

**IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CASE NO: ANUHCR 2018/0092

BETWEEN:

THE QUEEN

RAVIAN BRADSHAW

Appearances:

Ms. Rilys Adams, Counsel for the Crown

Mr. Andrew O’Kola, Counsel for the Defendant

2021: October 1st,
November 3rd

RULING

Background

- [1] **WILLIAMS, J.:** On the 17th of September, 2018 the learned Director of Public Prosecutions “DPP” indicted the defendant, Mr. Ravian Bradshaw, on one count of rape. The matter went to trial in January 2019. At the end of the Defendant’s three-week long trial, the jury was not unanimous; they were hung. An acceptable majority of the jury could not find Mr. Bradshaw guilty; neither did an acceptable majority find him not guilty.
- [2] The Defendant was remanded to prison and the matter was listed for re-trial in 2019.
- [3] No fresh indictment has been filed in the matter.
- [4] Counsel for the Defendant, Mr. Andrew O’Kola, has urged the Court to stay Mr. Bradshaw’s re-trial. He argued that there have been breaches of the Defendant’s constitutional rights, such as a right to a fair hearing in a reasonable time; and the failure to provide the Defendant with adequate facilities to properly put his defence. Mr. O’Kola is also relying on the inherent jurisdiction of the Court to protect the criminal justice system from abuse.

- [5] Crown Counsel Ms. Rily Adams has acknowledged that there has been some delay in the Defendant being retried; but Ms. Adams submitted that there is no need for the Court to intervene and issue a permanent stay of the proceedings.
- [6] At the heart of Mr. O’Kola’s submission, was the failure by the Crown to produce a transcript of the previous trial that ended in February 2019.

Recent History:

- [7] On the 15th June 2021, an Order was made for the transcript to be provided on or before the 27th July, 2021. The matter was adjourned to that date – 27th July, 2021.
- [8] When the matter was called up on the adjourned date, 27th July, 2021 no transcript of the trial was available. On that date, Counsel for the Crown informed the Court that the trial transcript was incomplete and it was being worked on. Another Order was made. It stated:

“There has been no compliance with the Court’s order of 15th June 2021 to have the transcript produced on or before the 27th of July 2021.

“Noting the representation by the Crown that the transcriptionist has indicated that the transcript is currently being worked on, this matter is adjourned to Friday, 24th September 2021, at 9:00 am.”

The matter was adjourned to 24th September, 2021.

- [9] On the 24th September, 2021 Crown Counsel was not present. The learned DPP however was present electronically. He indicated that the transcript was still not ready.
- [10] Mr. O’Kola renewed his concerns about the absence of the transcript and urged the DPP in the circumstances of this case to exercise his discretion and powers and discontinue the case.
- [11] The DPP indicated that he would speak with counsel who had conduct of the matter, (Ms. Adams), as well as the Virtual Complainant and that he would make an informed decision in the matter. The DPP asked for the matter to be adjourned to 1st October, 2021.
- [12] Ms. Adams appeared on the 1st October, 2021. Crown Counsel reported that the DPP met with the Virtual Complainant and the instructions from the DPP were that the Crown intended to proceed with the matter.
- [13] Mr. O’Kola made an oral submission for a stay of the proceedings. Ms. Adams responded on behalf of the Crown. Ms. Adams was given leave to file and serve written submissions on or before the 15th of October, 2021. The Defence was at liberty to respond on or before the 22nd October, 2021. The matter was adjourned to the 26th October, 2021.
- [14] Ms. Adams filed her submissions on 18th October, 2021. Mr. Okola’s did not provide any written response.

Earlier Court History

- [15] After the first trial ended in February 2019 and prior to June 2021, the endorsements on the Judge's file indicate that this matter came up before a judge on at least 24 occasions during that period.
- [16] The Defendant, who was remanded into custody on 13th February, 2019 when his trial ended with a hung jury, was given bail on 2nd May, 2019.
- [17] An entry on the Judges' file for the 2nd May, 2019 stated: "(3) Bailed. Not opposed given likely length of time before transcripts ready."
- [18] There are a number of other entries on the Judges' file regarding the transcript. A sample of some of these entries with their corresponding numbers are:
- 12th April 2019: (2) Transcripts will be needed – bail will be considered if overlong.
 - 7th June 2019: (1) No transcripts yet!
 - 27th September 2019: (2) Nothing filed re: transcripts.
 - 27th February 2020: (1) O'Kola now wants transcripts for John, Adams, Chapman, O'Garro.
 - 6th March 2020: (1) No progress – wrong audio file.
 - 22nd May 2020: (1) Still no transcripts.
 - 26th June 2020: (1) Defendant still [does] not have transcripts.
 - 28th October 2020: (2) Defendant in quarantine – need to discuss transcripts.
 - 6th November 2020: (1) ...argument over who should have filled in 'Form' for transcripts – not been done.... (3) [Crown] will formally ask for transcript re: 5 witnesses as per 27.02.20
 - 8th December 2020: (2) ...says transcripts by January.
 - 19th January 2021: (2) Transcript soon.
- [19] It is also apparent from the entries on the Judges' file that since 2019, the Parties have been invited to make submissions regarding the re-trial of this matter – given the unavailability of the transcripts. The scheduling written on the file shows:
- 7th June 2019 - Note (4): Argument – 01.07.19 O'Kola. 08.07.19 Adams.
 - 25th July 2019 - Note (3): By 13.09.19 – O'Kola argument. 20.09.19 – Adams reply.

Defence Counsel's Arguments:

[20] Mr. O'Kola on the 1st October, 2021 in his oral submissions contended that:

(1) There has been unreasonable delay of the Defendant's retrial;

(2) Should the Defendant be required to proceed in the circumstances of this case, it would represent a breach of the fundamental rights secured by the Constitution of Antigua and Barbuda as the Defendant would be denied relevant facilities that are required to make his defence; and

(3) The matter ought to be stayed as an abuse of process by the Crown.

[21] The Defendant's counsel noted that the Crown wanted to proceed with this matter without providing a transcript of the previous trial. Counsel submitted that not only is the transcript of the previous trial necessary whenever there is a retrial but, in the circumstances of this case, a transcript is even more important.

[22] Mr. O'Kola pointed out that he represented the Defendant in the previous trial. He noted that the jury was unable to reach a verdict. According to Counsel, there were numerous inconsistencies and contradictions not just between witnesses, but also where witnesses were shown to have given testimony that differed from their contemporaneous statements.

[23] Counsel for the Defendant submitted that the crux of what he has been hearing from the Office of the DPP as to the reason for not providing the trial transcript can be described as administrative inefficiencies.

[24] According to Mr. O'Kola, in an effort to get the retrial going, the Defendant agreed to a partial transcript. (This would have accounted for the Order of 27th February, 2020 regarding a partial transcript of just five of the witnesses). Counsel said in the circumstances, the Defendant agreed that only those witnesses "we examined strongly, where there would be inaccuracies" needed to be transcribed. Mr. O'Kola said that the defence felt that they were "backed into a corner" at that stage, so the concession was made.

[25] Mr. O'Kola submitted that it was impossible to have a fair trial without the provision of a transcript of the previous trial. He categorized the delay in providing the transcript as "inordinate" and "unjustified." Mr. O'Kola said that to proceed in such circumstances amounted to an abuse of process. Counsel said that in order to protect the integrity of the criminal justice system that the matter ought to be stayed.

Crown Counsel's Argument

[26] Ms. Adams on behalf of the Crown said that they could not dispute that the trial took place in 2019. Counsel said that the Order for a transcript came sometime afterwards. Ms. Adams acknowledged

that no transcript was produced. Ms. Adams stated that the Crown's position was that no transcript was needed.

- [27] Ms. Adams was of the view that the case for the Defendant was one of consent. Counsel opined that the absence of a transcript did not impair the Defendant's case. Ms. Adams said: "The defence's case at all material times was that there was sexual intercourse but it was consensual. The 'running' of this defence may not be prejudiced."
- [28] Counsel said that there were reasons for the non-production of the transcript. Those reasons were linked to resources.
- [29] Ms. Adams noted that the Defendant's matter was a retrial. According to Crown Counsel, such matters take less precedence in the preparation of transcripts; preparing matters for the Court of Appeal were given priority.
- [30] It was also submitted by the Crown that there was a period of time this year where, as a consequence of the Covid-19 pandemic, personnel were not working at the High Court building.
- [31] Counsel for the Crown acknowledged that there was at one stage an agreement with the Defence to produce a limited transcript and not a transcript of the entire trial. That document would contain certain witnesses only.
- [32] With regard to the representation made in Court on the 27th July, 2021 that the transcript was partially completed and was being worked on, Ms. Adams said that they have not yet received the partially completed transcript.
- [33] Ms. Adams said that measures could be implemented to explore and test any discrepancies as alleged by the Defendant. She submitted that recordings could be provided "very swiftly" and that those recordings rather than paper copies of the transcript could be used.
- [34] Ms. Adams noted that it was not only the Defendant who was awaiting a day in Court; but also the Virtual Complainant.

The Constitution

- [35] Section 15 of **The Constitution of Antigua and Barbuda**, Cap. 23 of the Laws of Antigua and Barbuda, Revised Edition 1992, addresses the 'Provision to secure protection of the law.' The relevant parts are:
 - (1) If any person is charged with a criminal offence then, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by a[n] independent and impartial court established by law.
 - (2) Every person who is charged with a criminal offence
 - a. Shall be presumed to be innocent...
 - b.

- c. Shall be given adequate time and facilities for the preparation of his defence.
- d.

[36] The submission on behalf of the Defendant is that:

(1) His trial has not been held within a reasonable time; and

(2) He cannot get a fair hearing, since he is being deprived of material that is critical to mounting his defence.

[37] The Defendant's view is that the Crown is solely responsible for not being in a state of readiness to proceed with the retrial of his matter. The delay cannot be attributed to him.

[38] The Defendant further alleged that it would be unfair to have a retrial without a transcript. This fair trial issue was linked to the alleged breach of subsection 15 (2) (c) the right to be afforded adequate facilities for the preparation of his defence. This is because the transcript in the defence's view is particularly important as inaccuracies of some witnesses featured at the earlier trial.

Covid 19 Impact

[39] The Covid-19 pandemic could have impacted on the retrial of this matter. Based on the entry on the Judges' file, the Defendant was placed in quarantine on one occasion and could not attend Court.

[40] The fact that there were no High Court criminal trials in Antigua and Barbuda for about a year meant that no trial, including the Defendant's, could have been held during that period. That, however, is a separate issue from being ready to proceed with the trial.

[41] The absence of any High Court criminal trials for several months meant as well that the transcriptionists would not have had any new High Court criminal trials to prepare for the Court of Appeal. Therefore, despite whatever merit there was in Counsel's submission that the transcripts for the Court of Appeal were a priority, and not the retrial matter, there ought not to have been any new High Court criminal trial matters which the transcriptionists had to prepare for the Court of Appeal.

[42] The Crown did indicate that the High Court staff would not have had access to the building for (an unspecified) period of time. There was no access to the High Court building as a consequence of the pandemic. This meant that the transcriptionists would have been at home. However, that submission is rejected as not having much merit. Did the closure of the building mean that transcriptions could not be done? What obtained in other jurisdictions of the Eastern Caribbean Supreme Court or the wider Commonwealth Caribbean where transcriptionists were restricted from going to the office? Was there any impediment to the work of the transcriptionists being done remotely?

Retrial Timeline

- [43] The importance of conducting timely retrials was highlighted in **Herbert Bell v The Director of Public Prosecutions and Another**, [1985] 1 AC 937 (PC). Bell was convicted of various offences and sentenced to life imprisonment as well as other concurrent terms of years. The Court of Appeal of Jamaica quashed his conviction and ordered a retrial. The issue of stay of proceedings as a consequence of the delay of Bell's retrial did not find favour with the Court of Appeal. The issue of delay was argued before the Privy Council.
- [44] Lord Templeman, in delivering the judgment of the Judicial Committee of the Privy Council, spoke of "delay in the context of a retrial." He said, at page 954:

"A period of delay which might be reasonable as between arrest and trial is not necessarily reasonable between an order for retrial and the retrial itself."

The Learning

- [45] Abuse of process is addressed this way in **Commonwealth Caribbean Criminal Practice and Procedure**, Fifth Edition (Dana S. Seetahal with updates by Roger Ramlogan) page 17:

"It has been said that since early times, every court has had an inherent power to stay criminal proceedings on the basis that they are oppressive and constitute an abuse of its process."

- [46] In a matter that arose in Anguilla, **Regina v Joseph Brice** Indictment No: 4 of 2011, the sole issue to be determined was whether a permanent stay of the indictment should be granted. The Honourable Madam Justice Louise Blenman (as she then was) noted:

"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. These are powers inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and suppress any abuses of its powers and to defeat any attempted thwarting of its process."

- [47] The circumstances in which a court would intervene are well settled. Madam Justice Blenman in **Joseph Brice** cited **Attorney General's Reference** (No. 2 of 2001) [2004] 2 AC 72; as well as **Derby Crown Ex Parte Brooks** [1985] 80 Cr App R 164. **Commonwealth Caribbean Criminal Practice and Procedure** refers to "the bedrock principles of abuse clearly enunciated in **R v Maxwell** [UKSC] 48." They all say the same thing: the power of the court to stop a prosecution for an abuse of the process of the court arises in two circumstances –

(a) Where it will be impossible for the Defendant to have a fair trial; and

(b) Where it offends the court's sense of justice and propriety to be asked to try the Defendant in the particular circumstances of the case.

- [48] Those circumstances which give rise to exercising the power to stop the prosecution for an abuse of the process of the Court is elegantly expressed in **Derby Crown Ex Parte Brooks**. It may be an abuse in the first of the circumstances, [identified at (a) above], if the “prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take advantage of the accused.” Or, in the second of the circumstances, [identified as (b) above], if “on the balance of probability the defendant has been or will be prejudiced in the preparation or conduct of his defence by delay which, on the part of the prosecution, is unjustifiable.”
- [49] Blenman J in **Brice**, at paragraph [54] pointed out:
- “In the first category of case, if the court concludes that the defendant cannot receive a fair trial, it will stay the proceedings without more... In the second category of the case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court’s sense of justice and propriety or will undermine public confidence in the criminal justice system and bring it into disrepute... a balance must be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute.”
- [50] In the Scottish case of **Dyer v Watson and another, K v H.M Advocate** [2002] HRLR 21, [2002] UKPC] D1 (PC), the Privy Council had to address the submission in the two unrelated Appeals that too much time had elapsed between when the Appellants were charged and the date of their respective trials. None of the Defendants were held in custody pending their trial and the only issue was the right to a trial within a reasonable time.
- [51] The Privy Council held that the object of the reasonable time requirement was to ensure that everyone against whom criminal proceedings were brought was guaranteed a final decision within a reasonable time to prevent an individual being left too long in a state of uncertainty about his or her fate. There was no requirement that the Defendant to show that he or she was actually prejudiced by the delay. It was up to the Crown to justify any lapse of time which appeared to be excessive. Their Lordships recognized three areas as calling for particular inquiry:
- i. the complexity of the case;
 - ii. the conduct of the defendant; and
 - iii. the manner in which the case had been dealt with by the administrative and judicial authorities.
- [52] The Caribbean Court of Justice, in **Frank Errol Gibson v The Attorney General** [2010] CCJ 3 (AJ) noted at paragraph [49]:
- “By deliberately elevating to the status of a constitutional imperative the right to a trial within reasonable time, a right which already existed at common law, the framers of the

Constitution ascribed a significance to this right that too often is under-appreciated, if not misunderstood.”

[53] The Justices of the CCJ went on to say at paragraph [52]:

“...this court cannot remain oblivious of well-founded concerns that breaches of the right to trial within a reasonable time are systemic in nature. If on the other hand it is apparent that prompt measures are being taken to address this problem in a decisive manner then a court is likely to take cognizance of such measures when it has to assess reasonableness of lapses of time or the remedies that should be applied.”

[54] It was noted at paragraph [62] of **Gibson** that:

“The fundamental objective of the reasonable time guarantee is not to permit accused persons to escape trial but to prevent them from remaining in limbo for a protracted period and to ensure that there is efficient disposition of pending charges. The guarantee is an incentive to the State to provide a criminal justice system where trials are heard in a timely manner.”

Summary Highlights

[55] The Defendant is charged with a very serious offence.

[56] The offence with which he is charged is also quite prevalent and the public no doubt have an interest in ensuring that those who are found guilty are punished.

[57] If there is a breach of the reasonable time guaranteed in the Constitution, there are consequences for a Defendant. As noted in **Gibson**, paragraph [49] where the CCJ stated: “That person is deprived of an early opportunity to have his name cleared and is confronted with the stigma, loss of privacy, anxiety and stress that accompany exposure to criminal proceedings.”

[58] Retrials are held with some alacrity.

[59] The Defendant’s original trial, commendably, commenced within four months of him being indicted.

[60] More than thirty months have elapsed since the original trial and the indication from the Crown on the 12th of April, 2019 that it was proceeding with a retrial.

[61] After the jury failed to reach a verdict, the Defendant was remanded pending his retrial. He was granted bail after the judge considered that there was a delay in producing the transcript of the trial. This was in May 2019.

[62] Having been granted bail, the Defendant’s liberty has been somewhat restored. Among the Defendant’s bail conditions are a requirement for him to reside at Cedar Grove with his mother; to sign in at the Langsford Police Station three times a week; and a prohibition from traveling outside of Antigua and Barbuda.

- [63] In the past two-and-a-half years, the Defendant has come to Court on more than two dozen occasions.
- [64] The defence demonstrated a desire to cooperate with the Crown to get the retrial going. In February 2020, Counsel for the Defendant indicated that a limited transcript with five of the witnesses may be sufficient to meet the needs of the defence.
- [65] In December 2020, the Crown informed the Court that the transcripts would be ready in January 2021. In January 2021, the Crown informed the Court that the transcript will be ready soon.
- [66] A new Order was made on the 15th of June, 2021 for the transcript to be provided on or before the 27th of July, 2021. This was to enable the scheduling of the retrial early in the upcoming term.
- [67] The Crown reported on the 27th of July, 2021 that the transcript was only partially complete and that it was being worked on.
- [68] To date, no transcript has been provided.
- [69] On the 1st of October, 2021 the Crown indicated that audio recordings could be provided in lieu of the written transcript.
- [70] On the 6th March, 2020 the Judges' entry on the file indicates that the wrong audio file was provided. Also in the Judges' entry on that day was an indication of an undertaking by the Crown to have the matter regarding the wrong audio file remedied that same day.
- [71] The Crown is not awaiting any specialist report – it is a retrial.
- [72] This is not a complex case. According to the Crown, the only issue for the jury is whether consent is made out. The Defendant is saying that the credibility and reliability of the Crown's witnesses form a major plank of the defence's case – as it did in the initial trial.

Non-Compliance

- [73] There has been no compliance with the Orders to provide the transcripts.
- [74] The administration of justice and the criminal justice system require that orders made are obeyed.
- [75] It is also a challenge to the Crown's duty of candour when undertakings given are not fulfilled. The Code of Ethics of the OECS Bar Association states, inter alia, that:

“When engaged as a public prosecutor the primary duty of an attorney-at-law is not to secure a conviction but to see that justice is done and to that end he shall not withhold facts tending to prove either the guilt or innocence of the accused.”

The term ‘withhold’ may well be considered to be not just an act of commission, but of omission as well. The duty of candour has been considered particularly in matters involving private prosecutions, judicial review proceedings and abuse of process applications. It is likened unto full, fair and frank disclosure or as the duty of utmost good faith.

- [76] Failure to provide the Defendant with a printed copy of the transcript makes it challenging, if not 'impossible' – as the standard is described in the first limb of the test of abuse of process - for Mr. Bradshaw to have a fair trial.
- [77] Given the circumstances of this case, its history post February 2019 when the jury was unable to pronounce conclusively on the Defendant's guilt or innocence, and upon balancing the interests of the Parties and public, the following Order is made:

Order

- [78] In preparation for the retrial of the Defendant, Ravian Bradshaw, the Crown is to provide the full transcript of the first trial on or before Tuesday the 9th of November, 2021 at 4:00 pm. Copies of the transcript are to be served to the Court and on the Defendant's counsel. In the event that the transcript is not provided and served as directed, the trial of Ravian Bradshaw for rape shall be stayed.

Colin Williams

High Court Judge

By the Court

Registrar