

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

COMMONWEALTH OF DOMINICA
DOMHCR2022/0002

BETWEEN:

THE STATE

V

ANDREW ARMOUR

Before:

The Honourable Justice Colin Williams, J

Appearances:

Ms. Sherma Dalrymple, Director of Public Prosecutions, assisted by Ms. Daina Matthew and Mr. Allen Alexander, State Counsel for the Commonwealth of Dominica

Mrs. Zena Moore-Dyer, for the Accused

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2023: October 23rd, 24th, 25th
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RULING

[1] **COLIN WILLIAMS, J.:** The Defendant, Mr. Andrew Armour, was indicted by the Learned Director of Public Prosecutions, Ms. Sherma Dalrymple, on the 4th of

January 2023, on a single count of manslaughter. The indictment, as amended, alleged that “Andrew Armour, on the 1st day of December 2012, by gross negligence did unlawfully kill Casey Anne Schulman.” Counsel, Mrs. Zena Moore-Dyer, submitted that her client, the Defendant, (Mr. Armour), did not have a case to answer.

[2] The no case submission was made after the prosecution adduced evidence from just one of the twelve witnesses listed on the back of the indictment. The lone witness who testified *viva voce* was the former Commander of the Marine Unit, now Inspector of Police, Mr. Simon Edwards. Inspector Edwards was deemed by the Court to be an expert in maritime navigation; this, following an application by the prosecution (without any objection from the defendant’s counsel) for the officer to be deemed an expert.

[3] Mrs. Moore-Dyer submitted that having heard the testimony of the State’s expert (Inspector Edwards) and considering all of the evidence disclosed on the deposition, there was an insufficiency of evidence to support any criminal case against the defendant.

[4] The learning in **Archbold 2013** at paragraph 4-362 cites **R v N Ltd** [2009] 1 Cr App R. 3, (CA), as authority for the proposition that:

“It is not open to a judge to rule that there is no case to answer before the close of the prosecution case without the express agreement of the parties, as may perhaps be the case where the whole of the evidence is agreed, or the remaining prosecution evidence is known with certainty.”

[5] The Learned DPP, Ms. Dalrymple, consented to the no case submission being heard prior to of the close of the prosecution’s case. The Learned DPP indicated that all the evidence for the State was disclosed in the deposition and no further evidence would be forthcoming by way of Notice of Additional Evidence.

Background

- [6] This matter stems from the death at sea of Ms. Casey Anne Schulman, a 22-year-old student from the United States of America. Ms. Schulman was among a group of about five hundred students participating in a study abroad programme called “Semester at Sea” in the Commonwealth of Dominica.
- [7] On the 1st of December 2012, a group of about fifty of the students from the “Semester at Sea” programme boarded a catamaran, named ‘Passion’, which was captained by Mr. Armour, the defendant. They departed from the Anchorage Hotel and proceeded on a cruise around the island. They stopped at one point for about an hour to facilitate snorkeling. They journeyed to Mero beach on Dominica’s north western coast where they were to have lunch.
- [8] At Mero beach, there is a designated swimming area that is demarcated by buoys.
- [9] Mr. Armour navigated the catamaran into the demarcated area. Some of the students disembarked and went on the land, some went into the water to swim, while some others remained on board the catamaran. Mr. Armour steered the catamaran out of the demarcated area and remained outside the demarcated area for some time. Mr. Armour later piloted the catamaran into the demarcated area around lunch time to collect food, for use on the vessel, which had arrived in a vehicle that was on shore. After receiving the containers with the food, Mr. Armour again navigated the catamaran out of the demarcated safe swimming area and remained outside of that area, beyond the buoys.
- [10] Later on, while the catamaran was at the location it had returned to outside of the demarcated safe swimming area, Ms. Schulman’s limp body was retrieved from the sea and placed on the back of the catamaran. She had several cuts to her body.

The Submission

[11] Mrs. Moore-Dyer grounded her submission that the defendant, Mr. Armour, had no case to answer on the first limb of **R v Galbraith** [1981] 73 Cr App R 124, [1981] 2 All ER 1060, at page 1042 letter B, where Lord Lane, CJ, said:

“If there is no evidence that the crime has been committed by the defendant, there is no difficulty, the judge will of course stop the case.”

[12] The nub of Counsel Moore-Dyer’s submission was that there was no crime at all.

[13] Counsel Moore-Dyer contended that her submission of no case to answer was augmented by the second limb of **Galbraith**, at 2(a), where Lord Layne said that:

“Where the judge concludes that the prosecution evidence, taken at its highest is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made to stop the case.”

[14] Mrs. Moore-dyer emphasized that the State was required to prove that Mr. Armour on the day of the incident navigated the vessel ‘Passion’ in a grossly negligent manner. The evidence, Counsel Moore-Dyer contended, fell far short of that standard.

[15] The defendant’s Counsel referred to the case of **R v Bateman** [1925] All E.R. 45, (1925) 19 Cr App R 8, which stated that the prosecution ought to prove that:

- i. The defendant owed a duty of care to the deceased;
- ii. The duty was not discharged; and
- iii. The defendant caused the death of the deceased.

State’s Response

[16] The Learned DPP accepted that the principles detailed in **Bateman** applied to this case.

[17] Ms. Dalrymple acknowledged that the State had to show that the actions of the defendant was “grossly negligent”. She accepted the submissions made by counsel

for the defendant that in order for the defendant to be convicted of committing an offence, the State had to show that whatever the defendant did when he was in charge of the vessel on 1st December 2012, Ms. Schulman's death was reasonably foreseeable.

- [18] The Learned DPP was of the view that it was up to a jury to determine whether Mr. Armour's actions were grossly negligent. Ms. Dalrymple said that it was a question of fact and only a jury could make that determination. The DPP said that it ought to remain a matter for the jury even if the State conceded the elements of **Bateman** were not discharged.

Some Deposition Statements

- [19] What evidence is apparent when the statements in the deposition were scrutinized?
- [20] Based on the statements in the deposition, the last person to see Ms. Schulman alive and well was the witness Mr. Jack Delehey.
- [21] According to Mr. Delehey, while at Mero, some of the students swam under the catamaran and surfaced between the two hulls. This area is at the front of the catamaran. Mr. Delehey said that he and Ms. Schulman "gravitated to each other." He said that Ms. Schulman suggested that they both swim under the catamaran. He and Ms. Schulman proceeded to the left rear of the catamaran where they treaded water and held on to the side of the vessel. They began talking while treading water and they kissed.
- [22] Mr. Delehey said that Ms. Schulman dipped her head under the water. He however remained with his head above the surface. He said he became confused after several seconds when Ms. Schulman did not resurface. He then swam to where the ladder was at the back of the catamaran. He saw Ms. Schulman who had several cuts to her body being hoisted out of the water on to the catamaran. He heard a

crew member yelling for an ambulance. Ms. Schulman was taken to the shore. Ms. Schulman was placed in the ambulance when it arrived. He journeyed in the ambulance to the hospital.

[23] Mr. Delehey said that while he drank some alcoholic beverages on that day before he got off the catamaran, he could not say if Ms. Schulman had any alcoholic beverages before she got out of the boat. He said that he had a close relationship with Ms. Schulman.

[24] Ms. Annie Sablon worked as a chef with the Mero Enhancement Committee. On the day of the incident, she was preparing meals. She observed the catamaran with students on it. When the catamaran reached the area demarcated with the buoys, the vessel's engines were turned off and the catamaran remained outside of the demarcated area for a while. After the vessel got to Mero, some of the students disembarked; some came ashore, and some stayed in the sea water. Ms. Sablon noticed when a vehicle arrived with the lunch for the students. The catamaran came closer to the shore, picked up the food warmers, then returned to the area where it was before. Ms. Sablon said that later on, following a conversation with her sister, she and two of the life guards went to the catamaran where she saw a young white lady laying at the back of the boat; the lady had cuts to several areas of her body. Ms. Sablon said that she was trained in First Aid and CPR. She and one of the life guards lifted the young lady on to a piece of board. Ms. Sablon said that the young lady was not responding.

[25] Ms. Catherine Dorset was a teacher from Arlington, Virginia, in the United States of America. She was with the "Semester at Sea" programme. Ms. Dorset knew the deceased, Ms. Schulman, for about a year prior to the "Semester at Sea" programme. Ms. Schulman was on the catamaran 'Passion' on the 1st of December 2012. Ms. Dorset disembarked at Mero beach and was in the water with some of the students. She did not know where Ms. Schulman was. Ms. Dorset heard a commotion and returned to the catamaran. One of the students told her something and she went over to where Ms. Schulman was lying on the catamaran. Ms. Dorset

observed many deep cuts and wounds on Ms. Schulman's body. An ambulance came and Ms. Dorset got off the vessel and went in the ambulance; Ms. Schulman was on a stretcher at the back of the ambulance.

Postmortem Examination

[26] On the 6th of December 2012, Dr. Milagros Romero Fernandez performed an autopsy on Ms. Schulman's body at the morgue of what was then the Princess Margaret Hospital. According to Dr. Fernandez:

“Casey Ann Schulman died as a consequence of hemorrhagic shock due to injuries caused from multiple trauma to the body with traumatic hemorrhages and sign of submersion asphyxia.”

[27] The pathologist said that there was a purple discoloration of the fingers, which was a sign of a person who died by drowning (submersion asphyxia). The doctor said it was possible that Ms. Schulman could have died from drowning.

[28] The pathologist noted that there were marks of violence (injuries) to the skull, face, throat and extremities. The majority of the fractures were on one side of the body – to the right side. The incisions ranged in sizes from 5cm to 20cm. There were fractures to the right temporal area of the skull, right clavicle, right humerus, right femur, right knee and the right tibia. The left tibia also showed fractures in four separate areas.

[29] Dr. Fernandez was of the view that the injuries could have been caused by a sharp, strong cutting object.

Expert's Evidence

[30] Inspector Edwards in his testimony gave a detailed breakdown of what he considered to be the relevant provisions of the Regulations of the International Maritime Organization, IMO, Convention referred to as the “72 COLREGS”.

[31] The expert in maritime navigation addressed the Traffic Separation Scheme, TSS, which determines the on-shore waterways that are subject to local navigation rules, and the off shore waterways that are subject to international navigation rules. He said that the international navigation rules work in conjunction with the local rules and the Convention rules may supersede national rules depending on the situation.

[32] Inspector Edwards highlighted rules numbers 2, 5 and 10, of the 72 COLREGS, which respectively address responsibility, look-out and safe speed.

[33] Inspector Edwards testified that the Mero beach has floating buoys that are anchored to the seabed to demarcate the safe swimming area for sea bathers and users of the Mero beach. He said that vessels were required to remain at a minimum distance beyond the buoys.

[34] The catamaran, Inspector Edwards said, was entitled to enter the safe swimming area to reach the shoreline for the disembarkation or embarkation of its passengers. Once passengers have disembarked, the captain of the vessel must move out of the demarcated area and stay not less than 50 meters away. Once outside of the demarcated area, a vessel captain who wishes to await passengers to re-board may:

- (1) Anchor the vessel;
- (2) Moore the vessel – tie it to an anchored buoy; or
- (3) Stay drifting.

[35] According to the maritime expert:

“Any prudent captain who decides to drift or have his vessel drift, will have his vessel at the ready for any eventualities which may occur, which include a gust of wind pushing his vessel to shore or away from shore, or the sea current drifting his vessel towards an area that the vessel should not be. A prudent captain will also have his engines at idle for quick response in maneuvering. He will also be on the lookout as to his surroundings *vis a viz* another vessel coming close to this, or debris in the water. He will also be able to, if it permits for him to, see persons on the shoreline.”

- [36] Inspector Edwards said that the catamaran 'Passion' could not be moored to the buoys at Mero because the vessel was too heavy. He identified the beaches in the Commonwealth of Dominica that had buoys to accommodate vessels of the size of 'Passion' being moored.
- [37] Inspector Edwards explained that if the catamaran was in neutral and idling, when it is put in gear, the propeller would move very slowly at first. He said that there would be a negative force exerted when the propeller was engaged, and this would prevent anyone from being pulled into it at idle speed.
- [38] The former head of the Marine Unit said that he was familiar with the catamaran 'Passion' and said that he went on board it several times. The catamaran was used as a pleasure boat, taking persons on excursions like whale watching. He said that the vessel had a left and right hull, and an elevated console in between the hulls which gave the captain a 360 degree view of the surrounding surface. He said that construction of the catamaran made it impossible for a captain to see what was happening under the console of the vessel.

Logical Findings

- [39] A number of things are apparent from the evidence of the expert witness and from what emerges from the statements in the deposition. Setting out some of the facts should help:
- a. Mr. Armour was at all times the captain and operator of the catamaran, 'Passion'.
 - b. Ms. Schulman, a young adult American student, was a passenger on the catamaran along with other students and at least one teacher.

- c. At the time of the incident, the 'Passion' was outside of the demarcated safe swimming area at Mero beach.
- d. The catamaran could not be moored to a buoy at Mero beach; there was no indication that it was anchored, but its location could be maintained by keeping the catamaran's engine on idle and putting it in gear whenever it became necessary.
- e. A prudent captain while drifting would from time to time engage the gear in order to maintain a safe location.
- f. When the gear is engaged, the propellers spin slowly at first and exert a negative force.
- g. When the captain is at the controls in the console of the catamaran, he cannot see what is beneath him.
- h. Ms. Schulman and a male person while in the water were separated from everyone else and were at the back of the 'Passion.'
- i. While at the back of the catamaran, Ms. Schulman submersed herself in the sea; this was just prior to her being extracted from the water with wounds about her body.
- j. At the time of the incident, the captain was not navigating the sea.

The Learning

[40] The concept of negligence is ever present in the Law of Tort. When it comes to the criminal law, the degree of negligence upon which criminal liability can be founded is substantially higher.

[41] **Archbold Criminal Pleading Evidence and Practice**, 36th Edition at paragraph 2531 says of negligence:

“Where death results in consequence of a negligent act, it would seem that to create criminal responsibility the degree of negligence must be so gross as to amount to recklessness. Mere inadvertence, while it might create civil liability, would not suffice to create criminal liability...It is not sufficient to create criminal liability to show the act which caused death constituted a tort...Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before a felony is established.”

- [42] **Archbold** goes on to state, at paragraph 2537, in relation to deaths resulting from the use of vessels, that:

“To make the captain of a vessel liable for manslaughter in causing a person to be drowned by running down a boat in which he was, it was held that it must be shown that the captain did some act which conducted the death; and that a mere omission to do the whole of his duty was not enough.”

- [43] **Archbold 2000** at paragraph 19-109 addresses the test of manslaughter by gross negligence thus:

“The ordinary principles of the law of negligence apply to determine whether the defendant was in breach of a duty of care towards the victim; on the establishment of such breach of duty the next question is whether it caused the death of the victim, and if so, whether it should be characterized as gross negligence and therefore a crime; it is eminently a jury question to decide whether, having regard to the risk of death involved, the defendant’s conduct was so bad in all the circumstances as to amount to a criminal act or omission.”

- [44] The authors of **Blackstone’s Criminal Practice 2017** note at paragraph B1.63 that:

“Manslaughter has traditionally been the one offence at common law in which negligence is expressly recognized as a sufficient basis of liability, but even here the negligence has to be ‘gross’.”

- [45] A case that is often cited is **R v Bateman**. The headnote in the All England Report states:

“To support an indictment for manslaughter the prosecution must prove, not only that the accused owed to the deceased a duty to take care, that that duty was not discharged, and that the default of the accused caused the death of the deceased, but also that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment. It is most desirable that in trials for manslaughter by negligence it should be impressed on the jury that the issue is not negligence or no negligence, but felony or no felony.”

- [46] Lord Hewart, CJ, in **Bateman** distinguished between negligence in civil and criminal jurisdictions that would ground liability. He said, at page 47 letters G to I:

“If A has caused the death of B, by alleged negligence, then in order to establish civil liability, the plaintiff must prove (in addition to pecuniary loss caused by the death) that A owed a duty to B to take care and that that duty was not discharged, and that such default caused the death of B. To convict A of manslaughter, the prosecution must prove the three things above mentioned and must satisfy the jury, in addition, that A’s negligence amounted to a crime. In the civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far short of that standard. The extent of his liability depends not on the degree of negligence, but on the amount of damage done. In the criminal court, on the contrary, the amount and degree of negligence are the determining question.”

- [47] In **R v Adomoko** [1994] 3 All ER 79, [1994] 3 WLR 288, [1994] Crim LR 757, (1994) 99 Cr App R 362, [1995] 1 AC 171, 158 JP 563, (HL), (*sub norm* **R v Prentice**, **R v Sullman**, **R v Holloway**), the decisions in **Bateman** as well as **Andrews v Director of Public Prosecutions** [1937] AC 576, (1938) 26 Cr App R 34, (HL), were reviewed. Their Lordships went on to hold that:

“...the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterized as gross negligence and therefore a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant’s

conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death...was such that it should be judged criminal.”

[48] Master of the Rolls, Lord Woolf, in **R v Inner South London Coroner, ex parte Douglas-Williams** [1999] 1 All ER 344, (CA), pointed to the subtle distinction between unlawful act manslaughter and one grounded in gross negligence. Lord Woolf pointed out at page 350, letters f to h:

“For gross negligence manslaughter...there must be:

- (i) Negligence consisting of an act or failure to act
- (ii) That negligence must have caused the death in the sense that it more than minimally or negligibly or trivially contributed to the death; and
- (iii) The degree of negligence has to be such that it can be characterized as gross in the sense that it was of an order that merits criminal sanctions rather than a duty merely to compensate the victim.

“In relation to both types of manslaughter [unlawful act and gross negligence], it is an essential ingredient that the unlawful or negligent act must have at least caused the death in the manner described. If there is a situation where, on examination of the evidence, it cannot be said that the death in question was caused by an act which was unlawful or negligent as I have described, then a critical link in the chain of causation is not established. That being so, a verdict of unlawful killing would not be appropriate and should not be left to the jury.”

Application

[49] A step by step search for the evidence to support the proposition is necessary.

[50] The first question to be addressed is whether the prosecution’s evidence established that the defendant owed a duty of care to Ms. Schulman. On the face of it, there is evidence for the fact finding forum to consider. Mr. Armour, as captain of the catamaran, must owe a duty of care to other users of the sea as well as to his passengers.

[51] Next. Could it be said that Mr. Armour breached his duty of care to Ms. Schulman? There is absolutely no evidence that he did. The State's expert detailed what a prudent captain would do. The evidence supports that Mr. Armour's actions on the 1st December 2012 met the criteria of a prudent captain. At the time of the incident, the evidence was that Mr. Armour was not navigating the catamaran; he was doing no more than ensuring that the vessel remained in its position beyond the designated safe swimming area.

[52] The evidence adduced by and available to the prosecution therefore fails to satisfy the necessary elements of the offence. It was insufficient to show that the defendant owed a duty of care, and that Ms. Schulman is dead. The prosecution also had to have evidence that Mr. Armour breached his duty of care to the deceased and that the death resulted from that breach. If those elements were all established, the case would then have to be left to the jury to determine the factual basis of gross negligence, whether in fact Mr. Armour's actions were so egregious as to amount to a crime.

[53] In the circumstances, the submission is upheld that the defendant Mr. Armour has no case to answer. The jury must therefore return a formal verdict of not guilty to the charge that Mr. Andrew Armour on the 1st day of December 2012 at Mero in the Parish of Saint Joseph in the Commonwealth of Dominica, by gross negligence did unlawfully kill Ms. Casey Anne Schulman.

[54] This case once again illustrates that not every unnatural death gives rise to criminal liability.

A Lingering Issue

[55] The fact that the defendant has no case to answer disposes of this matter. However, a jury was empaneled to try this case on Monday the 23rd of October 2023. The following day, at 8:40am on Tuesday the 24th of October 2023, Mr. Armour's counsel filed a notice of motion to stay the proceedings for a breach of his constitutional right to a fair hearing.

[56] Although the application was not ultimately pursued, a scrutiny of the basis of the application excites much concern. Given the pedestrian pace at which this matter proceeded over the years, it is necessary to ventilate aspects of what Mr. Armour terms a delay.

The Right

[57] Chapter 1 of **The Constitution of the Commonwealth of Dominica** addresses the 'Protection of Fundamental Rights and Freedoms.' Section 8 falls within Chapter 1 of the **Constitution**. The side note to section 8 states: "Provision to secure protection of the law." This is often described as the "right to a fair trial within a reasonable time."

[58] Mr. Armour's written Application said that he was seeking an order that:

- "1. The proceedings maybe (sic) stayed on the grounds that the Accused['s] Constitutional right (under section 8(1) of the Constitution of the Commonwealth of Dominica) to a fair trial within a reasonable time has been infringed.
2. "The proceedings be stayed for abuse of process as the Accused can no longer receive a fair hearing."

[59] Section 8(1) of the **Constitution** provides:

"If any person is charged with a criminal offence, 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".

[60] Mr. Armour swore to an affidavit in support of his application, briefly detailing the facts as he understood them. The State did not (more appropriately could not – and given subsequent developments – did not need to) respond to the Notice of Application for a stay of proceedings.

Arrest and Committal

[61] This case concerned an incident which occurred on the 1st of December 2012. Five months later, on the 7th May 2013, Mr. Armour was arrested and charged. Then the matter stalled, then limped its way into the High Court.

[62] The preliminary inquiry in this matter did not commence until seventeen months after Mr. Armour's arrest – or nearly two years after Ms. Schulman's death. Thereafter, there was a crawl in the committal proceedings:

- On the 22nd of September 2014, evidence from one witness was taken.
- On the 8th of September 2015, which was a few days shy of one year after the committal proceedings begun (on the 22nd of September 2014), the evidence of the second witness was taken.
- Two months later, on the 17th of November 2015, the testimony of a single witness was taken.
- There was a four-month break then on the 15th of March 2016, evidence was taken from two witnesses.
- Two years and two months then elapsed and on the 20th of May 2019, evidence from another two witnesses was taken.
- The following month, on the 11th of June 2019, one witness.
- Five months later, on the 25th of November 2019, evidence from three witnesses was taken. But two of the witnesses did not

complete their testimony. Those witnesses continued their evidence on two separate occasions.

- Two months later, on the 28th of January 2020, one of the witnesses who first testified on the 25th of November 2019 completed his testimony and another witness started his testimony.
- A year went by, then on the 18th of January 2021, the witness who started his testimony on the 28th of January 2020 as well as the witness who started giving evidence on the 25th of November 2019, completed their evidence.

[63] A year passed by between the taking of evidence from the last witness in January 2021 and Mr. Armour's case being committed to the High Court. After nearly six-and-a-half years and taking evidence from 12 witnesses on nine different days, the Magistrate on the 17th of January 2022, committed Mr. Armour to stand trial for Manslaughter.

The High Court

[64] Almost a year passed after Mr. Armour was committed in January 2022 to stand trial at the High Court, before the Learned DPP filed an indictment in the matter on the 4th of January 2023. Mr. Armour was arraigned eight days later, on the 12th January 2023. The matter proceeded to case management.

[65] On the 10th of February 2023, it is apparent from the Judge's notes that Mr. Armour's counsel at Case management demanded further disclosure regarding the training of the State's expert witness, Inspector Simon Edwards, as well as the complete '72 COLREGS' rather than just the three rules referred to by the witness. The Judge set deadlines for completing matters and noted:

"Trial reserved for October 16 – Jury selection. Court offered earlier trial date in July; declined by defence counsel."

- [66] Although the trial was fixed for the 16th of October 2023 the matter was called up on the 26th of September 2023 and counsel from both sides were invited to consider an earlier trial date. Mr. Armour's counsel submitted that the original trial date should stand. The matter was accordingly restored to the date that was originally agreed and set earlier in the year (at the sitting of the 10th of February 2023).
- [67] The trial however had to be pushed back from the 16th of October 2023, for a week, to the 23rd of October 2023, because of the Judge's absence from the State. On the new trial date, the Learned DPP made an oral application for an adjournment of the matter, citing the difficulty in getting two of the witnesses to be present for the start of the trial. Defence counsel did not object to any adjournment of the matter, but rather was concerned that the State promised at the committal stage to have the witnesses present for trial. The application for an adjournment was refused.
- [68] Mr. Armour in his affidavit in support of the notice of application for a stay, exhibited a single letter written by his counsel to the Learned DPP and dated the 5th of October 2023 – less than two weeks before the scheduled start of the trial – requesting information on how many witnesses would be available for trial and requesting particulars of the allegation of negligence. There was no suggestion of any oppression, no allegation that the State's conduct was dilatory in any way, no representation that Mr. Armour was disadvantaged in any way in the general conduct of this matter.

Defeating delays

- [69] The delay in holding the preliminary inquiry was evident in the testimony of witnesses. Mr. Delehey, for example, who was the last person to see the deceased alive without any injury, could not even recall giving a statement to the police

following the incident; and when he could not recall certain things about the day his friend died, he stated: "It has been seven years!"

[70] The fact that a simple preliminary inquiry with twelve witnesses took nearly seven years from its start to completion is scandalous and embarrassing. Stretching out matters in such a manner would obviously negatively impact on the Criminal Justice System.

[71] The situation in Mr. Armour's case can be contrasted with what the former Chief Justice of the Eastern Caribbean Supreme Court, Sir Dennis Byron, sought to achieve when he proclaimed the **Magistrate Court Pre-Trial Guidelines, 2003** for Saint Vincent and the Grenadines which entered into force on the 1st of July 2003. It may be useful for corresponding requirements and standards be established for the Commonwealth of Dominica which is a fellow Member State of the ECSC. The Guidelines address the 'Period of date of charge to preliminary inquiry' at Rule 7, and the 'Exceptions' at Rule 8:

"7. In proceedings in which a court is to hold a preliminary inquiry and:

- (i) the accused is on bail, the time within which the preliminary inquiry must be conducted must not exceed six months, or
- (ii) the accused is in custody, the time within which the preliminary inquiry must be conducted, must not exceed three months, from the date on which the charge is laid.

"8. Notwithstanding the time periods provided in Guidelines 6(i), 6(ii) and 7, where the accused:

- (i) is on bail, the maximum period between his first appearance in court and the disposal of the matter, whether by means of conviction, acquittal or a preliminary inquiry, must not exceed six months.

- (ii) is in the custody, (sic) the maximum time period between his first appearance in court and the disposal of the matter whether by means of a conviction, acquittal or a preliminary inquiry, must not exceed three months.”

[72] The time period of one year and five month between Mr. Armour’s arrest and the commencement of committal proceedings, then several more years before the completion of the preliminary inquiry, ought to be an unsatisfactory state of affairs for any judicial system.

[73] The **Needham’s Point Declaration** which emerged from the 7th Biennial Conference of the Caribbean Court of Justice Academy of Law, and which focused on “Criminal Justice Reform: Achieving a Modern Criminal Justice System,” noted as one of its goals going forward:

“That as a rule, trials should be held within one (1) year of the accused being charged (for indictable matters) and six months (for summary matters).

[74] The criminal justice practitioners at the Conference affirmed:

“That laws be enacted to guarantee prisoner remand timelines; to replace Preliminary Inquiries with sufficiency hearings and/or paper committals...”

[75] The **Declaration** also noted: “That courts should adopt a focused and integrated approach to eliminate criminal case backlogs, by using tools and measures such as robust case-management.” Those were just some of the 39 recommendations and were referred to because of their direct applicability to the circumstances of this case.

[76] It is not just the State/Crown and the Prosecution who must ensure that judicial officers and the justice system work optimally. Counsel representing accused persons cannot be absolved of any responsibility in ensuring a timely disposition of matters. One factor to be considered whenever the claim of unreasonable delay is made, must be what steps the party took to articulate and pursue their right. In Mr. Armour's case there appears to be a resigned acceptance of the pedestrian pace in the holding of committal proceedings. In **Bell v DPP** [1985] AC 937, (PC), one of the four factors to be considered in evaluating the issue of delay is the responsibility of a defendant in asserting his rights.

The Story's Been Told:

[77] Recently, in another matter here in the Commonwealth of Dominica, **The State v Yannick Lander**, DOMHCR 2017/0028, acting Justice Thomas Astaphan, KC, in a judgment dated 3rd of July 2023, granted an application on behalf of the accused for a permanent stay of the prosecution of the matter. Astaphan J (Ag) spoke of

“the travesty which occurs when a trial is not conducted within a reasonable time, as commanded by section 8(1) of the **Constitution of the Commonwealth of Dominica**,” (paragraph [38]).

[78] Mr. Lander was charged with the offence of murder on the 15th of November 2008. Mr. Lander was first arrested on the same day of the incident, which was three days prior to his being charged. An initial Preliminary Inquiry commenced sometime in 2009 or 2010, but was not completed because the Magistrate demitted office. Mr. Lander was admitted to bail in June 2010. The Preliminary Inquiry therefore had to be held *de novo*; it was started two years later and ran for five years. Nine years after Mr. Lander's charge and arrest his matter was committed to the High Court on the 18th of April 2017. He was indicted by the Learned DPP more than a year later, on the 30th of October 2018. His trial was set to commence on the 5th of June 2023 – some 14 years and five months after the proceedings were initiated. By the proposed trial date, seven of the State's seventeen witnesses who gave evidence

at the PI were unavailable for a variety of reasons, including death. The State intended to apply to have their depositions read into evidence. Also, Mr. Lander's medical records from the Psychiatric Unit and which he hoped to rely on as part of his defence, were apparently destroyed during the passage of Hurricane Maria in 2017. Astaphan J (Ag) stated at paragraphs [34] and [35] of his judgment:

"[34] Without his medical records from the Psychiatric Unit, the Applicant could not have a fair trial. His fitness to plead, and to participate in the trial would, like the question of his mental state at the time of the commission off the offence, be unavailable to him...and a trial under those circumstances would be inherently prejudicial, and unfair...

"[35] He has established that his right to a fair trial has been infringed by the unavailability of the Medical Records."

[79] There is an abundance of cases emanating from the Commonwealth Caribbean that address the issue of delay, whether under the broad rubric of an abuse of process which includes circumstances which offend the court's sense of justice and propriety, or as the constitutional imperative of a right to a fair trial where the circumstances may be such that a defendant may suffer specific prejudice.

[80] To sustain faith in the rule of law and the administration of justice, the mantra of "justice delayed is justice denied" ought to reverberate throughout the criminal justice system. Unreasonable, unnecessary and excessive delays must not be countenanced. The criminal justice system must operate to protect the rights and interests of the innocent accused and ensure that the guilty are swiftly punished.

[81] There is no necessity for a ruling on the notice of application for a stay of proceedings on behalf of Mr. Armour since the matter has not been argued. Indeed, no submissions, written or oral, were made. This postscript was added because instinctively, it appears that the length of time between the charge and the hearing

of the matter at the High Court was unacceptably wrong. Whether such delay would justify a stay, however, would depend entirely on the circumstances of the particular case.

Colin Williams, J
High Court Judge

By the Court

Registrar