First Plaintiff, the parties did not agree on the commencement date for the calculation of delay. As a result, I will address more thoroughly, what ordinarily is a relatively uncontroversial legal proposition.

20. The opposing legal positions taken by both parties are set out in *the A-G' Reference (No 2 of 2001)* [2001] EWCA Crim 1568. In this case, the Attorney General applied under section 36 of the Criminal Justice Act 1972, to refer the following two points of law for the opinion of the UK Court of Appeal.

> *"(i) Whether criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in Article 6(1) of the European Convention for the Protection of Fundamental Rights and Freedoms ('the Convention' in circumstances where the accused cannot demonstrate any prejudice arising from the delay.*

(ii) In the determination of whether, for the purposes of Article 6(1) of the Convention, a criminal charge has been heard within a reasonable time, when does the relevant time period commence?"

21. In paragraph 10 of the judgment, Lord Woolf CJ explained the traditional starting point for calculation of the commencement of delay:

"in the great majority of situations the date that a defendant is charged (in the sense we use that term in our domestic jurisprudence) will provide the answer. Ordinarily therefore the commencement of the computation in determining whether a reasonable time has elapsed will start with either a defendant being charged or being served with a summons as a result of an information being laid before the magistrates."

22. However, relying upon European Court decisions in *Deweer v Belgium* (1980) 2 EHRR 439 *and Eckle v Germany* (1982) 5 EHRR 1, at paragraph 11 of the judgement, Lord Woolf sought to align the Convention Article 6(1) test for the commencement of calculating delay with the test under the common law:

"There will, however, be situations where a broader approach is required to be adopted in order to give full effect to the rights preserved by Article 6(1) of the Convention. Mr Perry put the matter as follows. For the purposes of that Article there could be a period prior to a person formally being charged under English law if the situation was one where the accused has been substantially affected by the actions of a state so as a matter of substance to be in no different position from a person who has been charged. The importance of the approach that Mr Perry concedes the court has to adopt is that it takes account of the fact that there may be some stage prior to an accused being formally charged in accordance with our domestic law where, as a result of the actions of a state linked to an investigation, when he has been materially prejudiced in his position"

23. Mr Pettingill did not oppose Miss Tucker's contention that concerning the Second Plaintiff, the 6th January 2017 date of charge, is the commencement date for calculation of delay. However, in the case of the First Plaintiff, he contended the commencement date for the calculation of delay is not the 6th January 2016, the date he was charged. He argued the commencement date should be the 16th November 2016, the date the First Plaintiff was recalled, and his release on parole was revoked, approximately seven weeks earlier.

24. Relying upon the Bermuda cases *Roberts- Wolffe v Tomlinson* [2016] SC (BDA) 18 APP and *Giles and Attorney General v Hall* [200] Bda. L.R.26, Miss Tucker submitted these cases conclusively defined the commencement date for the calculation of the reasonable time requirement for both Plaintiffs is the date they were charged on the 6th January 2017.

25. There appears to be no dispute between the parties that in the case of the Second Plaintiff the calculation for delay commences on the 6th January 2017, the date she was charged. I agree and so find.

26. However, in the case of the First Plaintiff, I find the reasoning of Lord Woolf in paragraph 11 of *A-G' Reference (No 2 of 2001)* [2001] EWCA Crim 1568 both relevant and compelling. The First Plaintiff has been incarcerated from the 16th November 2016 as a direct result of the allegation of criminal conduct which led to him being charged approximately seven weeks later.

27. Whether analysis is rooted in the "substantially affected" test in the Strasbourg case law or the common law "materially prejudiced" test, the First Plaintiff lost his liberty on the 16th November as a result of a criminal allegation for which he was subsequently charged. For this reason, I find that in the case of the First Plaintiff, the commencement date for the calculation of the delay is the 16th November 2016.

III. Complexity of the Case

28. I start by repeating the comments I made earlier in this judgment citing Lord Templeman in the case *Bell V DPP*, who in turn relied upon the judgment of Mr Justice Powell in the US Supreme Court decision *Barker V Wingo.* In *Eckle v Germany* (1982) 5 EHRR 1 at para 80, the court held that it would permit greater periods of delay in a complex prosecution.

29. Neither party addressed me on the complexity of the case despite the leading authorities suggesting this is a factor which must be considered once the period of delay on its face causes real concern.

30. In my view, this case did not on its face appear complex. Neither party asserted the trial of allegations of possession nor possession with intent to supply cannabis was complex further, neither party submitted the case was complex in the management or calling of oral and documentary evidence. No case is straightforward; however, I find that the nature of the charges, in this case, did not justify a delay of over two years.

IV. Conduct of the Defence

31. I first address how the defence conducted the case in the Magistrates' Court. In *Dyer* at paragraph 54, Lord Bingham said:

> *"The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively."*

32. In *Rummun v Mauritius* [2013] UKPC 6, the court gave further guidance on how to assess the conduct of the defence in delay cases. The Privy Council considered the issue of delay under section 10(1) of the Constitution of Mauritius, which provided that any person facing criminal charges had a right to a fair hearing within a reasonable time.

The court held:

> *"It appeared from the Supreme Court's judgment in the instant appeal that much of the delay was attributable to the conduct of a co-defendant's case. Apart from the fact that R had advanced an unmeritorious defence, there was no suggestion that he was actively responsible for any significant delay. The magistrate should have addressed the question of delay in the context of the constitutional guarantee to a fair trial within a reasonable time. She should also have examined the individual responsibility of each of the defendants for that delay..... R's conduct was criticised in two respects; first, he had advanced a spurious defence and, second, had acquiesced in the delay engineered by one of his co-defendants and was complacent about the delays for which the prosecuting authorities were responsible. He had not pressed to have his case tried expeditiously, and that had to be taken into account in deciding whether any reduction in his sentence was appropriate, Celine considered. However, although he might have been passively acquiescent in the continued postponement of the case, there was no evidence that he was actively complicit in the manoeuvrings of others in delaying the trial. With regard to his decision to contest the case on grounds that proved unfeasible, that factor was to be treated with some caution. A defendant was entitled to put the prosecution to proof of his guilt. Much of the responsibility for the delay in the instant case lay with the prosecuting authorities (paras 13-19). "*

33. The chronology and procedural history of the case were relied upon by both parties in support of their opposing contentions on what role the conduct of the Plaintiffs played in the delay. Paragraphs 14 and 15 of the Defendants' skeleton

argument set out their submissions concerning the conduct of both accused and the court administrative system:

> *"14. Between the period of charge on 6th January 2017 and the filing of the Originating Summons on 28th January 2019 (a period of twenty four (24) months), there were fourteen (14) adjournments.*
>
> *15. It is our submission that based on the aforementioned, a number of adjournments were due to the Plaintiffs seeking adjournments, and a number of adjournments were due to the Court's administrative process. There were a handful of occasions where both counsel for the Plaintiff and for the Department of Public Prosecutions were both unavailable. For this reason, we submit that it is not possible to say that there was a significant delay which can be said to be both unreasonable and the responsibility of the Crown. "*

34. In reply to the Defendants' written submissions, Mr Pettingill argued there was no evidence that the Defendants themselves caused the delay of which they now complain. First, the disclosure requested on the 4th July 2017 was not received until October of the same year. The Defendants reply to this assertion was any delay in disclosure had no impact on the date the trial eventually took place. Next, Mr Pettingill contended that the Plaintiffs could not be faulted for making an application to the Supreme Court to stay the criminal proceedings. Further, even if the Plaintiffs had agreed to proceed with the retrial in January 2019, it is unlikely the date would be fixed before March 2019, by which time the First Plaintiff would have been in custody two years and four months. At that point, the damage would be irreparable because he would have served more time in custody than he would be sentenced to imprisonment if he was found guilty. Finally, the Plaintiffs could not be faulted for adjournments requested by counsel.

35. In my view, the chronology of events does not demonstrate the Plaintiff's counsel, or more importantly, the Plaintiffs themselves attempted to delay the trial. The adjournments requested by the Plaintiffs' counsel are explained by medical leave,

attendance in the House of Assembly, the death of Shawn Crockwell, counsel previously instructed in this matter, and requests for disclosure from the crown. I accept that on the 28th June 2018, both defence counsel were unavailable. Save for the unexplained request for an adjournment on the 28th June 2019, the adjournments appear to be reasonable applications.

36. I acknowledge that counsel for the Plaintiffs requested adjournments; however, I also bear in mind the decision of the Privy Council in *Rummun v Mauritius* [2013] UKPC 6. In *Rummun,* the court commented on the prosecution assertion that the defendant had delayed the trial. Discounting that assertion, the court said: *"there was no evidence that he was actively complicit in the manoeuvrings of others in delaying the trial"*. When balanced against the totality of the procedural history of the case, I find the conduct of the Plaintiffs is not such that their conduct disentitles them from making the argument that the retrial of the criminal charges they face should be stayed because of delay.

V. Conduct of the Judicial and Administrative Authorities

37. Assessing conduct of the judicial and administrative authorities necessitates further consideration of the law set out in *Dyer* together with the law on recall of persons released on parole. In paragraph 55 of *Dyer*, the court addressed the impact of administrative authorities on the question of delay as follows:

> *"55. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system."*

38. Turning to the Plaintiff Robinson's recall on parole and its impact upon how his case was dealt with by the administrative authorities, the starting point is the Criminal Code Amendment (No.2) Act 2014. The relevant sections of that Act are set out below:

"Section 70R(1) A person released on licence under section 12 or section 13 of the Prisons Act 1979 is subject to the following conditions of parole—

(a) the person shall not commit any offence against the laws of Bermuda during the period of the Parole Order;

Section 70R(2) In addition to the conditions set out in subsection (1), or in substitution of any of the conditions set out in subsection (1) where the Parole Board deem it appropriate, the Parole Board may, before or after the release on licence of a person—

(a) specify in his licence any number of special conditions to be complied with, which may be determined by the needs and circumstances of the particular person being released on licence and the requirements for public protection.
Section 70R (2) (b) specify as a special condition in his licence a requirement for the person to refrain from—

(i) associating with a specific person or group of persons suspected of committing crime or of having influence on the person released on licence that is unsuitable for his rehabilitation and that may lead the person to commit a crime;

Section 70R(3) A person released on licence who fails to comply with a condition or special condition of parole may be recalled by the Parole Board under section 12(5) of the Prisons Act 1979 or may be arrested as provided under section 70S of this Act."

39. The 2014 Amendment to the Criminal Code was in part influenced by criticisms made of the fairness of the process for recalling a person on licence expressed in two decisions of the Supreme Court of Bermuda and one Court of Appeal decision.

40. In the first instance, decision of *Shane McCoy Smith v The Minister of Health and Social Services and The Commissioner of Prisons (2nd April 1996)* Civil Jurisdiction 1996 No.19, Mr. Smith was sentenced to 14 years imprisonment for a variety of serious offences. On the 9th March 1993, he was released on licence under the provisions of section 12 of the Prisons Act 1979.

On page 4 of the judgment, Chief Justice Ground said:

> *"The decision to recall a prisoner is one which has severe consequences for him: he loses his liberty. I have no doubt, therefore, that in making such a decision the Minister is under a duty to act fairly. I find that a more helpful way of expressing it than saying that he is bound to follow the rules of Natural Justice, but in my view it amounts to the same thing.*
>
> *That is not the end of the matter, however, because it leaves the critical question of what the duty to act fairly entails in those circumstances. It is now well established that what amounts to fairness, or what the rules of Natural Justice require, is not an absolute, but varies according to the nature of the decision being made: "*

At page 5 of the judgment, he continued:

> *"In my view the prisoner should be afforded an opportunity to make representations both in writing and orally, if desired, and (given that his liberty is at stake) that extends to permitting him representation by counsel or a McKenzie type friend. I also think that the prisoner should be allowed, within reason and in an appropriate case, to call any witnesses on his own behalf to support his case.*

However, I do not think that fairness requires that the complaint or allegations against the prisoner be proved in any formal sense, nor do I think that an evidential hearing is required to establish them. This is because parole is a privilege and not a right, and until the completion of his original sentence a prisoner cannot claim the right to liberty of person guaranteed to others under the Constitution. Moreover, in order to retain an effective control over a prisoner the authorities need to be able to effect a speedy recall in cases of breach, without being unduly impeded, subject of course to the requirement that they do so in a fair manner. For the same reason I do not I think that the decision maker is precluded from having regard to hearsay or other matters which would be excluded by the strict rules of evidence, provided he puts his mind to the dangers inherent in such a course. The best way to ensure that he puts his mind to such dangers is for him to hear the prisoner's representations."

And on page 7

"When the reason for recall is pending criminal charges in respect of some offence alleged to have been committed while on licence, I do not think that the Minister need wait until a Court has disposed of those charges. To do so might well defeat the whole process if the trial is delayed, as it often may be. Release on licence is only a privilege and not a right, and the sanction of recall, to be effective, has to be a summary one. I think, therefore, that the Minister can decide to recall on the basis of pending criminal charges before they are determined by a Court, although whether he does so remains a matter for the exercise of an informed discretion taking account of all the circumstances. However, before recommending such a course I think that the Board should have before it sufficient details of the case for its members to understand the circumstances of the offence generally and to see whether there is a prima facie case, and the prisoner should be afforded sight of that material so that he can properly address the Board on that point. That may most conveniently be done by providing sight of the prosecution statements,

where they are available, but where they are not, a sufficient summary should be before the Board to enable it to discharge this function properly. Such a summary would have to be more detailed than the police report in the present case.

The Minister is not, of course, limited to matters which are the subject matter of a prosecution: he may recall for any breach of the conditions of the licence, and this may involve acting upon hearsay or the word of informers. In such a case I consider that as much detail as possible should be given to the prisoner to afford him a genuine opportunity to respond to the allegations. However, that is always subject to the overriding public policy considerations which allow police informants the benefit of anonymity. Nevertheless, in such cases, the Board in making their recommendations, and the Minister in making his decision, should address their minds to the dangers of relying upon such unattributed information.

At the end of the hearing on 27th March 1996, I made an order quashing the applicant's recall on the basis that the decision was made in breach of the requirements of procedural fairness, in that the applicant was not told of the allegations against him and was not offered a chance to respond to them in any way. As the matter was not one involving immediate violence or a risk of his absconding, and as the criminal court seized of the pending charges had seen fit to offer him bail, I saw no reason why the applicant should not be released, subject to complying with the terms of that bail. "

41. The decision of Chief Justice Ground on the recall aspect of the case was upheld on appeal. The recall procedure the Parole Board is required to follow arose again in the case of *Trott v The Parole Board, The Commissioner of Prisons and the Minister of Health and Social Services* [2004] Bda L.R. 54. In this case, Mr Trott complained about the revocation of his release on licence and his recall to prison. The brief facts are that Mr Trott was sentenced to 20 years imprisonment on the 12th March 1991, for offences of rape and burglary. On 13th October 2003, while on licence, he was charged with an offence of sexual assault and he appeared in

the Magistrates' Court to answer that on 14th October 2003, when he was remanded in custody.

On page 3 of the judgment Chief Justice Ground said:

> *"As to the original hearing on 5th November and the condition which was alleged to have been breached, I accept Ms Christopher's submission that the condition that he not be charged with any offence was not a fair or proper condition to have imposed in any event. It was something over which he had no personal control. The proper condition should be simply that he do not commit any offence. If he is then charged with the commission of an offence the way to deal with that is set out in my decision in the case of Shane McCoy Smith v The Minister of Health and Social Services and The Commissioner of Prisons (2nd April 1996) Civil Jurisdiction 1996 No. 19..... (When that judgment was delivered the decision was taken by the Minister on the recommendation of the Board. That procedure has now been shortened to some extent, and the decision is now that of the Board itself.) In other words, the fact of the charge is not itself a breach, but it may justify a recall pending the determination of the charge. If there is then an acquittal, or a withdrawal, or a termination of the charge for any other reason, there should be an immediate and proper reconsideration. By "proper" I mean one in which the person being recalled is given an opportunity to be heard and make representations"*

And on page 4:

> *"Against that background I think that the proper way ahead is not for me to quash the original recall – that may have been justified by the charge of sexual assault – but to mandate a proper hearing now in the light of that charge's subsequent withdrawal and all the other circumstances."*

42. In this application, the Plaintiffs contend that the Learned Magistrate caused a significant delay by conducting the trial, hearing evidence and after seeing the Second Plaintiff at trial, inexplicably pronounced he knew the Second Plaintiff at the point he was about to deliver his judgment. Because the Learned Magistrate had to abort the trial, the Plaintiffs say the blame for the consequential delay in the trial lays at the door of the court authorities. The Defendants submit that while the actions of the Learned Magistrate' recusing himself after hearing the evidence in this matter were not favourable and wholly unfortunate, the delay was not unreasonable. Within a month of this regrettable circumstance, Crown Counsel Richards wrote to have the case listed before the Courts for a new trial.

43. I accept that on the evidence, the trial was inevitably delayed as a result of the Learned Magistrate recusing himself after hearing all the evidence and that that delay must be attributed to the administrative or court authorities. However, I find that the impact of that delay could be mitigated by a speedy retrial which the Crown say they secured. Mr Pettingill disagreed suggesting the retrial would not have been heard until March of this year. The new trial date was not before the court, so I can only find the timing of a fresh hearing was left undecided. However, I accept the submission by Miss Tucker that a trial would, in all likelihood have taken place and concluded before the middle of 2019.

44. The principal conclusion is that the circumstances surrounding the necessity for a retrial have different implications and consequences for each Plaintiff. In the case of the Second Plaintiff, she has been on bail since her first appearance in court on the 2nd February 2017. The First Plaintiff, while on bail for the charge he faces, had his parole licence revoked and has been in custody since the 16th November 2016. Therefore, even on the assumption, the trial would have concluded in June 2019, the First Plaintiff would have been in custody two years seven months.

45. I now consider whether the revocation of the First Plaintiff's licence can be considered as relevant and part of the administrative process responsible for the delay.

46. Mr Pettingill makes the following attack on the recall procedure. First, the Parole Board did not respond to his letter of the 15th November 2017 seeking the release of his client until the 22nd July 2019. Second, Mr Pettingill disputes the assertion that his client had a hearing before the Parole Board at all, and if such a hearing took place, it did not comply with the provisions of section 70R of the Criminal Code Amendment (No.2) Act as read with the recall procedure to be followed in the authorities, *Smith* and *Trott.*

47. Mr Pettingill contends that the inevitable inference to be drawn from Mr Robinson's arrest is that he was recalled because he was alleged to have committed a criminal offence. However, the letter from the Parole Board states:

> *"Nevertheless, Mr Robinson breached condition eight (8) of the General Condition section of his Parole License, which reads as follows:*
>
> *(viii) To refrain from activities and association with persons, places or things that may lead to illegal activities…*
>
> *Through his actions and/or associations, Mr Robinson has placed himself in violation of condition 8 as he was arrested with a person who has admitted to and who has been charged with being in possession of a control drug, namely cannabis."*

48. The point Mr Pettingill makes is that the Parole Board could not have complied with the duty to give the First Plaintiff a fair hearing because the reason given for recalling him on the 16th November 2016, namely associating with a person charged with a criminal offence, is not something over which he could reasonably be said to have personal control. More importantly, the letter from the Parole Board dated 22nd July 2019, expresses another reason for the recall was the First Plaintiff's co-accused, the Second Plaintiff, admitted the offence. Mr Pettingill refers to the chronology of events and asserts the Second Plaintiff pleaded not guilty at her first appearance before the Magistrates' Court on the 2nd February 2017. The Parole Board did not become aware the Second Plaintiff acknowledged

responsibility for the offence until that fact was brought to its attention in the Chancery Legal letter dated 15th November 2017. Therefore, when did the recall hearing take place and what information was the First Plaintiff provided with to ensure the process complied with the guidance in the cases *Smith* and *Trott*?

49. Finally, Mr Pettingill asserts associating with someone who admits to a criminal offence is not something over which Mr Robinson had personal control and should not have formed the basis for recalling him. On this point, he relies upon the judgment of Chief Justice Ground in the *Trott* case.

50. Miss Tucker contends the First Plaintiff's recall on licence is a separate and unrelated issue which has no bearing on the question of delay. She further submits it is unfortunate the First Plaintiff could not be released on the bail he was granted; however, again that is a separate and distinct matter with no relevance to the application to stay the prosecution.

51. Miss Tucker and Mr Pettingill did not agree on whether and when a hearing took place before the Parole Board, and if a hearing did take place, what procedure was adopted. Miss Tucker submitted if the Court was left in doubt regarding what happened at the recall hearing a further adjournment should be granted to enable the Parole Board to supplement the letter of the 22nd July 2019 with an affidavit. Bearing in mind the case concerns delay before the courts, and I had already granted one adjournment to secure a letter or affidavit from the Parole Board together with counsel responses to specific questions of law, I did not believe it would be a proper exercise of my discretion to grant a further adjournment.

52. In the case of *Smith,* Chief Justice Ground expressly referred to the problem a person on parole may face if having been arrested for a fresh offence and recalled by the Parole Board, the trial is delayed. In the case of *Dyer,* the Court expressly found that a relevant consideration for the question of delay is whether the complainant is in custody. In *Dyer,* the Privy Council also stated that consideration of the question of delay is an exercise of judicial discretion based upon all the circumstances in the case.

53. In my view, the time the First Plaintiff has spent in custody, which essentially comprises the time his parole has been revoked, is directly attributable to the charge he faces and should be considered part of the response of the administrative authorities on the question of delay.

54. Turning to the question of what view I should form regarding whether the Parole Board followed the procedure in *Smith* and *Trott* and its impact on the question of delay. First, and by way of clarification, I do not suggest that the recall procedure adopted by the Parole Board to recall the First Plaintiff caused a delay in the criminal trial. Second, it is unfortunate the Court was not furnished with the minutes of the recall hearing so that it could form its own view of the proceedings. See the case of *Trott* on page 3. Third, I remind myself I am not sitting to hear an application to quash the First Plaintiff's recall.

55. I therefore limit myself to consider whether the First Plaintiff's incarceration consequent upon his recall is part of the administrative process of the court, I should consider on the question of delay. Of course, if the Court was in possession of evidence that the First Plaintiff's recall hearing strictly complied with the procedure set out in the cases of *Smith* and *Trott*, the First Plaintiff could not rely upon his time spent in custody to his advantage to the same degree.

56. The letter from the Parole Board states the recall hearing complied with the procedure identified in the cases of *Smith* and *Trott.* However, the letter does not state when the hearing took place. The timing of the recall hearing is critical in light of the criticisms made by Mr Pettingill.

57. Despite explaining what the Parole Board told the First Plaintiff he had to accomplish to be released from custody, the letter makes no mention or reference of the material the Parole Board relied upon to arrive at its decision at the hearing the First Plaintiff attended. Nor, does the letter mention that at the hearing the First Plaintiff had sight of the information within the possession of the Board which he was entitled to see such as the prosecution statements or a summary of the case against him. I am therefore unable to form a view of whether the recall

hearing did comply with the law, in which case, I will give the First Plaintiff the benefit of the doubt when I consider the role his time in custody played on the question of delay.

VI. Have the Plaintiffs suffered Prejudice

58. Even if the Plaintiffs establish unreasonable delay in the prosecution of the charges they face, they still must satisfy the court that they have suffered prejudice.

59. In *Dyer* at paragraphs, 78 and 79 Lord Bingham made the following comments regarding the issue of prejudice:

> *"78. Prejudice has not been identified by the court as a specific factor to which regard must be had when considering whether the period of time was reasonable. But this does not mean that the question of prejudice has been *409 ignored by the guarantees in article 6(1). On the contrary, the risk of prejudice if the guarantees are breached lies at the very heart of the article. The reason why the guarantee of a hearing within a reasonable time appears in article 6(1) is because prejudice is presumed to arise if the guarantee is violated. In Stögmüller v Austria 1 EHRR 155 , 191, para 5 the court said that the aim of article 6(1) is to protect all parties to proceedings against excessive procedural delays, and that in criminal proceedings especially it is designed "to avoid that a person charged should remain too long in a state of uncertainty about his fate".*
>
> *79. Where significant prejudice due to a period of delay can be demonstrated, it can be taken into account when making the assessment: Obermeier v Austria 13 EHRR 290, 307, para 72 and X v France (1991) 14 EHRR 483, 503, para 32. It may, for example, have a bearing on the conduct to be expected of the prosecuting authorities where they failed to give the proceedings the priority which they plainly ought to have been given in the circumstances. But it is not necessary for a person charged*

who claims that his article 6(1) Convention right has been violated to show that he has suffered, or will suffer, any actual prejudice. The mere fact of inordinate or excessive delay is sufficient to raise a presumption in his favour that he will be prejudiced. The burden of coming forward with explanations for inordinate delay is on the prosecuting authorities: Eckle v Federal Republic of Germany 5 EHRR 1, 29, para 80."

60. In *Bell v the DPP of Jamaica* [1985] AC 937 at page 952, Lord Templeman cited with approval the analysis of prejudice contained in the United States Supreme Court decision *Barker v Wingo* in which Mr Justice Powell held prejudice should be assessed in light of the interests of the Defendant whom the right to a speedy trial was designed to protect. After identifying prejudice resulting from the anxiety and stress waiting for the conclusion of the criminal proceedings, the Privy Council further held that a Defendant would establish evidence of prejudice if he suffers oppressive pre-trial incarceration. In *Novikov v Russia* [2013] ECHR 7087/04 the European Court stated:

"An accused in criminal proceedings, especially when he remains in detention pending investigation or trial, should be entitled to have his case conducted with special diligence and Article 6, in criminal matters, is designed to ensure that a person who has been detained is not kept in a state of uncertainty about his fate for a prolonged period"

61. The Second Plaintiff has waited over two years to have her criminal trial concluded. There has been unreasonable delay in the prosecution of the charges she faces. I find the Second Plaintiff has been prejudiced by the delay in completing her criminal trial breaching her Constitutional right to a fair trial within a reasonable time.

62. In the case of the First Plaintiff, in my view, he has suffered the anxiety of awaiting the outcome of the criminal charges he faces. Of crucial importance is the fact that the First Plaintiff has pleaded not guilty to the charge he faces but has been in custody since the 16th November 2016. It is relevant that the First Plaintiff

was granted bail for the charge he faces but has been incarcerated on recall of his licence while on parole as a direct consequence of the criminal charge.

63. I repeat the lack of conclusive evidence surrounding the procedure adopted by the Parole Board at the recall hearing for which I give the First Plaintiff the benefit of the doubt. In that regard, the First Plaintiff's period in custody is more prejudicial than the Court would otherwise consider his time spent in custody because it is not fully explained in a manner consistent with the recall procedure set out in the cases *Smith* and *Trott*. For this reason, I find the prejudice the First Plaintiff has suffered waiting in custody over two years four months for the conclusion of the criminal trial he faces has breached his Constitutional right to a fair hearing within a reasonable time.

VII. Remedies for Delay

64. Having concluded that there has been an unreasonable delay in the prosecution of the charges against both plaintiffs, I now turn to the appropriate remedy. In the case of *Dyer,* Lord Hope said the following at paragraph 129:

> *"The European Court has repeatedly held that unreasonable delay does not automatically render the trial or sentence liable to be set aside because of the delay (assuming that there is no other breach of the accused's Convention rights), provided that the breach is acknowledged and the accused is provided with an adequate remedy for the delay in bringing him to trial (though not for the fact that he was brought to trial), for example by a reduction in the sentence."*

65. In the Privy Council case, *Boolell v Mauritius* [2006] UKPC 46, the Court considered the right under the Constitution of Mauritius section 10(1) to a fair trial within a reasonable time regardless of whether the defendant had been prejudiced by the delay. A right for all purposes identical to the right enjoyed by an accused person under section 6(1) of the Constitution. Lord Carswell delivered the judgment of the court, and at paragraph 32 said:

"Their Lordships accordingly consider that the following propositions should be regarded as correct in the law of Mauritius:

(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.

(ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all."

66. And in the case of *Spiers v Ruddy* [2008] 1 AC 873 para 16, the Privy Council revisited the question of delay. Lord Bingham held:

"The authorities relied on and considered above make clear, in my opinion, that such delay does not give rise to a continuing breach which cannot be cured save by a discontinuation of proceedings. It gives rise to a breach which can be cured, even where it cannot be prevented, by expedition, reduction of sentence or compensation, provided always that the breach, where it occurs, is publicly acknowledged and addressed."

67. In the case of the Second Plaintiff, she has not been in custody awaiting the outcome of her fate. Although the anxiety she has suffered pending the outcome of her charges is a relevant factor of prejudice, such prejudice as she has experienced, can be mitigated in the remedy the trial court can impose at the conclusion of the criminal proceedings. For example, by way of reduction of sentence. For this reason, despite my decision that the Second Plaintiff's Constitutional right to a fair trial has been breached, I do not order that her retrial be stayed or discontinued.

68. In the case of the First Plaintiff, it is more difficult to determine the appropriate remedy. The traditional remedies consequent upon a Defendant establishing unreasonable delay are expedition, compensation and reduction of sentence. An expedited criminal trial is not a practical remedy because as Mr Pettingill asserts,

if the First Plaintiff is retried and acquitted he would have served 2 years 7 months in custody for an offence for which he was granted bail in circumstances where the First Plaintiff and his advisors are not in possession of material that his recall on licence followed the guidelines in *Smith* and *Trott.* Compensation has not been claimed by the First Plaintiff and the Court was not addressed on this remedy by either party.

69. In the event the First Plaintiff was retried and convicted, reduction of the sentence imposed is the most practical of the traditional remedies. Mr Pettingill submitted this remedy is unsatisfactory for the same reason he advanced against expediting the retrial. He further contended that the maximum sentence for possession of 477 grams of cannabis with intent to supply is in the range of 12 months citing *Holder v Miller* [2017] Bda Lr 95 and *R v Bascome* [2004] Bda. L.R 28. Miss Tucker rejected the suggested range of sentence and said the appropriate sentence would be 18 months to two years.

70. In my view, the three traditional remedies are not sufficient to address the situation the First Plaintiff faces. I accept Mr Pettingill's submission that expedition of the trial and reduction of sentence cannot compensate for the fact that the First Plaintiff has been in custody for two years and seven months for a matter for which he would traditionally have been released on bail.

71. In *A-G' Reference (No 2 of 2001)* [2001] EWCA Crim 1568, Lord Woolf said the following in paragraphs 20 and 21;

> *"20. If a person complains of a contravention of the reasonable time requirement in article 6, and if the court comes to the conclusion that there has been a contravention, then at the request of the complainant the court is required to provide the appropriate remedy. If the court is willing and able to provide the appropriate remedy, then the court is not compelled to take the course of staying the proceedings. "*

"21.There is a certain amount of authority on this subject. However, there is no authority which supports the conclusion that a stay is the appropriate remedy, except in limited circumstances where it is no longer possible for a defendant to have a fair trial, bearing in mind the ability of the court to exclude evidence or to take other action to achieve a fair trial. If a fair trial is not possible, then a stay would have to be imposed. Equally, it would be appropriate to stay proceedings if the situation is one where it could be said that to try the accused would in itself be unfair."

72. In my view, in light of the prejudice suffered by the First Plaintiff and the expedition and reduction of sentence remedies failing to adequately address that prejudice, I find the appropriate remedy is to stay the prosecution against the First Plaintiff because of the breach of his right to a fair hearing within a reasonable time. Further, when I take into account all the circumstances surrounding his incarceration and the conduct of the prosecution of the charge the First Plaintiff faces, it would be unfair to retry him.

VIII. Conclusion

73. In respect of the Second Plaintiff, I order her retrial will proceed. The retrial against the First Plaintiff is stayed. The First Plaintiff is entitled to a declaration that his right under section 6(1) of the Constitutional to a fair hearing within a reasonable time has been infringed. I will hear the parties on the issue of costs.

Dated 13th September 2019

DELROY DUNCAN
ASSISTANT JUSTICE