

SAINT LUCIA

EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)



CASE NO. SLUCRD2020/0138A,0139A,0140A,0141A

BETWEEN:

THE KING

and

DONAVAN ISHMAEL

Defendant

Appearances:

Mr. Bernick Faisal Counsel for the Applicant

Mr. Peter Moyston Counsel for the Crown

The Applicant present via Zoom from the Bordelais Correctional Facility

2025: July 18th;

- [1] **BROWNE, J:** The issue for determination in this application is whether the breaches of sections 38, 46 and 54¹ of the Child Justice Act¹ are of such effect to cause the dismissal of the matter against the Applicant, Donovan Ishmel, a child in conflict with the law as defined by section 2 of the said Child Justice Act.

Background

- [2] The Applicant was born on the 24th day of November 2001 to Keisha Nadine Laverne Ismael of Marchand. The applicant fell into conflict with the law in March 2019 and was arrested, taken before the Family Court and remained in custody at the Correctional Facility.

¹ 2018(NO.9 of 2018)

- [3] While the Applicant was remanded in custody, a mere five (5) months into his detention, on the 14th day of October 2019, it is alleged that the applicant aided and abetted two adult males in the rape Nadeje Mitchel, a female child being detained at the Bordelais Correctional Facility.
- [4] Both the Applicant and the Victim, who were children in conflict with the law, were being held at the facility, where adult prisoners were also being detained.
- [5] On the 24th day of March 2021, a sufficiency hearing was held in this matter, an indictment was filed on the 29th day of May 2021 and the applicant was arraigned on the 19th day of July, 2021. He pleaded not guilty to all counts,
- [6] To today's date, the applicant has been on remand for six (6) years, two (2) months and eight (8) days.

The Application of the Child Justice Act

- [7] The Crown in its submissions agreed with the defence that the facts as stated are not in issue. As such, it is not disputed that the Applicant at the time of the alleged offences before the Court was a Child as described in Section 2 of the Child Justice Act. The section defines a child as a person under the age of eighteen (18) years.
- [8] It also defines a child in conflict with the law as a child who is alleged to have committed an offence.
- [9] It is therefore clear that the Child Justice Act, applies to the applicant in the present case.

The sections of the Child Justice Act which fall to be considered

Section 38

[10] Section 38 of the Child Justice Act states.

"38.- Intention to prosecute

1. If the Director of Public Prosecutions intends to prosecute a Child in conflict with the law, he or she shall issue a certificate in the prescribed form confirming the intention to prosecute.
2. In issuing a certificate under subsection
 1. the Director of Public Prosecutions shall have regard to – 40 Child Justice Act;
 - a) the appropriateness of diversion under this Act;
 - b) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the Child;
 - c) the nature and gravity of the alleged offence;
 - d) the impact of the alleged offence on a victim of the offence;
 - e) an assessment report prepared by a probation officer under section 26(3); and
 - f) an evaluation or a report of a counsellor, medical practitioner or psychologist, if applicable.
 3. If a certificate under subsection (1) is not issued within twenty eight days after an initial inquiry, the Director of Public Prosecutions is regarded as having declined at institute proceedings to prosecute.

[11] Counsel for the applicant submitted that the filing of an indictment and the later arraignment of the applicant more that 1 year and 9 months after the alleged offence had been committed cannot be seen as equivalent to the notice contemplated in Section 38 of the Child Justice Act, especially as it fell beyond the forty-two (42) day maximum² set out in the Act.

² This is on account of any postponement of an initial inquiry which a magistrate may do for a period not exceeding fourteen days as outlined in section 33 of the Child Justice Act

- [12] The position of the Crown with regard to the need to comply with this section seems conflicting. On one hand the Crown expressed the view that the Director of Public Prosecutions was not obligated pursuant to the said Section 38 to issue a certificate until the necessary prescribed form was provided by regulations made pursuant to Section 79 of the Child Justice Act. They also submitted that the crux of the matter of Section 38 as seen in *Seth Nyhim John* is that neither the Director of Public Prosecutions nor the Magistrate had power to act contrary to this procedure.
- [13] The Court notes that there are no prescribed forms in the Schedule. Despite this, Section 24 of the Interpretation Act provides an avenue for compliance with Section 38 of the said Child Justice Act.
- [14] Section 24 of the Interpretation Act, Cap 1.06 provides that where a form is prescribed or specified by any enactment, deviations therefrom not materially affecting the substance nor calculated to mislead shall not invalidate the form used.
- [15] Interestingly, in the case of *Seth Nyhim John*, the Crown, without there being any prescribed forms filed a Notice of Intent to prosecute. The Crown appears very aware of how such a document can be drafted.
- [16] It therefore seems that both the Counsel for the Applicant and Counsel for the Crown are agreed on the fact that compliance with Section 38 of the Child Justice Act is mandatory.

Section 46

- [17] Section 46 of the Child Justice Act deals with time limit relating to the conclusion of the Trial
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1. *The Court shall conclude the Trial of an accused Child as speedily as possible and shall ensure that adjournments are limited in number and duration.*

2. *Sections 31 and 34, apply, with the necessary modifications required by the context, to the Court if the Child appearing in the Court for the first time is in detention.*
3. *If a Child remains in detention in a place of safety, a secure residential facility or a correctional facility and the Trial of the Child is not concluded within eighteen (18) months from the date on which the child has pleaded to the charge, the child shall be released from detention, unless he or she is charged with an offence listed under Schedule 3 item 1, 2 or 3.*

[18] Section 8 (1) of the Constitution of Saint Lucia Cap 1:01 of the Revised Laws of Saint Lucia 2022 provides that

" 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"

[19] In all criminal proceedings before the court, the overriding objective must be considered and applied. That objective is seen at Rule 1 of the Criminal Procedure Rules³ and states.

[20] "Part 1

1. *The overriding objective of these Rules is to enable the court to deal with criminal cases justly.*
2. *Dealing with a criminal case justly includes –*
 - a) *dealing with a case efficiently and expeditiously;*
 - b) *dealing with a prosecution and a defence fairly;*
 - c) *respecting the interests of witnesses, victims and jurors;*
 - d) *ensuring that appropriate information is available to the Court when bail and sentence are considered; and*

³ SI 22/2015

- e) *dealing with a case in a way that takes into account –*
 - i. *the gravity of the offence alleged;*
 - ii. *the complexity of the issues;*
 - iii. *the severity of the consequences for the defendant and others affected: and*
 - iv. *the needs of other cases...."*

[21] The Applicant has been remanded for over six (6) years, double the maximum penalty which could have been imposed for the offences before the Court, and even so, maximum sentences are not the usual starting points in sentencing and are reserved for the most serious offences. When considering sentencing guidelines in these matters and the likely starting point on consultation of the grid, it is unlikely that these offences would have fallen into that category.

[22] Without a doubt, assessing the circumstances of this case and the various pieces of legislation/rules, the Court is of the view that the detention of the Applicant for such a period of time is troubling and would seem in breach of his constitutional rights, especially since no explanation has been given for same.

[23] It is the objective of the legislation to ensure that accused persons do not remain detained for protracted periods of time and ensure the efficient and just disposal of matters. It is also an incentive to the State to provide a criminal justice system where trials are heard in a timely manner.⁴

Section 54

[24] 54. (1) *A Court shall not impose a sentence to a correctional facility on a child*

⁴ Frank Errol Gibson v The Attorney General (2010) 3 CCJ (AJ) para 62

- a) *unless the child is over the age of fourteen years at the time of commission of the offence; and*
- b) *unless substantial and compelling reasons exist for imposing a sentence to a correctional facility, which may include – 49 Child Justice Act (i) (ii) conviction of an offence under Schedule 3, or a previous failure to respond to an alternative sentence, including a sentence with a residential element; or*
- c) *in respect of an offence under Schedule 1; or*
- d) *as an alternative to another sentence specified in this Act,*

2. *If a sentence to a correctional facility is imposed on a child under subsection (1) that sentence shall be for a period not exceeding three (3) years.*

[25] In March this year, this section was amended by deleting the words, ***"that sentence shall be for a period not exceeding three years"*** and substituting the words, ***"the Court may impose a sentence it deems appropriate"***.⁵ This amendment came into effect on the published date.⁶

[26] Section 8(4) of the Constitution of Saint Lucia 's states,⁷ " A person shall not be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

⁵ Child Justice Amendment Act No.3 of 2025

⁶ 17th March 2025. While Parliament may make laws with retroactive effect, this was not indicated here

⁷ Chapter 1:01 of the Revised Laws of Saint Lucia 2022

- [27] As a consequence, the Court is of the view that the applicant would not fall to be sentenced to a more severe penalty on account of the principle of non-retroactivity.⁸ This view was also posited by Counsel for the Crown and Counsel for the applicant.

The approach of the Courts with respect to the Sections in question in the Child Justice Act.

- [28] With regard to Section 38 of the Child Justice Act, the Courts, both Criminal and Civil Divisions have made rulings with regard to compliance with this section. In the criminal case of **The King vs Nickron Baptiste and Haze Lamille**⁹, non-compliance with this section was detrimental to the case. In the civil case of Nyhim John¹⁰, Justice Alvin Pariagsingh ruled¹¹, *"neither the Magistrate nor the DPP has the power to act in any manner inconsistent with the procedure set out in the Act as there is no discretion in the Act or otherwise permitting them to do so. The orders of the Magistrate and the remand of the Petitioner passed the 42 day regime set up in the Act is accordingly unlawful and so too is his detention"*.

- [29] Section 46 of the Child Justice Act mandates that the trial of a Child should be conducted as speedily as possible, in other words, within a reasonable time frame. In a recent BVI case¹² Justice Richard Schneider states *"having trials proceed within a reasonable time is an indicator of a healthy criminal justice system"*. It is incumbent on all involved in the criminal system to ensure that cases are processed as efficiently as possible.¹³

- [30] The Applicant has been before the Court for over six (6) years as a child in conflict with the law, and an analysis of the circumstances of this case with regard to the unreasonableness of the delay and how much of that delay is attributable to the

⁸ Article 7 of the ECHR

⁹ SLUCRD 2021/0030,0031

¹⁰ SLUHCv2023/0514

¹¹ At paragraph 3

¹² The King v Nodu Emelandu BVIHCR 9 of 2022

¹³ The Queen and David Boardman (2015) EWCA Crim 175

Applicant, as well as consideration of the complexity of the case and if there is any evidence of any exceptional circumstance, shows that the delay has been unreasonable in all the circumstances.

Conclusion

[31] The Crown has submitted that the facts as submitted by Counsel for the Applicant are correct and there are remedies available to cure the breaches made such as costs as in the case of Nyhim John and even compensation in a Civil Court.

[32] It cannot be acceptable that in criminal proceedings where there are children in conflict with the law, and where the legislative framework which guides how these matters are to proceed, that these provisions are flouted and little or scant regard paid to them, to later suggest as a remedy, that the State now compensate such persons where the requisite state entities, failed to do their duty as required by the law. This is wholly unacceptable and unduly burdensome on the coffers of the State.

[33] In **R v Boardman**¹⁴ Sir Brian Leveson P quoted the following from the Review of Efficiency in Criminal Proceedings (23 January 2015): *"it cannot be right that a 'culture of failure' has developed in the Courts, fed by an expectation that deadlines which will not be met.... there must be good reason for it and there must be an expectation that the party which failed to comply can provide that reason. A failure to tackle this culture leads to a general indifference to compliance"*.

[34] The Court, having considered that which is required to be done under Section 38 and Section 46 of the Child Justice Act, as well as the sanctions that may be imposed under Section 54 of the said Act, finds that the breaches of these provisions, which are mandatory were detrimental to the prosecution of the matters before the Court, and as a consequence, the Court orders that these matters against the Applicant be forthwith discontinued and the Applicant discharged with respect to these offences.

¹⁴ [2015] EWCA Crim 175 at [2], [2015] 1 Cr App Rep 504, [2015] Crim LR 451

IT IS HEREBY ORDERED:

1. These matters against the Applicant be forthwith discontinued and the Applicant discharged with respect to these offences.

Justice Réchanne T. L. V. Browne
High Court Judge

BY THE COURT


DEPUTY REGISTRAR