

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCR 9 of 2022

BETWEEN:

THE KING

and

NODU EMELANDU

Defendant

Appearances:

Ms. Lyn Dailey, Crown Counsel for the Office of the Director of Public Prosecutions

Mrs. Valerie R. Gordon, Counsel for the Defendant

2025: April 10
14

**RULING ON APPLICATION FOR STAY OF PROCEEDINGS AS AN ABUSE OF
PROCESS**

[1] **SCHNEIDER J:** The Crown brings an application to adjourn Mr. Emelandu's previously set trial date. Mr. Emelandu brings an application to stay the proceedings against him due to unreasonable delay in getting his matter to trial. He stands charged with the following offences:

- (1) Indecent Assault (1st – 31st May, 2020)
- (2) Indecent Assault (1st – 31st May, 2020)
- (3) Indecent Assault (20th February, 2021)
- (4) Indecent Assault (21st February, 2021)

(5) Indecent Assault (1st – 31st July, 2021)

(6) Indecent Assault (1st – 31st August, 2021)

[2] He was charged on 26th November, 2021, with the first two counts and a few months later (3rd February, 2022) with the remaining four. The complainant is the same young person in all six counts. It is not a complicated case. It has now been close to 3½ years (40 months) since Mr. Emelandu was charged and, given that disclosure was still not available at the time of the application, it was not clear when his trial might begin. How could this be? Below is a chronology of some key court dates (with notes) in respect of this matter as recorded by the Court and contained in counsel's materials:

- (1) 29th November, 2021: First appearance before a Magistrate. Released on \$45,000.00 bail. The Court was informed that disclosure would be made.
- (2) 3rd February, 2022: Report to Court – Appeared in court. Disclosure promised was not provided to counsel.
- (3) 17th May, 2022: Signed: Official Committal. Defence had still not heard recording of the complainant's first interview.
- (4) 11th July, 2022: Committal by the Magistrate's Office.
- (5) 14th October, 2022: First Appearance – Indictment filed in the High Court on 14th October, 2022.
- (6) 12th December, 2022: Arraigned and entered a plea of 'not guilty'. Bail regularized in High Court.
- (7) 17th January, 2023: Bail Order, Case Management Conference and **Trial date set** (March, 2023 (sic)).
- (8) 1st Trial date set (19th – 29th September, 2023, back up number 1 for trial, did not proceed).
- (9) 6th October, 2023: Adjourned – Disclosure still missing.

- (10) 26th January, 2024: **Trial date set** (24th – 30th April, 2024).
Outstanding Transcript – Matter adjourned to 28th February, 2024.
- (11) 20th February, 2024: Case Management Conference – Disclosure still not complete – adjourned to 10th May, 2024; **Trial date set** (2nd back up trial date was for 8th – 12th July).
- (12) 14th April, 2024: The Crown advised that the **officers are still working on defence disclosure of DVD.**
- (13) 10th May, 2024: Disclosure still outstanding. Matter adjourned to 27th June, 2024.
- (14) 31st May, 2024: Disclosure not yet completed. Matter adjourned to 27th June, 2024.
- (15) 27th June, 2024: Disclosure still not complete. Matter adjourned to 19th September, 2024.
- (16) September 2024: Disclosure missing. Matter adjourned to 28th November, 2024.
- (17) 17th October, 2024: Transcript still outstanding. Matter adjourned to 28th November, 2024.
- (18) 28th November, 2024: Disclosure still not ready, Matter is adjourned to 9th December, 2024.
- (19) December 2024: Adjourned to 11th December, 2024 for status report.
- (20) 11th December, 2024: Ms. Andrea Johnson, Senior Crown Counsel advised that the Transcript is prepared and waiting for the Virtual Complainant to sign. Matter adjourned to 21st March, 2025.
- (21) 17th February, 2025: **Upon review, Justice Persad ordered the Director of Public Prosecutions (“the DPP”) to make complete disclosure to the defence by 31st March, 2025.**

(22) 26th February, 2025: Case Management Conference. **Crown said still an issue with the audio.**

(23) Further and final Case Management Meeting set for 4th April, 2025. Transcripts from DVD's still not produced. **Trial date set** (7th – 14th April, 2025). Defence is still missing disclosure. Crown to ensure DVD and transcript are delivered by 31st March, 2025. Justice Persad saw it fit to make this an Order.

(24) 4th April, 2025: Without notice, Principal Crown Counsel, Ms. Tracey Vidale, had only received the file 'minutes before court' brings an application to adjourn. Didn't know who would be prosecuting. Indicated that the Crown was not ready to proceed. It did not have disclosure ready. And, remarkably, that the defence request for disclosure had just come to light a few days prior. Disclosure had not been provided by 31st March, as ordered by the court.

(25) In the materials filed by the Crown in this matter, we learn that "Nonetheless, notwithstanding the above, as it pertains to the outstanding disclosure the Crown, upon receiving the notes of Jillian Mathias-Prince on the interviews, as well as the transcripts of both interviews on Friday, 4th April, 2025, disclosed the material on learned counsel Mrs. Gordon on Sunday, 6th April, 2025. **Therefore, completing the disclosure in relation to this matter.**"

[3] This matter was most recently set for trial to begin on 7th April, 2025, at what would have been the fifth scheduled trial date. I understand, through counsel, that the Crown had been admonished in the past with respect to this situation and was last directed to have disclosure in the hands of the defence by 31st March, 2025. That did not occur. On 4th April, 2025, at the final Case Management Conference, the Crown brought, without notice, an application to adjourn. Mrs. Gordon, on behalf of Mr. Emelandu, indicated that she would be bringing an application for a stay of proceedings on the next occasion. The matter was put to 12th April for that purpose.

- [4] The Crown has an obligation to disclose all material used or unused that is relevant to the matter. Similarly, the police investigators have an obligation to provide the Crown with all relevant materials in their possession. It is no answer to the accused that the police did not turn over relevant information when the Crown is aware that it is in the possession of the police. The obligation to disclose is not triggered by or dependent upon the accused requesting disclosure. Obviously, it is very often the case the defence is not aware, nor could they be expected to be aware, of what it does not have. Nor, is it for the Crown to 'second-guess' whether such information should be of importance to the defence.
- [5] There has never been a response from the Crown that the defence is not appropriately entitled to the material sought. Whether the Crown will or will not play the DVDs for the jury is a trial tactic that does not bear on its obligation to provide all relevant material to the defence. As I understand it, Mr. Emelandu is, *inter alia*, seeking two DVDs with audio that is audible. These DVD's apparently relate to two interviews of the complainant at two different points in time. There is said to be a material discrepancy between the two interviews. It is quite natural that the defence ought to be supplied with these two *audible* DVDs whether or not the Crown intends to play these for a jury. It may well be that the *defence* will wish to play the DVD's for the jury as credibility may be a central issue.
- [6] It is clear the reason this matter has not been able to proceed is that the Crown has not provided the defence with complete disclosure. The Crown has conceded that the material sought should be disclosed to the accused. This is not a case where the defence has contributed to the delay and then turned around to say that the matter has taken too long. The question before the court is, 'at what point is enough, enough?' At what point will the court step in and halt the prosecution with the extreme remedy of a stay of proceedings?
- [7] It is not insignificant that while Mr. Emelandu has been before the court with counsel for 3½ years, there was, as of 4th April, 2025, no Crown Attorney assigned with carriage of the prosecution of this matter. This fact is nothing short of 'alarming'. Mr. Emelandu has had counsel retained and has been ready to proceed since his arrest

(subject to receiving complete disclosure). The defence has pursued disclosure through correspondence with the office of the DPP and at several reporting dates before the court. The DPP in its written material, submits “....the late disclosure does not amount to the Defendant not being able to receive a fair trial; therefore, a stay of proceedings should not be ordered”.

Analysis

[8] The analysis begins with a recognition that it is always in the public’s interest, and a strong presumption, that criminal matters be determined on their merits. Complainants have an inherent right to see their allegations determined at trial. They will feel let down when their complaints are not fully prosecuted. Against this fundamental principle, the integrity of the criminal justice system requires fairness to the accused who sits before the court with a presumption of innocence. Delays in prosecution may result in an offending of the court’s sense of justice and propriety, potentially resulting in a stay of proceedings as the appropriate remedy. Where the court finds that the accused cannot receive a fair trial it may stay the proceedings without more.

[9] In the UK, as found in **R v Maxwell** [2011] 1 WLR 1837 para 13 (cited in **R v Salt and another** [2015], 1 WLR 4905), a court may grant a stay of proceedings as a remedy in one of two situations:

“It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court’s sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of 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 of the circumstances a trial will ‘offend the court’s sense of justice and propriety’ or will ‘undermine the public confidence in the criminal justice system and bring it into disrepute.’”

- [10] In the present case, at the time the application was initiated (4th April, 2025), it could not be said that it was possible that the accused could, on another day, receive a fair trial because, as of 4th April, there was no clear information provided by the Crown as to when or if the missing disclosure would ever be provided. It has been promised on many previous occasions. Crown counsel appearing for the DPP did not provide the court with any information as to when the disclosure might be available.

Later the court in **Maxwell** (para 23) went on to say:

“....proceedings could be stayed not only where a fair trial was impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place....a judge must weigh in the balance the public interest in ensuring that those who were charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court would adopt the approach that the end justified the means.”

(at para 40) “....the judge found that there had been a lamentable failure on the part of the prosecution; it had failed to provide the proper data to which the defendants had been entitled.”

- [11] This is very much the sort of ‘lamentable failure’ that is before the court in Mr. Emelandu’s case. Here, there has been no debate as to whether the defence was entitled to the missing disclosure it sought which included *inter alia* audible video recordings and transcriptions from interviews of the complainant. Numerous requests have been made by the accused both through correspondence and in submissions before the court. In all of the material filed there has been no clear explanation for the Crown’s failure to provide the material. There have been several appearances where it was acknowledged as proper disclosure and there have been, at reporting appearances, directions from the court to provide the missing disclosure. The last of these was a firm direction that the material be provided by 31st March, 2025. Presumably, if the Crown had any knowledge as to that direction being impossible to comply with, the court would have been so informed.

- [12] Beyond these competing interests, as stated in **The Queen and David Boardman** [2015] EWCA Crim 175 at para 22:

“It is beyond question that there is considerable pressure on all involved in the criminal justice system to maximise the use of limited resources and to ensure that cases are processed as efficiently as possible.”

[Criminal Procedure Rules at para 199] “Whatever we do, we must encourage a reduced tolerance for failure to comply with court directions along with a recognition of the role and responsibilities of the Judge in matters of case management. It cannot be right that a ‘culture of failure’ has developed in the courts, fed by an expectation that deadlines will not be met.”

Wasted days are days that might have been used to try other cases. Wasted days are expensive, unnecessarily engage court services, and slow the system down for all involved.

- [13] The court in **Boardman** went on to say that “...it is beyond argument that the respondent would have suffered prejudice: this complaint had been hanging over his head for many months and he was being asked to wait a further 8 months before it would be resolved.” Mr. Emelandu has had this matter ‘hanging over his head’ for 40 months and, at the time of the application, there was no end in sight.
- [14] The Supreme Court of Canada in **R v Jordan** [2016] S.C.J. No. 27 echoes the principles enunciated in the UK jurisprudence referred to above with respect to delay. The context in **Jordan** was whether the accused’s right, guaranteed by the **Canadian Charter of Rights and Freedoms, 1982**, s. 11(b), to have a trial within a reasonable time had been infringed and whether, as a result, a stay of proceedings should be entered.
- [15] The **Jordan** case provides an analytical framework that is easily transportable to the present situation in the British Virgin Islands. The court set a ceiling beyond which delay is presumptively unreasonable. In the superior court that ceiling is 30 months from the date of the charge until the actual or anticipated end of trial (minus delay attributable to the defence). Once the ceiling has been reached the burden shifts to the Crown to show

that the delay was *not* unreasonable due to exceptional circumstances. If the Crown fails, then a stay of proceedings will be entered. Exceptional circumstances may include illness or other circumstances outside the control of the Crown. Other factors may include some latitude for cases of exceptional complexity. Prejudice to the accused due to delay will be inferred and will not need to be proven. The defence will be reviewed with respect to efforts made to secure missing disclosure and expedite the proceedings and its cooperation in the setting of court dates. A contextual analysis will then be had. The questions then are:

- (1) Is the delay (40 months) presumptively unreasonable?
- (2) Is any of the delay attributable to the defence?
- (3) Is the case unusually complicated or complex?
- (4) Is there evidence of any exceptional circumstance?
- (5) Has the Crown established that notwithstanding the delay of 40 months, the delay is *not* unreasonable? and
- (6) Prejudice to the accused?

Reasonableness of Delay:

- [16] While it is not necessary that we import the Canadian threshold for presumptively unreasonable delay, I am of the view that a delay of 40 months is, by anyone's standard, presumptively unreasonable.

Delay Occasioned by the Defence:

- [17] The record does not reveal, nor has it been suggested, that any of the delay in bringing the present matter to trial has been the result of significant action or inaction on the part of the accused. The Crown submitted that disclosure was finally complete on 6th April, 2025.

Complexity of the Matter:

- [18] While the evidence has obviously not yet been called, the matter would appear to involve one principal witness/complainant. There does not appear,

nor has it been suggested, that there is anything complicated or unusual about the matter.

Exceptional Circumstances:

[19] At the time of the Crown's application to adjourn (4th April, 2025), the Crown attorney alluded to the office of the DPP 'transitioning' and that there were staffing issues. While that may be, the day-to-day vagaries of office management are inevitable; these are not circumstances that warrant or excuse unreasonable delay.

Prejudice to the Accused:

[20] While prejudice will be inferred and needn't be proven, it is apparent (from the affidavit of the accused) that he is 41 years old and has been a member of the Royal Virgin Islands Police Force for 16 years. He resides with his family. He has not been able to work. Because of the missing disclosure, he has not been able to prepare for trial.

Rebuttal of Presumption:

[21] The Crown has not satisfied the court that the delay of 40 months is a reasonable delay. Indeed, it is not clear *when* the matter might otherwise get to trial.

Conclusion

[22] The Crown appeared on the juridical day before this matter was set for trial (for the fifth time), seeking an adjournment, indicating that she had just been handed the file and was therefore not ready to proceed. In all of the circumstances, it would not be appropriate to, once again, adjourn this matter. The Crown's application to adjourn is dismissed.

[23] For the reasons stated above, I am of the view that there has been unreasonable delay in bringing Mr. Emelandu's matter to trial occasioned, for the most part, by the failure of the Crown to provide complete disclosure until 6th April, 2025, one day before the trial was to begin. The DPP says: "The

Crown submits now at this juncture the remedy for late disclosure would be to grant the Defendant time to review the disclosure and prepare with the additional disclosure served.” The Crown relied, curiously, upon the Supreme Court of Canada’s decision in **R v Bjelland**, [2009] S.C.C. No. 38, a case that had to do, not with unreasonable delay, but rather the exclusion of evidence at a preliminary inquiry. The accused in the present matter is bringing an application to stay for unreasonable delay, not an application to exclude evidence. Nevertheless, and ironically, the DPP is saying that the appropriate remedy is, in effect, to grant the Crown’s application for an adjournment (it was seeking because *they* were not prepared to proceed) so that the *accused* can finally now properly prepare for trial at some point in the future. Were this to occur, this would be the sixth trial date set. The other part of the recommended remedy (caution that the context of **Bjelland** was entirely different than the present situation), extracted from **Bjelland** would be for the court to issue a ‘disclosure order’. It is noted that both of these lesser, alternative remedies (ie adjournments and ‘disclosure orders’) have been tried on multiple occasions by this court to no avail.

[24] With the failure of less drastic remedies, the appropriate remedy is now a stay of proceedings. I would therefore grant Mr. Emelandu’s application. A stay of proceedings will be entered.

[25] At the outset, this court mused “How could this be?” And, while the following is not part of the court’s ‘reasons’, certain observations are important to make.

[26] The conduct of this matter was, as the court put it in **Maxwell**, a ‘lamentable failure’. The attending Crown on 4th April, the juridical day before the trial was to commence, had been handed the file ‘minutes before court’. The Crown was apparently unaware until recently of the defence having made previous requests for the missing disclosure. The Crown was obviously not ready to proceed and sought an adjournment on that basis.

[27] Perhaps the present situation, and others like it, would not arise if the Director of Public Prosecutions ran its office more like a law firm. Perhaps if a Crown

Attorney were assigned to each matter/file as it made its first appearance in Magistrate's Court and followed it through to completion, we would not be where we are today. With 'ownership' of a file comes accountability, responsibility, continuity, and an interest in moving the matter along as expeditiously and efficiently as possible. Having a Crown Attorney intimately involved with the file would make for more spontaneous responses to defence counsel, and more diligent oversight of disclosure, witness availability, any on-going investigation, etc. It would also avoid having a different Crown Attorney trying to familiarize themselves with a file 'minutes before court'. I have no doubt that had a Crown Attorney been assigned to the present matter at its inception most of the appearances and court time chronicled above would have been obviated. Having trials proceed within a reasonable time is an indicator of a healthy criminal justice system.

**Justice Richard Schneider
High Court Judge (Ag.)**



By the Court

Deputy Registrar