

THE EASTERN CARRIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

SKBHCV2023/0087

BETWEEN:

KENTAB TYSON

Claimant

and

THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

Defendant

SKBHCV2023/0088

BETWEEN:

MAVERICK TYSON

Claimant

and

THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

Defendant

SKBHCV2023/0118

K'SHANDO SAUNDERS

Claimant

and

THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

Defendant

Appearances:

Mr. O'Grenville Browne for the Claimants

Ms. Sasha Lloyd for the Defendant

2024: March 18;

May 16.

JUDGMENT

- [1] **GILL, J:** Three men whose serious criminal charges were dismissed/discontinued seek constitutional relief in respect of the time it took for their cases to be disposed of. They have brought separate originating motions, heard together.

Kentab Tyson and Maverick Tyson

- [2] On January 8, 2019, the claimants Kentab Tyson (“Kentab”) and Maverick Tyson (“Maverick”), who are brothers (therefore, using their first names for convenience as they have the same surname), were arrested on suspicion of committing attempted murder of three men.
- [3] On January 11, 2019, they were formally arrested and charged for the attempted murder of the three men. They were also charged with the offence of discharging a firearm in a public place. On that date, they were remanded to prison.
- [4] On January 14, 2019, they were further charged for the offence of possession of a firearm with intent to endanger life.

Kentab

- [5] After spending 77 days (11 weeks or 2 months and 3 weeks) on remand, on or about April 3, 2019, Kentab, having applied for, was released on bail with conditions, including a 6:30 p.m. daily curfew and reporting to a police station 3 times per week.
- [6] On May 24, 2022, all charges against Kentab were dismissed for want of prosecution in the Magistrate’s Court.
- [7] Kentab’s matter took a total of 40 months and 16 days, that is, 3 years, 4 and a half months, from charge to dismissal.

Maverick

- [8] Maverick was also granted bail at the same time as Kentab, but was unable to secure 2 sureties who had sufficient assets to stand as sureties.

- [9] After spending 20 months (1 year and 8 months) in prison, on September 28, 2020 all of Maverick's charges were dismissed for want of prosecution.

K'Shando Saunders

- [10] On January 31, 2020, the claimant K'Shando Saunders ("K'Shando", using his first name for consistency") was arrested on suspicion of the murder of Kennedy Isles.
- [11] On February 2, 2020, he was formally arrested and charged for murder and possession of a firearm, and remanded to prison.
- [12] He states that he made numerous appearances in the Magistrate's Court and on March 23, 2021, the presiding magistrate committed him to stand trial for the said offences.
- [13] On September 23, 2021, one of the State's witnesses was murdered, and subsequently, on October 18, 2021, the Director of Public Prosecutions (DPP) entered a nolle prosequi in respect of the charges against K'Shando and he was released.
- [14] K'Shando spent 669 days (21 months and 29 days or about 1 year and 10 months) in custody before the nolle prosequi was entered.

The claims

- [15] All claimants - Kentab and Maverick separately on May 12, 2023 and K'Shando on June 26, 2023 - filed fixed date claims against the Attorney General of St. Christopher and Nevis pursuant to section 18 (1) and section 18(2) of the Constitution of St. Christopher and Nevis ("the Constitution"). In each claim, the claimants seek the following:
- a) a declaration that the right to a speedy trial under section 10 (1) of the Constitution was breached;
 - b) a declaration that the periods of incarceration were in breach of section 5 (1);
 - c) a declaration that the delay before trial was unreasonable in breach of section 5 (5); and

- d) an order for compensation under section 5(6) and/or 18(2)(b) of the Constitution.

[16] Kentab and Maverick contend that the DPP, having a full duty of reviewing matters, should have discontinued proceedings within at least 8 months, given the lack of evidence against them. In relation to K'Shando, the DPP discontinued the matter on the basis that a witness was no longer available but did not give a reason why the State could not rely upon section 72 of the Evidence Act to read the witness' statement into evidence. Given the evidence used to arrest and charge remained the same, the claimants argue that it means the State did not have confidence in securing a guilty verdict at trial and therefore, should have dismissed/nolle prosequed earlier so as not to breach their individual rights. They contend that this failure resulted in the claimants' rights under sections 5(5) and 10 (1) of the Constitution being breached.

Applications to strike out the claims

[17] By notices of application filed on June 9, 2023, in the cases of Kentab and Maverick, and September 22, 2023, in the case of K'Shando, the Attorney General moved the court to strike out all 3 claims on the basis that the claimants had alternative remedies available to them.

[18] The court took the view that all issues raised in the strikeout applications could be dealt with at trial. In the circumstances, in determining the issues in this matter, I will consider all affidavits filed in support of the fixed date claims, and those in the strikeout applications.

The defendant's position

[19] Notably, the Attorney General, apart from affidavits in support of the applications to strike out the claims, filed no affidavits in response to the claims. When the strikeout applications came on for hearing on November 17, 2023, the court, being of the view that the issues in the strikeout applications could be dealt with at trial, set the

trial date of March 18, 2024, and made an order (dated said November 17, 2023) that the parties were at liberty to file additional affidavits on or before December 15, 2023. No additional affidavits were filed.

[20] The Attorney General contends that:

- i. There were adequate remedies available to the claimants within the criminal justice system.
- ii. There was delay in the bringing of the constitutional claims, and no cogent reason was given for the delays.
- iii. The claimants' allegations of a breach of their constitutional rights under section 5(5) and section 10(1) of the Constitution fail on both the facts and law.

Issues

[21] The court must determine:

- whether the claims must fail because:
 - i. the claimants had alternative remedies available to them
 - ii. there was delay in bringing the claims with no cogent reasons advanced;
- whether the state breached the claimant's rights under section 5(5) and section 10(1) of the Constitution;
- if so, to what relief are the claimants or any of them entitled?

Alternative remedies

[22] The claimants have brought their originating motions pursuant to section 18(1) and section 18(2), which read:

- (1) *If any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.*

(2) *The High Court shall have original jurisdiction*
(a) *to hear and determine any application made by any person in pursuance of subsection (1); and*
(b) *to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3)*
and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive):

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

[23] In the Privy Council judgment in **Brandt v Commissioner of Police & others (Montserrat)**,¹ Lord Stephens opined:

“First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court’s process in the absence of some feature “which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate”. The correct approach to determining whether a claim for constitutional relief is an abuse of process because the applicant has an alternative means of legal redress was explained by Lord Nicholls, delivering the judgment of the Board in *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 at para 25, as follows:

“...where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.”

There are examples of the application of that approach in cases such as *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265 at 68, *Jaroo v Attorney General of Trinidad and Tobago* [2002] 1 AC 871 at

¹ [2021] UKPC 12 at paragraph 35

para 39 and most recently, in *Warren v The State (Pitcairn Islands)* [2018] UKPC 20 at para 11.”

[24] During the course of these proceedings, the claimants have clarified that the basis of their claims is delay, not unlawful arrest, false imprisonment, malicious prosecution or other torts. The claims in respect of section 5(1) of the Constitution were withdrawn. I must stress here that this is a concession on the part of learned counsel at the hearing of the applications to strike out the claims, and at trial. This must be emphasised because notwithstanding this assertion by counsel, the claimants’ affidavits reveal their contention that their matters were dismissed because the State had insufficient evidence against them. At paragraph 9 of K’Shando’s affidavit in opposition to the application to strike out his claim, he affirms:

“I am informed by my Counsel and verily believe that as I am saying the State took too long to decide not to prosecute I can only bring a claim for a delay of my right to a fair hearing within a reasonable time. I cannot bring a claim in tort given this fact.”

[25] The Attorney General submits that where issues of delay are concerned, the appropriate court to deal with the matter and to provide relief is the criminal court, which is properly equipped with all the tools to effectively deal with the matter.

[26] In support of this proposition, the Attorney General cites the case of **Rashid A. Pigott v the Queen**² where Thom JA (Ag.), as she then was, at paragraph 26 of the judgment stated:

“Where there is inordinate delay in the trial of an accused person, the issue of infringement of his/her constitutional right to a fair hearing within a reasonable time guaranteed under section 15(1) [equivalent to section 10(1) here] of the Constitution may be raised at the criminal trial. Similarly, where there is inordinate delay between conviction and the hearing of the appeal it may be raised in the Court of Appeal as a ground of appeal against both conviction and sentence. Indeed section 18(3) embraces this approach.”

[27] The Attorney General submits that whilst the criminal proceedings were ongoing, the

² ANUHCRA2009/0009, delivered April 13, 2015

claimants had access to all of the safeguards and rights available to persons within a fair criminal justice system during criminal proceedings as a whole including, but not limited to:

- a) The right to apply for bail before a magistrate;
- b) The right to appeal to the Court of Appeal and the Privy Council against any decision of the Magistrate's Court or High Court;
- c) The right to apply for judicial review of any decision or failure to act of the learned magistrate or action of the Office of the DPP or any other person or authority by which the claimants were aggrieved;
- d) The right to apply to the magistrate to have the proceedings stayed as an abuse of the process of the court including on account of delay;
- e) The right to apply by constitutional motion for any such necessary order including a conservatory order for any rights infringed upon during the pendency of the criminal proceedings.

[28] The Attorney General argues that the alleged breaches ought to have been raised in the criminal proceedings and the claimants have failed to give a cogent explanation as to why this was not done.

[29] Maverick's charges were dismissed for want of prosecution by the presiding magistrate on September 28, 2020, followed by Kentab's on May 24, 2022. Having been committed to stand trial at the High Court, a nolle prosequi was entered by the DPP in respect of K'Shando's charges on October 18, 2021.

[30] Kentab and Maverick never reached the stage of trial at the High Court. The nolle prosequi in K'Shando's case was entered before his trial began. The pronouncement of the Court of Appeal in the **Pigott** case was to settle the issue as to whether separate Constitutional proceedings were required to deal with an alleged infringement of the right to a fair hearing within a reasonable time. The Court of Appeal answered in the negative and held that the issue of inordinate delay may be raised at the criminal trial, or even at the Court of Appeal.

[31] At paragraph 27 of the **Pigott** judgment, Thom JA went on to deal with the issue as it relates to other courts, as provided for in section 18(3) of the Constitution. In particularizing the Magistrate's Court (as is relevant here), Her Ladyship stated:

"The effect of section 18(3) *[of the Constitution of Antigua and Barbuda which is identical to section 18(3) here]* is that the Court of Appeal, the High Court and also a court martial can determine issues of contravention of any of the constitutional rights outlined in sections 3-17 where those issues arise in proceedings before the court. It is only where the issue arises in other courts such as the Magistrates' Court then the court is required to refer the matter to the High Court if a party makes such a request. It must be noted that even in such circumstances the magistrate is given a discretion not to refer the matter if the magistrate is of the opinion that the issue is frivolous or vexatious. The magistrate also has a discretion whether to refer the matter to the High Court where no request is made by any of the parties."

[32] There is no evidence that Kentab and/or Maverick made any request for referral to the High Court before dismissal of the charges, or that K'Shando did during his committal proceedings. However, given the distinct feature of delay, the assertion by the claimants that there are not proceeding on the basis of tortious allegations, and there being no disputes of fact, I am of the view that in these circumstances, the claimants were entitled to bring their claims in the High Court pursuant to sections 18(1) and 18(2) of the Constitution.

Claimants' delay in bringing the claims

[33] The Attorney General alleges delay between the conclusion of the criminal proceedings and the institution of the constitutional claims as follows:

- a) Kentab – 1 year;
- b) Maverick – 2 years and 10 months; and
- c) K'Shando - 1 year and 8 months.

[34] The Attorney General submits that where a constitutional claim is brought which, *prima facie*, raises the issue of delay, there is an onus on the claimant to give a cogent explanation for the delay in bringing the proceedings.

[35] The explanations for delay in bringing the claims are set out in their affidavits in opposition to the strikeout applications as follows:

Kentab (paragraphs 8 to 15)

- "8. In the month of September 2022, I received my file from my then Legal Counsel's chambers.*
- 9. I then took the file to my current Legal Counsel sometime in the month of October 2022. I instructed my Legal Counsel to seek legal action against the State.*
- 10. My Legal Counsel on or about the 16th day of November, 2022 wrote and served a pre-action letter to the Defendant seeking damages for violation of my right to liberty and/or right to a trial within a reasonable time.*
- 11. I am aware that the Defendant responded to my Legal Counsel on or about the 18th day of January 2023 **requesting time to investigate the matter and provide a substantive response on or before the 27th day of January 2023. The Defendant also requested, humbly, that my Legal Counsel, "... hold its hand on any further action(s)".***
- 12. I am aware that my Legal Counsel having received the Defendant's response 18th day of January 2023 agreed not to pursue further action given it was requested and on the basis that we felt this was a matter that would be resolved without a need to engage the High Court.*
- 13. I know that on or about the 27th of January 2023 **no response was received from the Defendant as promised.***
- 14. I know my Legal Counsel spoke with the Defendant after the 27th day of January 2023 **who promised to have a formal response by 31st day of March 2023.***
- 15. I know my Legal Counsel emailed the Defendant on or about the 3rd day of April 2023 to inquire as to the status of their formal response. To date, I have received no formal response." (Emphasis added)*

Maverick

- "6. I was released on 28th day of September 2020 but as my brother Kentab Tyson was still awaiting his trial, I did not know I could proceed in a suit against the State. I was under the impressions (sic) that I had to wait for his matter to be finished.*

7. *I know that although the charges were dismissed against me the State could have reinstated the very same charges against me. So, I also felt that with my brother still awaiting trial the State may have wanted to reinstate the charges if I had persued (sic) a lawsuit.*
8. *Once my brother's charges were dismissed, I felt more comfortable in trying to sue the State.*
11. *In the month of September 2022, I received my file from my then Legal Counsel's chambers.*
12. *I then took the file to my current Legal Counsel sometime in the month of October 2022. I instructed my Legal Counsel to seek legal action against the State."*

Maverick then repeats the evidence verbatim as in Kentab's affidavit above, including the communication with the defendant.

K'Shando

"10. I took some time to file my claim as I wanted to ensure I was mentally ready to endure being in the judicial system. Also, I had to seek new representation as my then lawyer was no longer available."

[36] In **The Attorney General of St. Kitts and Nevis and another v Marvin Phillips**³

where a claimant resorted to constitutional proceedings 3 years after the alleged breaches, as a result of difficulties with legal representation, Barrow JA (Ag.), as he then was, decided that in the absence of a cogent explanation, the delay was inordinate. At paragraphs 20 and 21 of the judgment, His Lordship opined:

"Even if the integrity of the explanation is assumed, what it amounts to is that others were to blame for causing the delay in commencing proceedings, not Mr. Phillips. That gives Mr. Phillips a cause of action against the lawyers who he said were negligent. It does not enable a court to relieve him of the consequence of that negligence. Delay in excess of three years in commencing proceedings is no less inordinate because a party's lawyers were to blame for causing the delay.

It seems plain that such delay was inordinate, given the absence of cogent explanation."...

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³ Civil Appeal No. 14 of 2002, delivered May 23, 2005

[37] In the case of **Smith v Commissioner of Police**,⁴ where a constitutional motion was filed 22 months after an alleged unlawful arrest, Ventour J held that such delay was inordinate and dismissed the constitutional motion summarily. The learned judge stated:

“There is no dispute that when one examines carefully all these authorities there is a common principle to be found in each of these cases and that is, when one is aggrieved as a result of a violation of one's fundamental rights, one should seek redress before the court with utmost expedition.

In matters of this nature the court has a duty to help those who are vigilant and who do not slumber on their rights. More importantly, if there is delay in bringing the motion, the applicant is under an obligation to explain the delay.”

[38] The Attorney General contends that the claimants have not provided a cogent explanation of the delay in these circumstances to bring the matter to the civil constitutional court.

[39] In my view, K'Shando's mental unreadiness and issues with legal representation are insufficient and inadequate reasons for his alleged delay. Maverick's excuses about feeling comfortable when Kentab's case was dismissed, and his erroneous impression that he had to wait until his brother's matter to be finished do not amount to cogent reasons. Although charged jointly, the brothers' individual circumstances turned out to be quite different in terms of timelines, and Maverick was obligated to bring his claim as soon as his charges were dismissed.

[40] Having been released on May 24, 2022, Kentab retrieved his file from his previous counsel who, all the claimants aver, was a winning candidate in the Federation's August 2022 elections and could no longer represent them as legal counsel. Kentab brought his file to his new counsel in October 2022, that is, about 5 months

⁴ (1997) 51 WIR 409 at 419 h to i (Trinidad and Tobago)

after his charges were dismissed for want of prosecution, and gave instructions to seek legal action against the State. His pre-action letter was served on the Attorney General on November 16, 2022. Communication between the Attorney General and in particular, the Attorney General's written request for counsel to "...hold it's (*sic*) hand on any further action(s)", and promising to respond on January 27, 2023 and again on March 31, 2023, reveals a good reason for Kentab's alleged delay. There is no denial of these written and verbal exchanges, and it is not unreasonable that counsel relied on the Attorney General's word (written and oral) that a response to the pre-action letter would be forthcoming, whether or not such response would be favourable to Kentab.

[41] Further, having found that Maverick has no cogent reason for delaying his action in awaiting the determination of Kentab's charges, I am of the view that the further delay after counsel approached the Attorney General cannot be attributed to Maverick.

[42] Local cases submitted by the claimants reveal the time between release and filed constitutional claims as follows:

- **Gavin Browne v The Attorney General of St. Christopher & Nevis.**⁵
Charges dismissed in the Magistrate's Court – September 26, 2016.
Constitutional claim filed – February 9, 2018. (about 1 year and 4 months)
- **Jermaine Browne v The Attorney General of St. Christopher & Nevis.**⁶
Claimant released – June 23, 2015. Fixed date claim filed – March 3, 2016.
(about 7 months)
- **Dustin Lapsey v The Attorney General of St. Christopher & Nevis.**⁷
Claimant's case dismissed – February 18, 2016. By its claim number, claim filed in 2019. (about 3 years)

⁵ SKBHCV2018/0108, delivered April 5, 2019

⁶ SKBHCV2016/0074, delivered November 19, 2018

⁷ NEVHCV2019/0086, delivered March 29, 2021

- **Everette Davis v The Attorney General of St. Christopher and Nevis.**⁸
Matter withdrawn; claimant released - February 4, 2013. By its claim number, claim filed sometime in 2013. (under 1 year)

[43] Although it appears that the point was not taken in these cases, I note the timelines involved. Given my position in relation to Kentab's circumstances, I find that his claim was timely. Notwithstanding that K'Shando has provided no cogent reason for his delay in bringing his claim 1 year and 8 months after he was released from custody, and Maverick gave no such reason before his counsel entered into discussions with the Attorney General, I will exercise my discretion not to dismiss any of the claims on the basis of the claimants' delay in filing them. I will proceed to consider the substantive claims.

Whether the State breached the claimants' rights under section 5(5) of the Constitution

[44] Section 5(5) of the Constitution states:

If any person arrested or detained as mentioned in subsection (3)(b) **is not tried within a reasonable time**, then, without prejudice to any further proceedings that may be brought against him or her, he or she shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or for proceedings preliminary to trial, and **such conditions may include bail so long as it is not excessive.**
(*Emphasis added*)

[45] Section 5(5) comes into play where a person in custody on a charge can establish that his or her trial has not taken place within a reasonable time, that is, there has been unreasonable or inordinate delay in getting to trial, and he or she remained in prison. In such a case, bail is one condition by which an accused will be released to await trial. Where bail is granted in those circumstances, the bail conditions must not be excessive.

¹² SKBHCV2013/0220, delivered June 30, 2014

[46] The claimants cite the local cases earlier mentioned in support of their claims:

- **Gavin Browne v The Attorney General of St. Christopher & Nevis.**⁹
Ventose J, as he then was, declared that a period of 533 days (17 months) without trial was a contravention of section 5(5) of the Constitution
- **Jermaine Browne v The Attorney General of St. Christopher & Nevis.**¹⁰
Ventose J found that a period of 35 months was a breach of section 5(5).
- **Dustin Lapsey v The Attorney General of St. Christopher & Nevis.**¹¹
Moise J, in the Nevis Circuit, opined that a delay of 31 months was a breach of section 5(5).
- **Everette Davis v The Attorney General of St. Christopher and Nevis.**¹²
Ramdhani J (Ag.) declared that in the circumstances of that case, detention for a period of 8 months and 5 days was in contravention of section 5(5) of the Constitution.

[47] A breach of section 5(5) does not occur solely on the basis that an accused person is not tried within a reasonable time. If one can demonstrate to the court that there is inordinate delay in getting to his or her trial, then that person has a right to be released, with or without conditions, pending trial. The breach comes about if, in the circumstances of an unreasonable delay, one's right to be released is denied. In the event the court finds that there was inordinate delay in bringing the claimants, or any of them, to trial, then the court must consider whether they were stripped of their right to be released from prison to await trial.

[48] Kentab was granted bail with conditions and released on April 3, 2019 after spending 77 days or 11 weeks or 2 months and 3 weeks on remand.

[49] Maverick applied for, and was granted bail at the Magistrate's Court at the same time as Kentab, but he was unable to meet one of the conditions of his bail, to secure 2 sureties who had sufficient assets to stand as sureties. This alone cannot

⁹ SKBHCV2018/0108, delivered April 5, 2019

¹⁰ SKBHCV2016/0074, delivered November 19, 2018

¹¹ NEVHCV2019/0086, delivered March 29, 2021

¹² SKBHCV2013/0220, delivered June 30, 2014

lead the court to conclude that the bail conditions were excessive. Apart from the requirement for 2 sureties, there is no evidence of what those conditions were, in particular, the bail sum. In fact, there is no allegation by Maverick that the bail conditions were excessive or oppressive. He spent 20 months at the prison, including 9 months after he was granted bail.

[50] K'Shando never applied for bail. He spent 669 days or 21 months and 29 days on remand before a *nolle prosequi* was entered in his matter. He acknowledges that he could have got bail for murder but he did not apply because he did not think he would get bail. The Attorney General submits that on the authority of the Privy Council case of **Duncan and Jokhan v The Attorney General of Trinidad and Tobago**,¹³ the release of a person in custody is a right of that person to access a method of release pending trial, and not an automatic process.

[51] In the circumstances of the claimants, where Kentab and Maverick were granted bail, with no evidence that the bail sum was excessive (in the case of Maverick), and where K'Shando never applied for bail, even if the court were to find that there was inordinate delay in the proceedings, the claimants cannot successfully claim that they were deprived of their liberty in breach of section 5(5) of the Constitution. 77 days or 11 weeks or 2 months and 3 weeks on remand, on serious charges including attempted murder, in circumstances where Kentab and Maverick are not proceeding on the basis that they were unlawfully or falsely arrested, by no stretch can be considered unreasonable or inordinate delay. Maverick's additional 9 months remaining in custody and being unable to secure sureties to facilitate his release, cannot be a breach of section 5(5), when he was granted bail relatively early in the proceedings. The claimants' cases can easily be distinguished from **Gavin Browne, Jermaine Browne, Dustin Lapsey and Everette Davis** where the periods of detention were inextricably linked to their unlawful detention and/or arrest, that is, where there was no proper basis for detention or arrest of the individual claimants. The claimants in the instant matters are not alleging that they were unlawfully

¹³ [2021] UKPC 17

detained or arrested. Being lawfully detained, and having access to bail (granted in the cases of Kentab and Maverick, and not accessed by K'Shando), I find that the State was not in breach of section 5(5) of the Constitution.

Whether the State breached the claimants' rights to a fair hearing within a reasonable time under section 10(1) of the Constitution

- [52] Again, the claimants have made it clear that they are not bringing their claims on the basis that they were falsely or unlawfully arrested. In fact, at paragraph 8 of his affidavit in opposition to the application to strike out his claim, K'Shando states, "*My claim is not one where I am saying the State had no reasonable suspicion that I had committed the offences and therefore unlawfully arrested.*" The claimants are alleging that breach of section 10(1) to have a fair hearing within a reasonable time has resulted in a breach of the right to liberty under section 5. Section 10(1) provides as follows:

10.-(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

- [53] In the Privy Council case of **Darmalingum v The State**,¹⁴ in dealing with section 10(1) of the Constitution of Mauritius, which is in identical terms as section 10(1) here, Lord Steyn, in delivering the reasons for the decision of the Committee, observed that section 10(1) contains three separate guarantees, namely (1) a right to a fair hearing; (2) within a reasonable time; (3) by an independent and impartial court established by law. The claimants are engaging limb 2 only – reasonable time.

- [54] In determining whether there has been unreasonable delay, I seek guidance in the judgment of the Caribbean Court of Justice in **Gibson v Attorney General of Barbados**¹⁵ where the Court stated:

"A finding that there has indeed been unreasonable delay in bringing the accused to trial must be made on a case by case basis. It cannot be reached by applying a mathematical formula although the mere lapse of an

¹⁴ [2000] 1 WLR 2303; [2000] UKPC 30 at paragraph 14; see also *Boolell v The State* UKPC 46, per Lord Carswell at paragraph 32(i)

¹⁵ [2010] CCI 3 (AJ)

inordinate time will raise a presumption, rebuttable by the State, that there has been undue delay. Before making such a finding the court must consider, in addition to the length of the delay, such factors as the complexity of the case, the reasons for the delay and specifically the conduct both of the accused and of the State.”

Length of delay

- [55] Kentab complains of a delay of 40 months, Maverick, 20 months, and K'Shando, 21/22 months before their cases ended. Whether the time it takes for a matter to be completed from charge to disposal is to be considered unreasonable depends on the particular circumstances of each case.

Reason for the delay

- [56] Kentab and Maverick were formally arrested and charged within 3 days of the shooting incident in their matter. However, they point out that the State sought and was granted numerous adjournments, being unable to proceed either because of lack of a file or just not in a position to proceed for some reason.
- [57] They submit that given the DPP's duty under section 65(2) of the Constitution to institute, undertake and discontinue criminal proceedings, there should have been a continuous review of the case to determine if the case should proceed or be withdrawn. They posit that this failure allowed for there to be a longer delay, and resulted in the court bringing each matter to an end as opposed to the State.
- [58] The Attorney General did not provide any evidence as to the reason for the delay in any of the claims. Kentab and Maverick submit that the State has the responsibility of informing the court why they were able to arrest and charge within less than a week of the incident but unable to properly prosecute the matter.
- [59] In **Everette Davis v The Attorney General of St. Christopher and Nevis**¹⁶ Ramdhani J (Ag.) stated, “The law enforcement arm of the State wields considerable coercive power that must not be exercised except for good cause. Thus, when the

¹⁶ SKBHCv2013/0220 at paragraph 49

time comes for accountability, more must be given to the court to show such good cause.”

[60] Kentab and Maverick aver that the State has not shown to the court that the delay was reasonable for one reason or another. The State has offered no explanation why:

- 1) despite no direct or circumstantial evidence, the matter was not discontinued by the Crown;
- 2) Maverick’s case was dismissed before Kentab’s despite being jointly charged;
- 3) when it was realised that Maverick was discharged, why did the State not discontinue against Kentab?

[61] K’Shando went through the committal proceedings at the Magistrate’s Court and was committed to stand trial at the High Court. However, a nolle prosequi was entered on October 18, 2021 by the then learned DPP. The nolle prosequi was entered given the death of a State witness on September 23, 2021.

[62] K’Shando points out that there is no explanation from the State as to why section 72 of the Evidence Act was not utilised at trial given the death of the witness. He explains that a witness’s death does not mean the trial has to end because the State has a safety net in the Evidence Act whereby the statement of an unavailable witness can be read into evidence. Therefore, the witness’s death did not present a major hurdle, if any at all, to the State to prevent them from continuing the prosecution.

[63] Kentab alleges that the State simply entered a nolle prosequi after 21 months and seems to think no reason should be given as to why, and why was it not done earlier.

[64] Having not provided the court with evidence of an explanation for the delay, the Attorney General submits that the average time for a matter to come to trial is 2 years, and that it is the time beyond the normal course of the proceedings that is to

be considered.¹⁷ The Attorney General urges the court to note that at the time the claimants' matters were pending, there was the advent of the COVID-19 worldwide pandemic, and submits that the court ought to take judicial notice of the statutory orders during the period of March 2020 to December 2021, considering it was a state of emergency. The pandemic resulted in the following:-

- It adversely affected the criminal justice system of the Federation of St. Kitts and Nevis (as was the case in many other countries);
- During the course of the pandemic there were restrictions on the right of movement of all persons within the Federation.
- As a result, all legal proceedings in all courts of the Federation were unavoidably delayed, due to no fault of the State.

[65] It is unfortunate and concerning that the State has provided no explanation for the alleged delay in these cases. It appears that learned Crown Counsel for the Attorney General, being so confident of success on the strikeout points, did not feel it necessary to file evidence to explain or justify the timelines involved. On November 17, 2023, when the court determined that the issues in the applications would be dealt with at trial, the Attorney General was given the opportunity to file such evidence by December 15, 2023. That did not happen.

Whether the claimants asserted their rights

[66] The claimants submit that when their counsel made objections to the prosecution requesting adjournments for failure to proceed, this was the assertion of their rights.

[67] The Magistrate's Court is a creature of statute to which constitutional matters are not ventilated. As such, they contend that it was impossible for their lawyer to raise constitutional arguments.

[68] Remarkably, the claimants submit to this court that they relied on their then counsel to act on their behalf, that they are not learned men with knowledge of the court and

¹⁷ See *Carlton Bedminster and Careem Bedminster v the Director of Public Prosecutions and the Attorney General* ANUHCv2007/0423

judicial system so were unable to do more than rely upon their able counsel to assert their rights. They felt they had to be discharged before they could seek redress under the Constitution.

[69] The Attorney General counters as follows:

- (a) K'Shando did not assert his rights in applying for bail during the proceedings.
- (b) The issue of delay was not raised at any point during the criminal proceedings.
- (c) There was no application of any constitutional issues raised within the criminal courts.
- (d) The constitutional claims were brought in a delayed manner with no cogent explanation for the same.
- (e) There was due process and the "delay" asserted by the claimants did not render the proceedings unfair.

[70] Considering the above, the Attorney General submits that:

- (1) The delay, if found, is not inordinate and further, it occurred during the time of a state of emergency;
- (2) The complained delay is not presumptively prejudicial to the proceedings to render it unfair to the claimants; and
- (3) Any prejudice to the claimants is not from the delay, if any, but arises from the claimants' failure to assert their rights.

[71] In my respectful view, the bare statements that their counsel made objections to the State's applications for adjournments do not suffice as asserting their rights as regards delay in the proceedings. Kentab and Maverick asserted their rights which were afforded to them under section 5(5) of the Constitution. The claimants have produced no evidence that the issue of delay was raised in the magisterial proceedings. The raising of the issue of inordinate delay at the committal stage does not entail a constitutional motion for which a magistrate has no jurisdiction to entertain. It appears that it is only when Kentab's case was dismissed and

K'Shando's case was nolle prosecuted, that the issue of delay became a concern for the claimants.

K'Shando

[72] K'Shando's position is that the DPP, having entered the nolle prosequi instead of utilising the Evidence Act and proceeding to trial with the statement of the murdered witness, should have discontinued the proceedings against him earlier.

[73] K'Shando was arrested and charged for the murder of one Kennedy Isles on reasonable suspicion that:

- 1) He was at a residence where and when the offence took place;
- 2) He was seen running out of an alley after the shooting which resulted in the death of the deceased.
- 3) He was seen with a firearm in his hand jumping the wall of the fire station.

[74] All of this is good circumstantial evidence on which K'Shando was arrested and charged, and upon which the learned magistrate committed him to stand trial. Therefore, up until the death of the witness, there were good grounds to continue the prosecution of the matter.

[75] K'Shando has clearly stated that his claim is not one where he is saying that the State had no reasonable suspicion that he committed the offences, that is, including the firearm offence. He is claiming that the State took too long to decide not to try his case. Interestingly, at paragraph 12 of his affidavit in opposition to the application to strike out his claim, K'Shando affirms:

"I am not stating that the adjournments created the delay, in fact the adjournments provided the State the necessary time to review the file to determine if they should have Nolle Prosequi the matter earlier instead of waiting some 21 months to do so."

[76] At paragraph 35 of his affidavit in support of his originating motion, he states:

- *"That the State knew or ought to have known, having a continuing duty to review files, that there was no evidence against me to find me guilty of either or all of the offences for which I was arrested and charged."*

[77] It is evident that the DPP entered the nolle prosequi as a result of the witness' death before trial at the High Court. The decision of a DPP not to proceed to trial on the death of a witness is not out of the ordinary. It is not for one to speculate that, since the DPP did not continue with the prosecution of the case with an application to tender the dead witness' statement in evidence before judge and jury, there was no evidence all along to successfully prosecute the matter. In his discretion, the learned DPP decided not to proceed and in my respectful view, was not obligated to provide a reason as to why he did not avail himself of the relevant provision in the Evidence Act. Not pursuing a trial on the death of a witness is a just cause for a DPP to discontinue a prosecution, notwithstanding the option of invoking section 72. The learned DPP may have had other good reasons, not before the court, for his decision, but one ought not to speculate that the reason was that there was no evidence to go forward.

[78] Moreover, K'Shando did not assert his rights by taking any steps to challenge the alleged delay. He says he did not think he would get bail for murder. Although not a part of K'Shando's evidence, I also note that a consideration for many murder accused in not applying for bail is that if found guilty, time spent on remand is taken into consideration in sentencing.

[79] Therefore, on serious charges, including murder, where the prosecution was discontinued on the death of a major witness, and where the claim is not being pursued on the basis that the State did not have reasonable suspicion to arrest and charge him or that he was unlawfully or falsely arrested or maliciously prosecuted, K'Shando cannot properly claim that the State breached his right to trial within a reasonable time. I find no merit in the submission that he should have been released earlier. A period of 669 days or 21 months and 29 days or 1 year and 10 months in custody on a murder charge where the accused was committed to stand trial on strong circumstantial evidence, in my view, is not unreasonable, and does not amount, in the circumstances of this case, to a

breach of section 10(1) of the Constitution.

Maverick

- [80] Maverick applied for and was granted bail the same time as Kentab. Being unable to satisfy one of the conditions of his bail to secure sureties, he remained in custody with no allegation of excessive bail. He was lawfully detained on serious charges including attempted murder. I am of the view that an additional 9 months in prison after bail was granted, giving a total of 20 months before his charges were dismissed, even in the absence of an explanation from the Attorney General, is not an unreasonable delay in the circumstances of Maverick's case.

Kentab

- [81] The failure of the Attorney General to provide a reasonable explanation for the delay of 40 months or 3 years 4 months and 16 days is to the detriment of the State. This is particularly so in the absence of a reason why Kentab's charges were dismissed for want of prosecution on May 24, 2022 after Maverick's which were dismissed on September 28, 2020 when the brothers were jointly charged for the same offences. This amounts to a difference of about 1 year and 8 months. The court is left confused as to how this situation came about. Was Kentab not present in court when Maverick's case was dismissed by the learned magistrate on September 28, 2020? While noting that Maverick was in custody, having not secured sureties for bail, and that Kentab was out on bail, was there any reason why Kentab was treated differently? Was there any justification for a period of an additional 1 year and 8 months to elapse before Kentab's case was also dismissed for want of prosecution?
- [82] With nothing before the court from the Attorney General, the court is constrained to conclude that in Kentab's case, there was inordinate delay between his charges and dismissal. This is so even though Kentab was released on bail after 77 days or 11 weeks or 2 months and 3 weeks in custody and was so released for the majority of the time his matter remained before the court. The fact that an accused is out of custody on bail does not absolve the State of its duty to afford

him or her a trial within a reasonable time. There is no evidence that Kentab contributed in any way to the delay. The serious charges, including attempted murder, hung over his head for the entire period until his charges were dismissed without evidence being led. In these circumstances, it was incumbent on the State to provide an explanation for this delay, which was inordinate. Without more, it would be unjust and unreasonable for the court to conclude otherwise. Therefore, I find that there was a breach of section 10(1) of the Constitution of Kentab's right to trial within a reasonable time.

Relief – Kentab Tyson

[83] Section 5(6) of the Constitution reads:

Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person or from any other person or authority on whose behalf that other person was acting:

Provided that a judge, a magistrate or a justice of the peace or an officer of a court or a police officer acting in pursuance of the order of a judge, a magistrate or a justice of the peace shall not be under any personal liability to pay compensation under this subsection in consequence of an act performed by him or her in good faith in the discharge of the functions of his or her office and any liability to pay any such compensation in consequence of any such act shall be a liability of the Crown.

[84] As established, this is not a matter where the claimants are asserting that they were unlawfully arrested or detained, and I have determined that there was no infringement of the claimant's rights under section 5(5). Accordingly, Kentab is not entitled to compensation under section 5(6). Whether he is entitled to compensation for breach of section 10(1) is discretionary. The court has to consider what is an appropriate remedy for breach of the reasonable time provision in Kentab's case.

[85] In **Gibson**¹⁸, the CCJ opined:

"When devising an appropriate remedy a court must consider all the circumstances of the particular case, especially the stage of the proceedings at which it is determined that there has been a breach. In particular the court

¹⁸ [2010] CCJ 3 (AJ) at paragraph 61

should pay special attention to the steps, if any, taken by the accused to complain about the delay since, as was pointed out by Powell J of the US Supreme Court in *Barker v Wingo*, delay is not an uncommon defence tactic.”

[86] At paragraph 69 of the judgment, the Court went on:

“An award of damages for breach of the reasonable time guarantee should be considered as an appropriate remedy only where the accused will no longer be tried or has been tried and acquitted or where his conviction has been quashed. **And even in those cases the making of such an award should not be regarded as automatic but would depend on the particular circumstances of each case.**” (*Emphasis added*)

[87] Kentab asserted his right under section 5(5) of the Constitution when he applied for and was released on bail with conditions pending the determination of his charges. Subsequent to that, there is no evidence that he raised the issue of, or took any steps in relation to delay, especially after Maverick’s charges were dismissed. After Maverick’s release, a further 20 months or 1 year and 8 months elapsed without Kentab asserting his rights as regards this delay. Apart from 77 days or 11 weeks or 2 months and 3 weeks, he was out on bail for the vast majority of the 40 months and 16 days or 3 years and 4 and a half months it took from charges to dismissal. In these circumstances, and taking into account the public interest in the determination of serious crimes, I am of the view that a declaration is a sufficient and appropriate remedy for the inordinate delay in the determination of Kentab’s case.

Order

[88] Based on the foregoing, I make the following orders and declarations:

- 1) The claimants are not entitled to a declaration that their rights under section 5(5) of the Constitution were infringed.
- 2) The claimant Kentab Tyson is granted a declaration that his right to a trial within a reasonable time under section 10(1) of the Constitution was infringed.
- 3) The claimants Maverick Tyson and K’Shando Saunders are not entitled to a declaration that their rights under section 10(1) of the Constitution were infringed.

- 4) The claimant Kentab Tyson is awarded costs agreed in the sum of \$5,000.00.
- 5) There is no order as to costs in relation to the claimants Maverick Tyson and K'Shando Saunders.

Tamara Gill
High Court Judge

By the Court

Registrar