In The Supreme Court of Bermuda

CIVIL JURISDICTION
2017 No: 320

BETWEEN:

SABIAN HAYWARD

Plaintiff

And

THE ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS

Defendant

JUDGMENT

Dates of Application:	Friday 8 November 2017
Date of Judgment:	Thursday 30 November 2017
Counsel for the Crown:	Shakira Dill-Francois (Deputy Solicitor General)
Counsel for the Accused:	Susan Mulligan (Christopher's)

Delay of trial of Accused
Constitutional right to be tried within a reasonable time (s. 6(1) of the Bermuda Constitution)

JUDGMENT of Acting Puisne Judge Shade Subair Williams

Introduction:

1. The Plaintiff is an Accused person charged with drug offences on indictment. He has been awaiting trial for a period in excess of 2 years. He now appears before this Court on his Originating Summons claiming that he has been deprived of his right to a fair trial within a reasonable time, contrary to section 6 of the Constitution of Bermuda.

Background Summary:

2. The Plaintiff first appeared in the Magistrates' Court on 2 September 2015 where the matter remained for some nine to ten months.

3. The Crown filed an *ex parte* application for the preferment of a voluntary bill on 30 June 2016 to bring the matter to the Supreme Court for trial.

4. The learned Justice Charles-Etta Simmons consented to the voluntary bill in a ruling delivered on 18 July 2016 wherein she also made findings on the applicability of the new criminal procedural rules. The 18 July 2016 written ruling was delivered without a hearing or input from the Defence.

5. The Plaintiff through his Counsel subsequently sought to be heard by Justice Simmons on an *inter partes* basis in complaint of her 18 July 2016 ruling on the following principal grounds which may be surmised as follows:

   (i) The learned judge made findings on a procedural point of law without having heard from Counsel on either side and after the matter had been fully adjudicated and decided by the lower Court;
   (ii) The learned judge wholly mist-stated the Plaintiff's position taken in the Magistrates' Court on the applicability of the new legislative regime;
   (iii) The learned judge consented to the preferment of the voluntary bill without having assessed the sufficiency of the evidence; and
   (iv) The learned judge's consent to prefer the voluntary bill was inconsistent with her findings that the new criminal procedure rules applied

6. It took a few days short of a full year for this application to be heard by Justice Simmons.

7. On 13 July 2017 when the parties finally appeared before Justice Simmons, she set aside her 18 July 2017 ruling on the corrected procedural point of law and recused herself from hearing arguments on the sufficiency of the evidence. (A written ruling was not delivered.)

8. For that reason, the evidential sufficiency arguments were heard before me as an acting puisne judge sitting on 14 July 2017 and 31 July 2017. Two weeks later, I delivered a written ruling on 14 August 2017 holding that the Crown had indeed satisfied the evidential sufficiency test. In my ruling I commented on the delay in this case at paragraph 38:

   "*Turning briefly to the subject of delay, I note that the alleged offences occurred approximately three (3) years ago. Approximately a year passed before the Accused was charged by police. Nearly a one-year period then lapsed while this matter was in the Magistrates' Court. The matter has now been in the Supreme Court's jurisdiction for over a year now without arraignment. In my view, the avoidance of further delay is crucial*."

9. Notwithstanding, the matter is now before me again nearly three months later, and the Defendant is still without trial.

The Magistrates' Court Proceedings

10. On 2 September 2015 Mr. Hayward first appeared in Plea Court (jointly accused with another) when the matter was adjourned to 16 September 2015 and thereafter for further mention on 30 September 2015. On 14 October 2015 the Defence elected a Long Form Preliminary Inquiry (LFPI) which was listed for 3 December 2015.

11. For reasons attributable to Counsel for the co-accused, the LFPI was adjourned to 24 February 2016. However, on 24 February 2016 Mr. Hayward did not appear and a warrant was issued on account of his non-appearance. A mention date was then set for 3 March 2016.

12. On 3 March 2016 Mr. Arion Mapp appeared holding for Ms. Mulligan. The Prosecution submitted that the new criminal procedural rules were operational and that the matter ought to be sent to the Supreme Court in accordance with the Criminal Jurisdiction and Procedure Act 2015. On account of Ms Mulligan's absence, the Defence was unprepared to argue this point on 3 March 2016. Consequently, the matter was adjourned to the following week on 10 March 2016.

13. On 10 March 2016 the procedural law point was fully argued and the Magistrate ruled that the former statutory regime applied. Accordingly, a LFPI was fixed for 13 April 2016. However, due to illness Ms Mulligan did not appear on the April return date. Furthermore, Mr. Hayward did not appear and a second warrant was issued for his non-appearance in these proceedings. Two days later, Mr. Hayward surrendered before the Court and the warrant was discharged and his bail was again extended.

14. The final appearance of this matter in the Magistrates' Court was on 24 June 2016. On this occasion the co-accused was not produced from prison custody. The Magistrate accordingly listed the matter for LFPI on 22 July 2016. However, one week later the Crown filed an *ex parte* application for the preferment of a voluntary bill on 30 June 2016.

The Supreme Court criminal proceedings

15. The *ex parte* application for the preferment of a voluntary bill was considered on the papers by Justice Simmons. Without hearing from the parties, Justice Simmons considered the

applicability of the new statutory regime and decided that the Magistrate erred in proceeding under the former indictment procedure rules.

16. Justice Simmons also found that the Learned Magistrate's non-compliance with section 23 provided an adequate basis for the Court's consent to prefer the voluntary bill of indictment. The Registrar was directed to sign the Bill of Indictment and did so on 18 July 2016. This decision was recorded in Justice Simmons' written ruling delivered on 18 July 2016.

17. On 1 August 2016 Mr. Hayward appeared before Justice Simmons in the monthly arraignment session. Ms Christopher, holding for Ms Mulligan, advised the Court that Ms Mulligan would later file a section 31 application on behalf of Mr. Hayward. Ms. Christopher also stated that Ms Mulligan would file submissions on the ex parte application which culminated in Justice Simmons' 18 July 2016 ruling.

18. On 9 August 2016 Ms Mulligan was directed to file written arguments and mutually agreed proposed dates for a hearing. On 15 August 2016 Ms Mulligan filed an application which she labelled 'judicial review'. Confusion ensued as to whether or not the application filed was intended to be a section 31 application. In the September 2016 monthly arraignment session, Justice Simmons remarked, '*I do not understand this Judicial Review Application- this certainly does not take the form of a Judicial Review application. Judicial Review is not the appropriate application. Mention on 3 October and reserve trial date for 6 Feb. Ms Mulligan to clarify Judicial Review application filed- I simply cannot make heads or tails of it.'*

19. On 3 October 2017 the matter came before the learned Justice Carlisle Greaves during the regular monthly arraignment session. Ms. Mulligan's application on that occasion was referred to as a section 31 application and a motion to quash the indictment. Justice Greaves remarked, '*I am prepared to hear a section 31 and several in one day- you say an hour- I will hear one every hour and get them cleaned up for you- we have to do something to straighten this up- so whatever there is, I am prepared to hear it- I just set something for mention- I do not anticipate that Justice Simmons is going to have anything to do… I do see why we can't set this for mention for hearing before Simmons J on 14 October 2016 at 11:00m. This is mention for hearing- I can't say anything more than that- if there is going to be a ruling- I expect to hear arguments…'*

20. The 14 October 2016 hearing never came to pass due to the occurrence of hurricane Nicole in Bermuda on the day prior on Thursday 13 October 2016. Counsel for both sides advised that immediate and several attempts were made by the parties for the matter to be relisted before Justice Simmons specifically. There were no criminal trials which proceeded before Justice Simmons' for a five week period from Monday 17 October 2016 to Friday 18 November 2016. (Friday 11 November 2016 was the Remembrance Day public holiday). The learned judge started the trial in ***R v Damon Morris et No. 16 of 2016*** on Monday 21 November 2016.

21. The relocation of the Registry due to toxic mold contamination of Court files resulted in unavoidable administrative challenges between 25 October 2016 and 18 November 2016.

22. On 6 February 2017 the parties appeared for trial before Greaves J. The prosecutor, Ms. Larissa Burgess, informed the Court that the Crown attempted to obtain clarity from both Ms Mulligan and the Court as to whether or not Ms. Mulligan's application was being brought as a judicial review action. She explained that if the answer was in the affirmative, the Crown would necessarily seek representation from the Attorney General's Chambers. The position on 6 February 2017 was that the Crown was unaware of the procedural nature of Ms. Mulligan's application.

23. Ms. Mulligan suggested that she was unable to clarify the nature of her application because of the contradictory approach taken by Justice Simmons in granting a voluntary bill under the old regime but holding that new legislative regime applied. Ms Mulligan complained, "*So I don't know how I review it at this point- whether it is a section 31 or Judicial Review or review of the- (judge interrupted)*". Ms Mulligan explained that in one part she wished to make arguments on the sufficiency of the evidence and that in the second part she sought to be heard on the question of the applicable statutory regime for the committal proceedings. The prosecutor, however, (and correctly) submitted that the new criminal procedure rules did not preclude the Crown from proceeding by way of Voluntary Bill.

24. Greaves J, having recognized that Ms. Mulligan's application would improperly invite him to review the decision of a judge of concurrent jurisdiction directed as follows, "*I am going to make an order that this matter be heard by Simmons J immediately after the present trial- whenever that will be- and I am going to set it at a time- give her some time to catch herself- I am going to set it for eleven o'clock whatever day that is*." Ms Mulligan then undertook to refile her application which apparently was misplaced during the relocation of the Registry.

25. The judge then read aloud his hearing note as follows, "*Mrs Mulligan issue still outstanding per Simmons J rulings on the 18 of July 2016- I am going to put here 'see file for Simmons J ruling- matter should therefore be heard before her- the Court having heard the submissions of Mulligan for the Defendant Hayward and Burgess for the Crown- Court is also of the view that the issue can only be resolved before Simmons J and will order an expedited hearing before her immediately to follow her present trial… R v Bennet and Davy- so the order is- I think Ms Simmons may be going off shortly after that… so I am going to set it: 'mention for Simmons J at eleven am on the day immediately following her present trial of R v Bennet and Davy…at DLBE (Court building)*' Greaves J then directed that both Defendants appear with their respective attorneys.

26. Despite the Court's clear direction, the matter was not heard by Justice Simmons following the *R v Bennet and Davy* trial. At paragraphs 16-17 of Ms. Mulligan's Originating Summons, she states:

"*16. ...Again, despite counsel's advice to the Court that this matter must, at least initially, be heard by Simmons J., the matter was again listed before Greaves J. Submissions were again heard as to why the matter could only properly (be) heard by Simmons J, and Greaves J referred the matter back to Mrs. Justice Simmons on a date to follow a jury trial she was presiding over at that time.*
17. Again, despite efforts made by counsel for the Plaintiff and his co-defendant, the matter did not get set for hearing following the completion of Simmons J jury trial in April 2017."

27. As a point of correction, I will take judicial notice that the *R v Zoe Bennett and Omar Davy Indictment No.s 26 and 39 of 2016* trial before Justice Simmons commenced on Monday 16 January 2017 and concluded on Thursday 16 February 2017 and not in April 2017.

28. At paragraph 16 of the Plaintiff's 6 September 2017 affidavit, he states:

"*I know that my lawyer made phone calls and wrote to the Court, but was unable to get my case back into Court until April 2017. We were again before Justice Greaves who did not seem to recall his earlier ruling that Mrs. Justice Simmonds (sic) (Simmons) should hear this application and he indicated that the Court file had been lost so he had not (sic) (no) notes or materials from previous appearances. My lawyer again explained why it had to be heard by Mrs. Justice Simmons and Mr. Greaves again agreed with her and said the Registrar would set it for when Mrs. Justice Simmonds (sic) (Simmons) finished her current trial*"

29. In fact, Mr. Hayward's application was not listed again until 3 July 2017 when it was simply mentioned in the regular monthly arraignment session again before Justice Greaves. Mr. Hayward (seemingly unaware of the fixture) failed to appear before the Court. Defence attorney, Mr. Arion Mapp, holding for Ms. Mulligan, informed that Court that Mr. Hayward had not likely been properly notified to attend Court as he himself only received the Court list on the preceding Friday when he happened to notice Mr. Hayward's name listed.

30. The Deputy Director of Public Prosecutions, Ms. Cindy Clarke, appeared for the Crown on 3 July 2017 and stated,

"*I understand that there may only be actings (Acting Puisne Judges) but at this point the Crown is- it's been outstanding for some seven (7) months- so we'll take an acting on the 13th of July please- preferably in the afternoon…*"

31. On 3 July 2017 the Plaintiff's co-accused, represented by Defence attorney Marc Daniels, also advised the Court that he had unsuccessfully employed efforts '*for some time*' to get his own Client before the Court to be sentenced. The co-accused then entered a guilty plea to the remaining count on the indictment (having entered a guilty plea to only one count previously). Justice Greaves fixed a sentence date for 5 July 2017 and ordered for Mr. Hayward to attend Court on that return date which he did. The section 31 application (and effectively the *inter partes* arguments against the consent given by Justice Simmons a year prior in July 2016 to prefer the voluntary bill of indictment) was listed for 13 July 2017.

32. Ms. Mulligan's application challenging the sufficiency of the evidence was listed for hearing on 13 July 2017 before me. This undoubtedly increased the mounting frustration in Counsel who sent another written request for the matter to proceed before Justice Simmons instead. On the basis that Ms. Mulligan's application was to be heard *inter partes* on the consent given by Justice Simmons in her 18 July 2016 ruling, Justice Simmons acceded to the request.

33. During the 13 July 2017 hearing, Ms. Mulligan complained that the learned judge significantly mis-stated her Client's position in the 18 July 2016 ruling delivered one year prior. In her ruling (*[2016] SC (Bda) 74 Crim (18 July 2016)* p.4) Justice Simmons stated:

    "*On 10 March 2016 Ms Mulligan seemed to be the only person who appreciated that continuing to attempt to deal with the matter pursuant to the Indictable Offences Act by way of a Preliminary inquiry had no basis in law. She was correct as any such proceeding would amount to a nullity*."

34. However, the arguments made by Ms. Mulligan stated the exact opposite position than that recounted by the learned judge. Ms. Mulligan's during the preceding 3-4 months in the Magistrates' Court was in pursuit of an order for a preliminary inquiry.

35. Counsel also complained that Justice Simmons' 18 July 2016 review of the applicability of the old statutory regime was made without request or input from Counsel for either side. Counsel for both sides agreed that the Court ought to have heard full arguments from both the Crown and the Defence before effectively reversing the Magistrate's finding on a disputed point of procedural law.

36. Ms. Mulligan further submitted that the Justice Simmons' ruling that the repealed statutory regime was no longer applicable to these proceedings was inconsistent with her consent to prefer a voluntary bill of indictment because a preferment could have only been done under the old statutory regime.

37. Accordingly, Justice Simmons set aside her 18 July 2016 ruling and held that the repealed statutory regime did in fact apply to this case. Further, the learned judge withdrew her consent to the preferment of the voluntary bill accepting that her consent to prefer the bill of indictment had been given without any consideration to the evidence. Justice Simmons, accordingly, fixed the application to be made afresh before me on an *inter partes* basis. A written decision on these findings which effectively reversed her ruling in *[2016] SC (Bda) 74 Crim (18 July 2016* on the applicability of the new statutory regime was not delivered.

38. Having recused herself on 13 July 2017 from hearing arguments on the sufficiency of evidence application, Justice Simmons listed the matter to be heard by another judge and directed the re-opening of the voluntary bill application on an *inter partes* hearing.

39. On 14 July 2017 the matter appeared before me. The application was part-heard when I adjourned at an early hour to accommodate a request made by the prosecutor. The application was fixed to continue on 31 July 2017 which was the earliest return date convenient and available to the prosecuting Counsel. Two weeks thereafter I delivered a written ruling (*[2017] SC (Bda) 64 Crim (14 August 2017)* finding that the Crown's evidence surpassed the sufficiency threshold. I also ordered for the Accused to be arraigned in the next September arraignment session, expressing that it was crucial to avoid further delay in listing this trial to proceed.

40. On 1 September 2017 Mr. Hayward was arraigned before Justice Simmons. He entered not guilty pleas to the indictment and a trial date was fixed for 14 November 2017, notwithstanding Ms Mulligan's indication that she would be unavailable due to her fixtures in the Court of Appeal. Another trial matter was fixed to proceed in the same Court on 14 November 2017 and did in fact start on that date. I also note that Ms. Mulligan also commenced the *R v Butterfield & Perinchief Indictment No. 37 of 2015* trial before Justice Simmons on 23 October 2017 which is ongoing and likely to be completed on the same date of delivery of this Judgment.

41. On 6 September 2017 Ms Mulligan filed the Originating Summons with which I am now concerned.

42. At the 7 November hearing before me, Counsel on both sides advised that timing of the delivery of my judgment on the Originating Summons would have no impact on the inability of the 14 November 2017 fixed trial due to Ms. Mulligan's involvement in the ongoing trial before Justice Simmons in *R v Butterfield & Perinchief Indictment No. 37 of 2015*. Understandably, *R v Butterfield & Perinchief* proceeded on priority as it had been on the Supreme Court criminal docket since 3 October 2015 ie. for over two years without trial.

The Originating Summons

43. The Plaintiff's pleaded grounds of complaint are summarized between paragraphs 23-28 of the Originating Summons:

23. The total delay in this matter from the date of the alleged offence to the date when it is anticipated trial may finally proceed in the Supreme Court is 3 year, 2 ½ months (38 ½ months). The time that has elapsed since this matter was first brought into the Magistrates' Court and the anticipated date of trial is 2 years, 2 ½ months (26 ½ months).

24. The Plaintiff attests that all but 3 months delay as a result of his co-defendant's counsel being unavailable and 2 ½ months delay due to the illness of his own counsel is attributable to the Prosecution, as the prosecution must bear the burden of all forms of systemic delay, including administrative errors, delays caused by police and prison authorities, and delays originating with the Court.

25. Thus the total delay attributable to the Crown from the date of the offence until the date of the anticipated trial is 33 ½ months. The total delay attributable to the Defendant is 2 ½ months.

26. A delay of 33 ½ months from the date of the Plaintiff's arrest, is an unreasonable delay in all of the circumstances of this case.

27. That as a result of the length of delay, prejudice to the Plaintiff must be presumed.

28. That in addition to the presumed prejudice, the Plaintiff has suffered actual prejudice as a result of this unreasonable delay before his trial.

44. The redress sought is as follows:

"A declaration that the Plaintiff has been deprived of his right to a fair trial within a reasonable time contrary to section 6 of the Constitution;

An order dismissing the charges against the Plaintiff;

Any such further or other relief as this Honourable Court may consider just;

Costs"

45. The Originating Summons is supported by an affidavit sworn by the Plaintiff on 6 September 2017. The Crown also filed affidavit evidence reply. I have carefully read and considered all of the affidavit evidence filed.

The Law

46. The Originating Summons is made pursuant to Order 114/1 of the Rules of the Supreme Court 1985 which reads:

"*Proceedings instituted pursuant to section 15(1) of the Constitution shall be commenced by originating summons*."

47. Section 15(1) of the Bermuda Constitution Order 1968 reads:

"*15(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress*."

48. The foregoing provision alleged by the Plaintiff to have been or to be contravened is section 6(1) which provides:

"*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*."

49. Firstly, I dispose of pre-charge delay complaint pleaded by the Plaintiff in the Originating Summons. Ms. Mulligan withdrew this component of her arguments and conceded during the 7 November 2017 hearing before me that pre-charge delay was an unsustainable ground of complaint.

50. The Deputy Solicitor-General, Ms. Dill-Francois, referred me to *Allison Roberts-Wolffe v John Tomlinson [2016] SC (Bda) 18 App (15 February 2016)* where the learned Hon. Chief Justice, Ian Kawaley, delivered an ex tempore judgment in an appeal against the decision of the learned Magistrate Khamisi Tokunbo dismissing an Information containing dog offence charges. The Information had been summarily dismissed on a statutory limitation point. The Court in considering the limitation period held that a prosecution for a summary offence commences when the Information is sworn before the Magistrate.

51. Ms Dill-Francois also pointed the Court to the dissenting judgment of Lamer J in the Supreme Court of Canada in *Elijah Askov v The Queen [1990] 2 R.C.S* where he stated in agreement with the majority:

"*I agree, rather with the view that the time frame to be considered in computing trial within a reasonable time only runs from the moment a person is charged. Pre-charge delay will in no way impair those interests with which s.11(b) is concerned. Prior to the charge, the individual will not normally be subject to restraint nor will he or she stand accused before the community of committing a crime. Thus, those aspects of the liberty and security of the person protected by s. 11(b) will not be placed in jeopardy prior to the institution of judicial proceedings against the individual by means of the charge*."

52. It is plainly correct that a person's right to a fair trial within a reasonable timeframe is not determinable by the length of a pre-charge police investigation. Section 6(1) of the Constitution could not sensibly operate to impose a deadline on the completion of a police investigation.

53. When looking at the general principles on a person's right under section 6(1), Ms. Dill-Francois relied on *Giles and Attorney General v Hall [2004] Bda L.R. 26* where the Plaintiff claimed by Originating Summons that his right to a fair trial had been contravened contrary to section 6(1) of the Constitution. Justice Storr, at first instance, granted the Applicant, Andrew Hall, a declaration that he had been deprived of his right to a fair trial within a reasonable time.

54. The case was heard on appeal and the judgment was delivered by Evans J.A. At page 3 of his judgment:

"*The authorities were reviewed by the Judicial Committee of the Privy Counsel (sic), Lord Bingham of Cornhill presiding, in Dyer (Procurater Fiscal, Linlithgow) v Watson and Another [2002] UKPC D1 [2002] 4 LRC 577. In Paragraph 52 of his judgment, with which Lord Hutton, Lord Millet and Lord Rogers 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."

55. Counsel also referred me to the judgment of Bell J (as he then was) in *Angela Cox (Ploice Sergeant) v Jahkeil Samuels [2005] Bda LR 24*. The judgment in *Samuels* arose from a Notice of Appeal filed by the Crown against the decision of the learned Magistrate, William Francis, to dismiss a summary Information against the Respondent on the basis of delay alone. The relevant part of the learned Magistrate's decision was recited by Bell J on page 1 as follows:

"*Issue for me therefore is whether in light of this over 2 years delay with memories fading justice can be done. To make matters worse I do not see that this trial can take place before March due to the present state of the court calendar. I rule therefore that to start this case at this stage after so many delays so late will be unjust. I dismiss this Information*."

56. Justice Bell stated in his judgment that he restricted his consideration of matters to the issue of delay and cited *Giles and Attorney General v Hall* as the relevant law. At page 3 of the judgment it reads:

"*Hence, when the matter finally came on for trial on 16 December 2004 (and Mr. Wolffe indicated that the Crown was ready to proceed on that date) instead of a trial there was an application for the dismissal of the information, to which the magistrate acceded. This means that from the time the first trial date was set, there was no less than 6 adjournments, each of which caused a delay of approximately three months. Of these six, one is unexplained, two*

were due to the Court's administrative process, and certainly two, and in part a third, were the Responsibility of the Respondent. Hence, it is impossible to say that there was any significant delay which can be said to be both unreasonable and the responsibility of the Crown. I do not regard the delay in filing the original information as being unreasonable. Neither do I regard the two occasions where the Court's administrative process occasioned an adjournment as representing an unreasonable delay in the circumstances. Even though the Wor. Francis was the magistrate who dealt with the matters on 16 December 2004, it had not been understood on 11 March 2004 that he would still be acting at that time, so that adjournment was not at all unreasonable. Neither do I regard one further adjournment of three months due to the state of the Court calendar as being unreasonable."

57. The Court in *Jahkeil Samuels* thus held that the learned magistrate was wrong in law to dismiss the information on the grounds of delay and allowed the appeal.

58. In *Bailey v Wm E Meyer & Co Ltd [2017] Bda LR.5* the learned Chief Justice referred to *Dyer v Watson [2004] AC 379; [2002] UKPC D1* and *Giles and the Attorney General v Hall [2004] Bda LR 26* as the leading authorities on the constitutional right to a fair trial within a reasonable period of time.

59. Ms. Mulligan filed a voluminous bundle of Canadian cases to which she referred minimally during the hearing before me. However, I have carefully reviewed all of those authorities filed which deal with section 11(b) of the Canadian Charter of Rights and Freedoms which reads: "*Any person charged with an offence…has the right to be tried within a reasonable time*".

60. Ms Mulligan addressed me on *Elijah Askov v The Queen [1990] 2 R.C.S*. which dealt with the issue of trial delay on appeal from the Court of Appeal for Ontario. At first instance, the trial judge stayed the proceedings having found that the major part of delay following the appellants' committal stemmed from institutional problems. However, on appeal the Court of Appeal found that there had been (1) no misconduct on the part of the Crown; (2) no indication of any objection by the appellants to any of the adjournments; and (3) no evidence of any actual prejudice to the appellants. For those reasons the Court of Appeal set aside the stay and directed that the trial proceed. However, on appeal from the Court of Appeal, the Supreme Court of Canada allowed the appeal and directed the stay of the proceedings.

61. Per Dickson C.J. and La Forest, L'Heureux-Dubé, Gonthier and Cory JJ the Court recorded at pages 1200-1201 the following as the correct approach to the assessment of unreasonable trial delay:

"*The court should consider a number of factors in determining whether the delay in bringing the accused to trial has been unreasonable: (1) the length of the delay; (2) the explanation for the delay; (3) waiver; and (4) prejudice to the accused. The longer the delay, the more difficult it should be for a court to excuse it, and very lengthy delays may be such that they cannot be justified for any reason. Delays attributable to the Crown will weigh in favour of the accused. Complex cases, however, will justify delays longer than those acceptable in simple cases. Systemic or institutional delays will also weigh against the Crown. When considering delays occasioned by inadequate institutional resources, the question of how long a delay is too long may be resolved by comparing the questioned jurisdiction to others in the country. The comparison of similar and thus comparable districts must always be made with the better districts, not the worst. The comparison need not be too precise or exact; rather, it should look to the appropriate ranges of delay in determining what is a reasonable limit. In all cases it will be incumbent upon the Crown to show that the institutional delay in question is justifiable. Certain actions of the accused, on the other hand, will justify delays. A waiver by the accused of his rights will justify delay, but the waiver must be informed, unequivocal and freely given to be valid.*

Here, the delay of almost two years following the preliminary hearing was clearly excessive and unreasonable. The Crown did not show that the delay did not prejudice the appellants, and nothing in the case was so complex or inherently difficult as to justify a lengthy delay. This trial was to be heard in a judicial district notorious for the time required to obtain a trial date and figures from comparable districts demonstrate that the situation there is unreasonable and intolerable."

62. Cory J in delivering the judgment of the Supreme Court, with which Lamer J dissented but agreed in the parts outlined on page 1219, made the following compelling observations on the importance of the right to a fair trial within a reasonable period of time:

"*I agree with the position taken by Lamer J that s. 11(b) explicitly focusses upon the individual interest of liberty and security of the person. Like other specific guarantees provided by s.11, this paragraph is primarily concerned with an aspect of fundamental justice guaranteed by s. 7 of the Charter. There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.*

Although the primary aim of s. 11(b) is the protection of the individual's rights and the provision of fundamental justice for the accused, nonetheless there is, in my view, at least by inference, a community or societal interest implicit in s.11(b). That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest. A trial held within a reasonable time must benefit the individual accused as the prejudice which results from criminal proceedings is bound to be minimized. If the accused is in custody, the custodial time awaiting trial will be kept to a minimum. If the accused is at liberty on bail and subject to conditions, then the curtailments on the liberty of the accused will be kept to a minimum. From the point of view of community interest, in those cases where the accused is detained in custody awaiting trial, society will benefit by the quick resolution of the case either by re-integrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law. If the accused is released on bail and subsequently found guilty, the frustration felt by the community on seeing an unpunished wrongdoer in their midst for an extended period of time will be relieved."

63. The Court continued in its judgment to examine the inevitable risks of reducing the quality of evidence available which arise on account of trial delay.

Findings on Delay

No unreasonable delay in the Magistrates' Court

64. The first LFPI hearing was listed for 3 December 2015, some three months after the first Magistrates' Court appearance. I find no unreasonable delay here. The adjournment of the 3 December 2015 LFPI hearing was at the request of the Co-Accused and cannot be said to have occurred for administrative reasons or at the fault of the judicial authorities. The 24 February 2016 LFPI date was lost due to Mr. Hayward's non-appearance. Mr. Hayward, alone, is at fault for the loss of time between 24 February 2016 and 3 March 2016.

65. Ms. Mulligan criticized the prosecution for raising the committal procedural point for the first time on 3 March 2016. However, I find no such criticism to be warranted. The correct legislative procedure for the committal proceedings would have undoubtedly been a foreseeable component of the committal hearing preparation, especially in the wake of a new statutory regime. However, Ms. Mulligan sent a junior counsel to the hearing in her stead on a misguided estimation of the simplicity of the hearing. The prosecution cannot be faulted for that.

66. The following LFPI hearing date on 13 April 2016 was adjourned due to Ms. Mulligan's illness and Mr. Hayward's second non-appearance which resulted in the fixture of the 24 June 2016 hearing date. This delay is at the feet of the Defence. The final period which followed endured only one week as the voluntary bill application was filed on 30 June 2016.

67. For these reasons, I find that the Crown cannot be properly faulted for any of the delay which occurred in the Magistrates' Court.

No unreasonable delay in the Supreme Court in 2016

68. I find no unreasonable delay in the initial period when the matter was first before the Supreme Court between 30 June and 1 August 2016. Ms Mulligan's 15 August 2016 ambiguous application for 'judicial review' clearly caused real confusion which in turn protracted matters. Justice Simmons expressed uncertainty on the nature of the application in September 2016. This was not clarified by the Defence. To add to the cloudiness of the application, on 3 October 2016 Ms. Christopher, holding for Ms. Mulligan, described the application in Court as a motion to quash the indictment and a section 31 application.

69. From 3 October 2016 the matter was adjourned to 14 October 2016 before Simmons J. This hearing date did not come to pass due to the hurricane on the previous day. This caused an unavoidable adjournment. The occurrence of natural disasters and the immediate aftermath ought not to be included as part of any unreasonable delay period.

70. There were no criminal trials which proceeded before Justice Simmons for a five week period between Monday 17 October 2016 and Friday 18 November 2016. However, the emergency relocation of the Registry on Thursday 25 October 2017 due to toxic mold findings and poor infrastructural conditions is classifiable as another unavoidable natural disaster. Court Circulars were issued during this period to explain the various stages of administrative restoration. During this time, Justice Simmons relocated her Court home from Sessions House to the Commercial Court Building and then to Dame Lois Brown Evans Building. This was a necessary response to the hurricane damage caused to Sessions House.

71. Court Circular No.25 of 2016 confirmed that the criminal registry was restored and operational from the Dame Lois Browne Evans building as of 18 November 2016. The relocation of the registry did not prevent Court hearings from proceeding. It did, however, impede on the efficiencies of Court filings up until 18 November 2016 and quite plausibly explains why Counsel's numerous request for a relisted hearing in October and November 2016 seemed to have fallen on deaf ears.

72. For these reasons, I have not found any unreasonable delays to have occurred in the Supreme Court between 30 June 2016 and December 2016.

Excess of Five (5) months' unreasonable delay in the Supreme Court in 2017

73. It was necessary after the delisting of the 14 October 2016 fixture for the Plaintiff's *inter partes* application to Justice Simmons to be heard and determined expeditiously and in any event within a reasonable timeframe. Ideally, Ms Mulligan's ½ day *inter partes* application would have been listed in 2016 prior to the start of the *R v Damon Morris et al No. 16 of 2016* trial which commenced on 21 November 2016 through to the end of the calendar year and up to Friday 13 January 2017. The fact that this did not occur is unfortunate, not unreasonable. The *R v Morris* trial would have understandably proceeded with priority as it was a multi-defendant case which in this jurisdiction can be difficult to schedule due to the low number of criminal defence attorneys. Also, the *R v Morris* trial was initially fixed for a 7 November 2016 start date; so the later start on 21 November would have understandably motivated the learned judge to sit with minimal disruptions. I find it would not have been reasonable to expect the learned judge to interpose the Plaintiff's matter before the close of the *Morris et al* trial.

74. Again, I agree that Ms. Mulligan's application might have been listed on priority to follow the Damon Morris trial before Justice Simmons started the *R v Zoe Bennet and Omar Davy No. 28/29 of 2016* on the following Monday, 16 January 2016. However, some understanding must be had for the fact that Justice Simmons had just finished a 34 day trial and was perhaps distracted by the need to start the next trial without further delaying the general progress of the criminal calendar. Further, Justice Greaves left the jurisdiction in November 2016 and did not return until the start of February 2017. This left no practical opportunity between 21 November 2016 and 6 February 2017 for this matter to be relisted. Furthermore, Ms. Mulligan still had not yet clarified the nature of her application prior to 6 February 2017. Therefore, it is understandable if the Court at that point had not yet fully grasped the relief sought.

75. The Court listed the *inter partes* application on day 1 of the trial, ie. 6 February 2017 before Greaves J. It was at this time that the Court had the first opportunity to gain a better understanding that Ms Mulligan was, effectively, pursuing an *inter partes* hearing before Justice Simmons in respect of her 18 July 2016 ruling. Justice Greaves during that hearing expressed his understanding that the Plaintiff's Counsel wished to challenge Justice Simmons' 18 July 2016 decision wherein she (i) consented to the preferment of a voluntary bill of indictment without regard to any of the evidence and (ii) made findings on the applicable procedural law for committal proceedings without input from Counsel and after the matter had been adjudicated in the lower court. Accordingly, Justice Greaves determined that he could not resolve Ms Mulligan's application because to do so would erroneously

place him in appeal of his sister judge of concurrent jurisdiction. This was the only reasonable approach available to the Court.

76. However, Justice Greaves' 6 February 2017 order for the *inter partes* application to be heard by Justice Simmons on an expedited basis did not materialize. More so, his order for the matter to be listed for mention before Justice Simmons on the day following her completion of the *R v Bennet and Davy* trial which concluded on Thursday 16 February 2017 did not come to pass. The next listed trial before Justice Simmons was *R v George Simmons No. 37 of 2016* which started on Monday 20 March 2017. This resulted in a 4 week trial-less period before Justice Simmons unused.

77. Ms. Mulligan's ½ day application request continued without a hearing before Justice Simmons for the entire months of March, April, May and June 2017. Criminal listings are a judicial function controlled and managed by the Trial Supervising Judge alone. Hence, this delay would be described as systemic or institutional as it was controlled by a judicial authority.

78. According to the Plaintiff's affidavit evidence, this matter was relisted in April 2017 before Justice Greaves. This does not appear to be correct according to the Court Smart (audio) record. Notably, the Crown makes no suggestion of an April 2017 appearance in its reply affidavit evidence. Further, there is no suggestion in the Crown's written or oral submissions that the matter appeared before the Court in April 2017. I, therefore, proceed on the basis the next Court appearance after 6 February 2017 occurred on 3 July 2017 when the matter was listed for mention in the regular monthly arraignment Court.

79. On 13 July 2017 Ms. Mulligan's *inter partes* application finally came before Justice Simmons for the first time after her ex parte ruling delivered one year prior on 18 July 2016. I find that the unreasonable delay portion of that period attributable to the Court's judicial process runs from the start of 16 February 2017 through to the 13 July 2017 hearing, thus 21 weeks / 5.25 months.

80. The proceedings as they occurred between 13 July 2017 and 1 September 2017 do not give rise to a meritorious complaint of unreasonable delay. I also find that the Court's listing of this matter for trial to commence on 14 November 2017, notwithstanding Ms. Mulligan's indication that she would be occupied before the Court of Appeal, was a reasonable attempt to dispose of this matter expeditiously. This listing followed my direction made on 14 August 2017 for the avoidance of further delay.

Analysis

81. In applying the approach outlined by Lord Bingham in *Dyer (Procurater Fiscal, Linlithgow) v Watson and Another [2002] UKPC D1 [2002] 4 LRC 577* I have, as a first step, considered the period of time which has elapsed. The Plaintiff's case started in the Magistrates' Court on 2 September 2015 where it remained for 10 months. The case has subsequently been in the Supreme Court since 30 June 2016 without trial for approximately 18 months. This comes to a total of 28 months ie. leading into 2 ½ years without trial. However, I have found that the period of unreasonable delay caused by the judicial authorities comes to some 21 weeks / 5.25 months. This is systemic and falls on the shoulders of the Crown in constitutional applications.

82. The next step is for me to consider whether 21 weeks / 5.25 months of unreasonable delay for a matter that has been without trial for 28 months gives rise for real concern. If it does, I must go on to consider numerous other general factors and circumstances particular to this case. In my judgment, an unreasonable delay period of 5.25 months in the Supreme Court of Bermuda is cause for grave concern. For that reason, this Court is bound to examine all of the various other factors and circumstances.

83. The Plaintiff's criminal case is not one of any great complexity. I find it curious that the Defence spent such an inordinate period of time pursuing a hearing in challenge of the sufficiency of the Crown's evidence and the mode of committal proceedings. This is a case where the Crown's evidence clearly satisfied the prima facie threshold requirement for committal proceedings (see my previous ruling in *The Queen v Sabian Hayward [2017] SC (Bda) 64 Crim (14 August 2017)*. On the face of the Crown's evidence, Mr. Hayward was caught red-handed by police in possession of a large quantity of controlled drugs with his Co-Accused who has been sentenced on his guilty pleas. Experienced Counsel, such as Ms. Mulligan, is more than competent to make a sound and reasonable assessment of the evidence. I find it equally curious why the Defence did not withdraw from this technical argument on 6 February 2017 when the opportunity to proceed to trial before Greaves J arose. Of course, the Defence was entitled to pursue any legal process available to it and should not be precluded from so doing on account of systemic inefficiencies.

84. In determining the reasonable timeframe for a trial in this case, I must cast my mind to the practical realities of criminal litigation in the Supreme Court. Ms. Mulligan referred to Justice Greaves' well known case management system of fixing trials within a 3 month timeframe of an Accused's first arraignment appearance. This listing system was optimal and ideal. A dereliction from the 3 month pre-trial period goal post, however, does not in my judgment amount to a breach of section 6(1) of the constitution and is not always realistic.

85. The Supreme Court bench is currently comprised of two very senior and experienced judges, one of whom sits as a full time judge and the other who sits as a part-time judge hearing the majority of the criminal trials listed. There is also a roster of two acting puisne criminal judges. A reasonable timeframe for a trial will also depend on the number of trials listed and the availability of the criminal judges. I have taken judicial notice of the level of indictment traffic in the Supreme Court since the Plaintiff's matter was first brought to the Supreme Court on 30 June 2016 by voluntary bill. From July 2016 to present there have been somewhere between 25-30 trials listed. Since July 2016, the average trial has been listed within a 6 month period of the first arraignment date. There are nevertheless a minority group of trial listings which have exceeded an 8 month waiting period.

86. Having had regard to all of these points, I find that an unreasonable delay period in excess of 1 year from 16 February 2017 would more plausibly qualify as a deprivation of the Plaintiff's constitutional rights in this case. This is not hard and fast and does not mean that a trial listing which moderately goes beyond 16 February 2018 will automatically constitute a breach of section 6(1). Further, any future assessment of the Plaintiff's section 6(1) constitutional rights would necessarily be tied to the facts and circumstances of the proceedings as they occur in the future.

87. Findings of unreasonable delay which are a fraction of the total computation of time will not always amount to a deprivation of one's constitutional right to a fair trial within a reasonable period of time. The assessment of the Plaintiff's constitutional rights will not be examined myopically. The Court will look to all of the varying factors and realities to determine whether the delay is overall unreasonable. In this instance, the unreasonable delay period was less than one quarter of the total 28 month waiting period.

88. I have considered the evidence from the Plaintiff and the submissions from both Counsel on the presumed and actual prejudice to the Plaintiff. I accept that the Plaintiff has experienced great frustration and feels denied of the opportunity to demonstrate the innocence he is presumed to have. In the Plaintiff's affidavit he spoke about his diabetic father who resides in Jamaica, having now lost his eye sight and suffered an amputated leg. The Plaintiff has not, as part of his bail conditions, been permitted to travel and visit his ill father. I have not ignored the obvious agony which the Plaintiff and his family have undergone in waiting for the Court listings his Counsel so persistently pursued. Of course, I am also mindful that a greater portion of the overall delay period was coined by the Defence in the Magistrates' Court and by the occurrence of a hurricane and toxic mold in the Supreme Court Registry in 2016.

89. In considering the subject of prejudice to the Plaintiff, I have also placed my mind to the need for protection of the community's interest which I hold to be implicit in section 6 of our

Constitution. If the accused, having been released on bail, is subsequently found guilty and imprisoned, it would mean that he, an unpunished wrongdoer, had been at liberty in the community for an extended period of time after having been caught by the authorities.

Conclusion

90. Having examined all of these aspects of this case, I find that the Plaintiff has not been deprived of his constitutional rights under section 6(1). However, I do agree that the Plaintiff's criminal proceedings have been moving with dragging feet. Such systemic or institutional delays will necessarily weigh against the Crown in constitutional applications.

91. This case narrowly missed a dismissal of charges by this Court. This matter must now be listed for trial expeditiously. Counsel of record should make themselves flexibly available to accommodate the earliest possible trial listing. A new trial date must be canvassed and confirmed before the close of December 2017.

92. I see no reason to depart from the usual approach of the Courts as it relates to costs. Ordinarily, the Court will not make an order for costs in constitutional matters involving unsuccessful litigants in pursuit of their constitutional rights against public authorities.

93. In my previous security for costs ruling delivered in *Ayo Kimathi et al v the AG et al [2017] SC (Bda) 87 Civ*, I outlined the leading authorities and costs principles applicable to non-frivolous constitutional applications involving unsuccessful private citizens. These principles were initially stated in the costs ruling of the learned Hon. Chief Justice, Ian Kawaley, in the same case matter and again in *Mahesh Sannapareddy v The Commissioner of the Bermuda Police Service and The Attorney General [2017] SC (Bda) 54 Civ (5 July 2017)* which outlines the expected approach of the Crown in the rare circumstances when it intends to recover its costs from a constitutional application.

94. At paragraph 21 in *Sannapareddy* the learned Chief Justice stated:

> *"It is impossible to overstate the significance of the Court of Appeal for Bermuda's decision in Barbosa in terms of promoting access to the Court by litigants wishing to seek constitutional relief. Implicit in the new costs regime is the notion that the State should be willing to bear its own costs in assisting the Court to construe the Constitution in the context of adjudicating a citizen's non-frivolous complaint that his or her fundamental rights have been contravened."*

95. In *The Minister of Home Affairs and The Attorney General v Michael Barbosa Civil Appeal No. 3 & 3A of 2016* the Bermuda Court of Appeal upheld this general rule which was first

stated by the learned Justice Stephen Hellman at first instance. Also see Justice Hellman's ruling in *Holman [2015] SC (Bda) 70 Civ (13 October 2015)* where he followed the approach of the South African Constitutional Court in *Biowatch Trust v Registrar: Genetic Resources and Others [2009] ZACC 4* and the Eastern Caribbean Court of Appeal decision in *Chief of Police et al v Calvin Nias (2008) 73 WIR 201*.

96. In my judgment, the Plaintiff's claim was far from frivolous. For those reasons, I am not minded to make an order for costs. However, I will hear the parties on costs if either side within the next 21 days makes such a request by letter filed in the Registry.

Dated this 30th day of November 2017

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SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE OF THE SUPREME COURT