

THE EASTERN CARIBBEAN SUPREME COURT

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

COMMONWEALTH OF DOMINICA

CASE NO. DOMMCR2017/0028

BETWEEN:

THE STATE

Respondent

and

YANNICK LANDER

Applicant

Before:

The Honourable T. W. R. Astaphan, K.C., J., (Ag.)

Appearances:

Ms. Sherma Dalrymple with Ms. Marie Louise Pierre-Louis, for the State
Mrs. Zena Moore-Dyer, Counsel for the Applicant

2023: June 9

2023: July 3

JUDGMENT ON APPLICATION FOR A PERMANENT STAY OF PROSECUTION

“Timely justice is one of the hallmarks of a free and democratic society. Timely trials were possible. More than that, they were constitutionally required. Trials within a reasonable time were an essential part of the criminal justice system’s commitment to treating presumptively innocent accused persons in a manner that protected their interests in liberty, security of the person and a fair trial. However, the criminal justice system had come to tolerate excessive delays”¹.

¹ R v Jordan [2016] SCC 27, page 470, paragraph (i), per Moldaver, Karakasanis and Brown JJ (Abella and Cote JJ concurring)

- [1] **ASTAPHAN, K.C, J. (Ag.):** On the 2nd June, 2023, the Defendant/Applicant, Mr. Yannick Lander, who had, on **15th November, 2008**, been charged with the offence of Murder which was alleged to have occurred on **12th November, 2008**, and who was committed to stand his trial before the High Court **on 18th April, 2017**, from which committal he was indicted by the then Director of Public Prosecutions, Ms. Evelina E.M. Baptiste, on **30th October, 2018**, some nearly ten years after he had been arrested on **12th November, 2008**, filed an “*Application by way of a Notice of Motion*” for a Permanent Stay of the prosecution of the Applicant for the offence on which he had been indicted “...*for abuse of process as the Accused can no longer receive a fair hearing.*”
- [2] The trial on the said Indictment, which was set to commence on Monday 5th June, 2023, was caused to be adjourned pending the hearing and determination of the said application.
- [3] The application was supported by two affidavits of the Applicant – one a supplemental affidavit – various exhibits; and Submissions which were filed on 9th June, 2023.
- [4] On the 9th June, 2023, The State filed an affidavit in response to the said application, together with submissions and authorities.
- [5] On the 9th June, 2023, this Court heard the oral submissions of Counsel for the Applicant, Mrs. Zena Moore Dyer, and Counsel for the State, Ms. Marie Louise Pierre-Louis, and the Honourable Director of Public Prosecutions, Ms. Sherma Dalrymple.
- [6] At the conclusion of the hearing, and upon consideration of the application, affidavits, written submissions, exhibits and the oral submissions of the said Counsel, this Court granted a Permanent Stay of prosecution of the Applicant.

[7] At the outset I wish to address a point of clarification. The Permanent Stay issued by this Court covers not only this Indictment, but any charge which may have arisen out of the alleged facts which undergirded the charge and indictment of the Applicant. There can be no further charge preferred against the Applicant arising out of the alleged events of 12th November, 2008. That is the effect of the Permanent Stay granted by this Court.

[8] Although the Notice of Motion, as it is called, did not expressly premise the Application on *section 8(1) of the Constitution of the Commonwealth of Dominica*, it is clear from the Notice and the affidavits filed in support, as well as the submissions of the Applicant (both written and oral) that what had been implicated in the Application is the Applicant's Right to a fair trial within a reasonable time, which is guaranteed by that section. They all speak to the length of time which has elapsed since the Applicant was charged, and the date set for the trial of the charge; 15th November, 2008, to 5th June, 2023 - and the lack of fairness should the Applicant be tried at this late date without having available to him for his defence his Medical Reports from the Psychiatric Unit of the Dominica-China Friendship Hospital, as well as the unavailability of seven of the seventeen Prosecution witnesses whose Depositions the State intended to apply to have read into evidence. The Applicant bases his application on this passage of time, along with the other matters mentioned, for a Stay on the basis of an "*Abuse of Process*", while the essence of his application, affidavits and submissions inexorably speaks to a *section 8(1)* infringement. In any event, the State has not taken issue with either the form or the substance of the Applicant's application, and expressly premised their submissions at the oral hearing on the basis of *section 8(1)* of the Constitution.

THE RELEVANT FACTS

[9] From the affidavits before me, I discern the facts to be as now follows:

- i) One Duane Pinard was killed on 12th November, 2008, at Castle Comfort, in the Commonwealth of Dominica;

- ii) The Applicant was arrested on 12th November, 2008, on suspicion of murdering the deceased;
- iii) He was interviewed by the Police on 14th November, 2008;
- iv) He was charged with Murder on 15th November, 2008;
- v) He was brought before a Magistrate on 17th November, 2008, at which time he was placed on remand;
- vi) That a Preliminary Inquiry into the charge of Murder was commenced “in or about 2009 to 2010” before Magistrate Tiyani Behanzin, who demitted office before the Preliminary Inquiry was completed;
- vii) That the Applicant was admitted to bail on 15th June, 2010, over one year and seven months after his arrest;
- viii) That nearly two years elapsed before the Preliminary Inquiry could start de novo before another Magistrate;
- ix) That there were occasions when adjournments were sought by both the Defence and the Prosecution, for various reasons which were apparently accepted by the then presiding Magistrate;
- x) That on 18th April, 2017, - *nine years after his arrest and charge* - the Applicant was committed to stand trial before the High Court;
- xi) That on 30th October, 2018 – *thirteen days short of 10 years after his arrest and charge, and one year and six months after he was committed* – an Indictment was presented by the then Director of Public Prosecutions, Ms. Baptiste;
- xii) That the State proposed to commence the Applicant’s trial before the High Court on 5th June, 2023, that is to say, *14 years and five months after he was arrested and charged with the offence*; and
- xiii) That seven (7) of the State’s seventeen (17) witnesses which it proposed to call at the trial are unavailable for a variety of reasons, including death, and the State intended to apply to have their Depositions read into evidence before the Judge and Jury.

TWO ADDITIONAL ISSUES WHICH ARISE

- [10] The Applicant raised an additional ground for his Application that:
- a) he has not had disclosed to him the Notes of Evidence/Depositions of the aborted Preliminary Inquiry before former Magistrate Behanzin; and
 - b) the fact that the Medical Records of the Defendant from the Psychiatric Unit of the Dominica-China Friendship Hospital are unavailable, and he submits that, without them both, he would be prejudiced in the presentation of his defence.
- [11] As to (a), the fact of non-disclosure of the Notes of Evidence/Depositions in the aborted Preliminary Inquiry is of no meaningful assistance to the Applicant on this application.
- [12] This is so because had there been a trial; or was the Permanent Stay not granted so that there would be a trial, the issue of that non-disclosure is a matter which the Trial Judge would have dealt with, as it is an issue which would impact the Applicant's defence *during the trial* – possible impeachment of State witnesses on prior inconsistent statements. The Trial Judge would be fully equipped to deal with that issue during the trial.
- [13] A Trial Judge has the benefit of sections 31B to 31E of the *Criminal Law and Procedure Act, Chap. 12:01 of the Laws of the Commonwealth of Dominica* to assist with this issue before and during the trial on Indictment of an accused person.
- [14] Objection on the basis of that non-disclosure would only arise, *after the trial*, for consideration by an appellate Court where the Trial Judge excludes those “Behanzin” Depositions or does not order them to be made available to the defence, and that exclusion or non-ordering is alleged to have prejudiced the trial of the

Applicant so as to render the trial unfair. It is not a ground for Constitutional relief under section 8(1) of the *Constitution of Dominica* at this stage, and, for the same reasons, it is also premature as a ground at Common Law on an allegation of unfairness.

[15] That particular duck was yet to quack.

[16] As to (b), this presents a different set of considerations. On this the State has submitted that *"The Accused has complained that his medical records are unavailable and for this reason it is impossible to ensure a fair trial. The Accused has failed to explain the relevance of these records. No issue of fitness to plea (sic) has been raised and there is no indication in the affidavit that the Accused is relying on a defence that is predicated on a defect of mind" (paragraph 18 of the State's Submissions).*

[17] Section 36A of the **Criminal Law and Procedure Act** (ibid) sets out the procedure as to *"decision-making capacity"* of accused persons in criminal trials.

[18] Subsection (1) states that:

"An accused is unfit for trial if the accused lacks decision making capacity".

[19] Subsection (4) states that:

"Notwithstanding subsections (2) and (3), the question of decision-making capacity must be determined as soon as it arises."

[20] Subsections (5) through (14), inclusive, set out the procedure to be followed in the process of making this determination, and the considerations the Court must engage in the exercise.

[21] Then, subsection (15) says this:

“The Court shall assess decision making capacity with a view to ascertaining whether an accused can undergo a trial or plead guilty with the assistance of special measures”.

- [22] It is clear from a reading together of subsections (1) and (15) that this exercise is to determine whether the Accused is fit *to stand trial, or to plead guilty*. It is equally pellucid that this section *does not* address the Accused's mental capacity at the time of the event which predicates the charges. These are two entirely different considerations.
- [23] What is clear is that it is open to the Applicant to raise the issue of fitness, at the start of his trial, during the trial, (subsection (4)), and up to the opening of the case for the defence, if, having been raised earlier in the proceedings “*the Court is of the opinion that it is expedient to do so*” (subsection (2)).
- [24] This *section 36A* determination, where an accused person has a history of psychiatric affliction, requires the Medical Records from the Psychiatric Unit of the Hospital, as well as a current Report from the Consultant Psychiatrist – who will need the said Records in order to produce a proper psychiatric Report on the Applicant, and which Report would also be necessary if the accused also intended to raise a M'naghten defence. So that it cannot be said that the unavailability of the Applicant's Medical Records from the Psychiatric Unit, due to the fault of no one, does not implicate the fairness of the trial.
- [25] For clarity, the M'naghten defence – the first legal test for criminal insanity – avails an accused person who can establish on evidence that either his mental state was such that he did not know what he was doing when he committed the Actus Reus, or that he knew what he was doing, but did not, because of his mental state, know that it was wrong. Essentially, that he was of unsound mind at the time of the committing of the Actus Reus which founds the offence.

- [26] The burden of proof under M'naghten lies on the accused person. If he is to prove that he was legally insane, it would assist his defence if, having had prior Medical Records from the Psychiatric Unit of the Hospital – which necessarily implies that he was being treated for some psychiatric malady – he is able to have those Records to assist with his defence.
- [27] So that, under both *section 36A and M'naghten*, the lack of availability of the Applicant's Medical Records from the Psychiatric Unit of the Hospital deprives him of what could well indeed be of important assistance in defending the case against him – under 36A that he is unfit to stand trial, and under M'naghten that he could not have had the necessary Mens Rea to be found guilty of the offence for which he was indicted.
- [28] This Court has before it a Psychiatric Report on Yanick Lander prepared by Psychiatric Consultant at the Dominica – China Friendship Hospital, the distinguished Dr. Nadia Wallace, the Head of the Psychiatric Unit, dated May 15, 2023, and which was provided to the Court under a Court Order pursuant to *section 8(1) of the Mental Health Act*. In this Report Dr. Wallace states, at page one, paragraph 2, "Clinical Diagnosis", that "*Mr. Lander has a history of having been previously treated privately by psychiatrist Dr. Griffin Benjamin, then at the Acute Psychiatric Unit. However, his medical record could not be located at the Unit. It is my belief that his record may have been amongst those which were destroyed during Hurricane Maria in 2017.*" If anyone is in a position to make that assertion, albeit a '*belief*', it is Dr. Wallace, given her position at the Unit. I accept this uncontroverted evidence as fact.
- [29] The State has not denied that the Applicant has a history of psychiatric medical problems, and that he had Medical Records at the Psychiatric Unit of the Hospital which are now unavailable. In fact, Dr. Wallace, Consultant Psychiatrist at the State – owned Hospital, has provided evidence in her Report of both Mr. Lander's

previous psychiatric treatment by Dr. Benjamin, and the fact of her belief that the Records were destroyed by Hurricane Maria in 2017.

[30] What the State has done is to claim insufficiency in the particulars of the Applicant's claim as follows:

- i) To repeat paragraph 18 (as set out above), and paragraph 19 of the State's Submissions: *"18. The Accused has complained that his medical records are unavailable and for this it is impossible to ensure a fair trial. The Accused has failed to explain the relevance of these records. No issue of fitness to plea (sic) has been raised and there is no indication in the affidavit that the Accused is relying on a defence that is predicated on a defect of mind", and "19. Without a proper articulation of where the prejudice lies exactly this is no basis to stay the proceedings" and*
- ii) at paragraph 14 of the Affidavit filed by the State: *"The Accused's forth (sic) complaint at paragraph 13 is that his records from the psychiatric unit are unavailable. The Accused has failed to explain the relevance of these records. No issue of fitness to plea (sic) has been raised and there is no indication in the affidavit that the Accused is relying on a defence that is predicated on a defect of mind."*

[31] With regards thereto, the Applicant says the following:

- i) At paragraph "iv" of the Notice of Motion: *"iv. The medical records of the Defendant from the Psychiatric Unit are unavailable. **Such records are necessary to ensure a fair Trial**" (sic), and;*
- ii) at paragraph 13 of the Applicant's Affidavit in Support: *"13. I have been informed by my solicitor and verily believe that my medical records from*

the Psychiatric Unit are unavailable and such records are vital to the presentation on my Defense and to my obtaining a fair Trial (sic) and will prejudice me in the presentation of my defense.
(underlining and bold added)

- [32] What could the Applicant be there referring to if not the issues of his decision-making capacity (section 36A), and M'naghten insanity which are "*vital*" to his defence, and which will tend to the fairness of his trial? It is clear that he intended to engage either and/or section 36A, and a M'naghten defence. No other interpretation of the words underlined and bolded above is logically permissible.
- [33] It is beyond doubt to the Court that this is clear from what is quoted above, and I so Hold it to be. The State's submissions on this point are unmeritorious, and border on being vainglorious. The Applicant is not required at this stage in the proceedings to articulate "where the prejudice lies exactly" absent his said Medical Records, nor is he required to set out with particularity that he intends to seek a section 36A determination, or to employ a M'naghten defence.
- [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 of the offence, be unavailable to him, and to the "Fitness Jury" and the "Trial Jury", respectively, and a trial under those circumstances would be inherently prejudicial, and unfair. I so Hold for all the reasons stated above.
- [35] He has established that his right to a fair trial has been infringed by the unavailability of the Medical Records.
- [36] Also, the unavailability of 7 of the State's 17 witnesses, whose depositions the State intended to apply to have read into evidence, by itself, and in matrimony with the unavailability of the Medical Records, compound this unfairness, as the Applicant

will not have the opportunity to test that evidence by cross examination, and the Jury will not have the opportunity to witness such testing, and the demeanor of those witnesses.

[37] Judgekind is yet to create a direction, or suite of directions which could neutralize the prejudice which would inevitably fall upon the Applicant should 7 of 17 Prosecution witnesses give evidence through the reading of their depositions.

[38] Their unavailability underscores the travesty of justice 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*.

[39] ***MAIS CE N'EST PAS FINI.***

[40] *Section 8(1) of the Constitution of the Commonwealth of Dominica* is as follows:

“8. (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.” (emphasis added)

[41] Further, *Section 16 of the Constitution* gives the High Court original jurisdiction to hear and determine applications made under *subsections (1) and (3) of section 16 of the Constitution*, alleging breaches of *sections 2 to 15* [the Fundamental Rights and Freedoms Chapter], of the Constitution, and gives the Court power to devise remedies thusly: the ***Court “... 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 2 to 15 (inclusive) of this Constitution: ...”*** (emphasis added.)

[42] With respect to section 8. (1), this Court can set aside the following considerations as not being in issue: (i) that “the charge [has not been] withdrawn”, and (ii) that the Court is in fact and in law “an independent and impartial Court established by law.”

- [43] The issue therefore arising under *section 8. (1)* for consideration is: Whether the Applicant has been “*afforded a fair hearing within a reasonable time...*” as is commanded by *section 8(1) of the Constitution*.
- [44] I have already ruled in paragraph [14] above, that the unavailability of the Applicant’s psychiatric medical records since September 2017, the time of Hurricane Maria, – which records were at all times in the custody, and under the control of the State, in the State owned and run hospital –, and the unavailability of 7 of the State’s 17 witnesses, deprive the Applicant of a fair trial under *section 8. (1)*.
- [45] It is understood that a person charged can claim that his trial is not a fair trial at any time after the process has begun, but before the passage of any significant time. In other words, the ‘*fair trial*’ aspect of the right is not time sensitive, like the ‘within a reasonable time’ aspect is, by definition. In this sense the “within a reasonable time” limb is not engaged in a purely “fair trial” consideration. And, time (in the ‘within a reasonable time’ sense) permitting, where a trial has been held to be unfair, the accused can be tried de novo with corrective measures in place to ensure the fairness of the trial. The same cannot be said where the breach is of the “within a reasonable time” element of *section 8(1)*.
- [46] Where, however, the trial is declared not to have been held within a reasonable time, nothing can be done by the court to make any further time in which the trial must now be held, “*within a reasonable time*”, regardless of the question of ‘fairness’. That bell would have already tolled.

“WITHIN A REASONABLE TIME” – WHAT REMEDIES ARE THERE?

- [47] I find on the undisputed evidence before me that the passage of 14 years and five months without the Applicant’s trial being completed, in and of itself, and without more, constitutes a breach of his right to be tried within a reasonable time as guaranteed by *section 8(1) of the Constitution of the Commonwealth of Dominica*.

[48] As to remedies, case law seems to suggest that remedies for breach of this 'reasonable time' command is somehow contingent upon, and subordinate to the "fair trial" command.

[49] For example, in **R v Misick and others**², where there were multiple defendants, and a trial which had been underway for years, punctuated with many delays and, eventually aborted on the death of the Trial Judge before completion, the Chief Justice of the Turks and Caicos Islands, Agyemang CJ, a case brought under the Constitution of that Colony for redress under section 6(1), (and, apparently, on Common Law grounds, and in which there appears to have been little mention of section 6 (1)), the Court found that:

- i) *"There was an inordinate and unjustifiable delay admitted by both the prosecution and the defence. That was a breach of the defendants' right to a trial within a reasonable time under section 6 (1) of the Constitution*³." (underlining and italics added)
- ii) *"That the defendants had all suffered prejudice to some degree could not be denied and they all said so, and even in the absence of clarity or perhaps regarding specific acts or conditions of prejudice, close to a decade of being in criminal proceedings with all that it carried ... must have led to the assumption of prejudice*⁴. (italics added)
- iii) *"What presented a difficulty and made the proposed retrial an impossible exercise in fair trial was the manner in which it had been presented in the new Information which, by reason of the historic delay [10 years], and the track record, could not possibly produce a fair trial. In a retrial of similar dimensions, the danger of such a trial was that a decision on the overloaded Information may become unfair due to the enormous timescale of the alleged offences, the timescale of the trial, the sheer number of witnesses and the multiplicity of issues to be resolved by the court*⁵." (italics added)

² (Abuse of Process) (2021) 98 WIR 543

³ Page 544, paragraph (2)

⁴ Page 545, a-b

⁵ Page 545, b-c

- iv) *“That, on top of what had already been endured by the defendants, would not only be to disregard but to pour contempt on the constitutional guarantee of a trial within a reasonable time (seeing that the said right had already been breached), and would most certainly not constitute a fair trial where the defendants could adequately defend themselves. The retrial that was proposed on the new Information could not produce a fair trial for any of the defendants in another drawn-out trial⁶.”* (italics added)
- v) *“As the new information stood, it could not produce a fair trial in which the defendants would be able to defend themselves in respect of allegations of financial malfeasance which required memory recall. That was because it was sure to result in another trial of huge dimensions with its attendant delay. The very nature of it would produce delay, even with the expressed will of the court to properly manage the trial in order to ensure some expedition. If there was any hope of continuing with proceedings that would be fair, it would be achieved through severance of the trials with an eye for the reduction of complexity. In severing the trials, regard must be had to the continuing breach of the constitutional guarantee of a trial within a reasonable time⁷.”* (italics added)
- vi) *The Learned Chief Justice then said that: “There was merit in the defendants’ arguments. Yet a fair trial was still possible, and the integrity of the court would be upheld in less complex trials which were properly managed to a speedy conclusion. Therefore, a temporary stay of proceedings would be ordered on the ground of a lack of a fair trial on the new information⁸.”* (italics supplied)

[50] The Bahamian case of **Genear McKenzie and The Director of Prosecutions**⁹, is a case in which the Appellant who was arrested in September, 2009, filed suit alleging that her constitutional Right to be tried within a reasonable time was infringed in that more than ten (10) years had passed since her arrest, and she sought a stay.

[51] The trial judge found that the appellant’s said Right had been infringed but did not grant a stay. Rather, the judge ordered that the proceedings would be stayed if the

⁶ Page 545, d-e

⁷ Page 545, e-g; paragraphs [189]-[192], [195], [198], [210], [212], [216], [221], & [222]

⁸ Page 545, l; page 595, [227]

⁹ SCCrApp. No. 124 of 2020

appellant's trial was not commenced by 23 November, 2020, or that the matter would be stayed if the trial was not commenced within 30 days thereafter.

[52] The Court of Appeal allowed the appeal to the limited extent that, if the trial of the appellant did not commence on 23 November 2020, through no fault of the appellant or her Counsel, the trial would be stayed.

[53] Both the High Court and the Court of Appeal premised their decisions on the 'fact' that a 'fair trial' could still be had if their timeline was met. Never mind the "within a reasonable time" element which they both found to have been breached.

[54] In both these cases the Courts –both the High Court and the Court of Appeal - found that the right to trial within a reasonable *time had been breached*, but went on to fashion a "remedy" on the basis that a "fair trial" was possible if the Director of Public Prosecutions severed the Information and tried the defendants separately (**Misik**), and in **McKenzie** the Court set a deadline for the trial to commence, after which it would be stayed. So, it was in these two cases that the right to a trial within a reasonable time was subordinated to the right to a fair trial despite the findings of a breach of the right to be tried within a reasonable time as is mandated by the relevant sections of the respective Constitutions.

[55] Interestingly, Jon Isaacs, JA, who delivered the unanimous judgment of the Court in **McKenzie**, quotes¹⁰ the Jamaica Court of Appeal in the case of **Mervin Cameron v Attorney General of Jamaica**¹¹ as follows:

(Isaacs JA) "... after referring to Lord Hobhouse's statement in **Attorney General's Reference, [Attorney General's Reference, (No 2 Of 2001) [2003] UKHL 1968]** speaks of this complacency in the following terms at paragraph 132 to 133; '[132] *The consequence of Lord Hobhouse's*

¹⁰ At pages 12 – 13, paragraph 32

¹¹ [2018] JMFCFULL 1

approach is that no matter how egregious the delay, no matter how dilatory the state is, as long as the trial can be said to be fair such a trial can never be barred unless there is some undermining of the trial process itself or some evidence of abuse of power or manipulation by the state. This is (sic) explains why, in Jamaica, trials are taking place in quite a few instances nine years after the incident. To borrow the words of the Canadian court, a culture of complacency has taken root and that culture has been nourished by the view that it matters not how long it takes as long as the defendant can meet the prosecution's case then it cannot be said that a fair trial is not possible. If Lord Bingham's approach represents the law under the new Charter then section 14(3) is completely useless in terms of securing a stay without proof of the inability to get a fair trial.

[133] I do not think that this is what the Jamaican people want under the new Charter. They want a system that disposes of criminal cases within an acceptable time frame. The consequence of Lord Hobhouse's interpretation in Jamaica has been that trials have been taking longer and longer to come to trial. Any judge who has been in the criminal courts in Jamaica sees that there is no urgency in getting matters tried on the date they are set. ”

This Court adopts the foregoing paragraphs quoted from the Jamaica Court of Appeal and would substitute the word 'Dominica' for the word 'Jamaica', and the word 'Constitution' for the word 'Charter' or 'new Charter' where they appear therein.

- [56] Unlike what was quoted from the Jamaican case, both the Chief Justice of the Turks & Caicos Islands and the Bahamian Court of Appeal, (cases chosen at random from the many this Court reviewed), followed the principles of **Attorney General's Reference No. 2**¹², (and cases with similar 'remedies'), and proceeded to fashion a 'remedy' based upon a purported and fanciful ability available to the accused

¹² (No. 2 of 20010 [2003] UKHL 1968]

persons to have a “fair trial” if certain things were done. This, despite the Constitutional Right to be tried within a reasonable time having been expressly found by the Courts to have been breached by the State.

[57] There are other cases which have done the same thing. These Judgments have bifurcated the right to have a fair trial within a reasonable time into “lesser” and “greater” elements.

[58] It appears from those Judgments that, if there is a breach of the right to be tried within a reasonable time, that breach is subject to the remedy of amelioration if a “fair trial” is still “possible”. The first being “not so great”, and the second “greater”.

[59] Where is there the basis in law for such an approach as this?

[60] The Constitution of the Commonwealth of Dominica, as stated above, gives the citizen access to, and vests original jurisdiction for the enforcement of *Fundamental Rights – sections 2 to 15 – in the High Court (sec. 16(1))*, and empowers the Court to “...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 protections of sections 2 to 15 (inclusive) of this Constitution.” (sec. 16(2)) to remedy any breach. The Constitutions of the Commonwealth of the Bahamas, and of the Turks & Caicos Islands, like most of the former and current British Colonies in the West Indies, have near identical enforcement provisions.

[61] Thus, *section 16 (1)* provides access to the High Court – in which it vests original jurisdiction to hear and determine (2) – to Citizens who allege a breach of their Rights, and *section 16 (2)* gives that Court power to provide a remedy for any breach found. (For completeness, *subsection (3)* provides access to the High Court if in proceedings before any other Court (other than the High Court, Court of Appeal or a Court Martial), any question arises as to the contravention of any of sections 2 to

15, providing that any Court does not opine that the raising of the question is merely frivolous or vexatious.)

[62] Once, therefore, the High Court has determined that there has been a breach of the Right, its next obligation is to fashion a **remedy for the purpose of enforcing or securing the enforcement of** that right.

[63] This Court has enforced the right to a hearing within a reasonable time by granting a Permanent Stay of the prosecution of the Appellant. This would have been the remedy granted even if this Court had not found that the Applicant's Right to a fair trial has been breached by the unavailability of the Medical Records, and severally, the unavailability of 7 of the 17 Prosecution witnesses.

[64] Had the Medical Records been available, and all 17 witnesses being present, willing and able to give evidence in court, the Stay would nevertheless have been granted because of the breach of the 'within a reasonable time' command of *section 8(1)*.

[65] How does the Court enforce or secure the enforcement of the right to be tried within a reasonable time when the Court has found that that right has been breached?

[66] In **McKenzie** and in **Misick** the Courts sought to enforce or secure the enforcement of that right, it having been found and declared to have been breached, by effectively *extending the time within which the trials were to take place* beyond the already excessive time which founded the declaration of the breach in the first place. These 'remedies' were taken purportedly in exercise of the (section 16, Dominica) constitutional powers which empower the courts to effectuate a **remedy for the purpose of enforcing, or seeking the enforcement of** that right.

[67] But that is not what was done. The Right was declared to have been breached. The trials were declared not to have been held within a reasonable time. In both cases the Courts recognized this. Yet the Courts did nothing to enforce or seek to enforce

the Right to be tried within a reasonable time – which had, by the very Courts' findings, had long gone.

- [68] In **Misick** the Court said that to continue with the Information with the defendants all joined on it, in light of what had transpired before, would be “... *to pour contempt on the constitutional guarantee of a trial within a reasonable time (seeing that the said right had already been breached) and would most certainly not constitute a fair trial where the defendants could adequately defend themselves*¹³.” (bold added)
- [69] The Court suggested that “*If there was any hope of continuing with proceedings that would be fair, it would be achieved through severance of the trials with an eye for the reduction of complexity. In severing the trials, regard had to be had to the continuing breach of the constitutional guarantee of a trial within a reasonable time*¹⁴.” (bold added)
- [70] So, in **Misick** the concept of a fair trial still being possible by severing the trial was the remedy for the breach of the trial within a reasonable time guarantee. In **McKenzie** the Court of Appeal held, on the basis that a fair trial was still possible, that the trial must be held by a date certain. In doing so, in light of the positive declaration that the accused's right to a trial within a reasonable time had been breached, the remedy for the reasonable time breach, was the same concept that a fair trial was still possible, and to extend the time within which the trial could be held *notwithstanding the declared breach of the Right to be tried within a reasonable time*.
- [71] If this approach represents the Law under the Constitution of Dominica, then *section 16(1)* is completely useless in securing a trial within a reasonable time as guaranteed by section 8 (1). (**Cameron** adopted and adapted)

¹³ Ibid at fn. 2

¹⁴ Ibid at fn. 2

- [72] In **Cameron** it is stated (immediately before the words adopted above): “*To borrow the words of the Canadian court, a culture of complacency has taken root and that culture has been nourished by the view that it matters not how long it takes as long as the defendant can meet the prosecution case then it cannot be said that a fair trial is no longer possible.*”
- [73] And that is precisely what undergirds the reasoning in both **Misick** and **McKenzie**.
- [74] *Section 16 of the Dominica Constitution* does not support such reasoning. *Section 8(1)* commands a fair trial within a reasonable time. Neither of the two expressions – fair trial, or within a reasonable time – is subordinate to the other. The latter is not trumped if a Court thinks that the former is still possible. The former does not prevail over the latter. Were that the intent of the framers of the Constitution – that the essential Right was the Right to a fair trial – there would be no need for the words “within a reasonable time.” These words would be otiose. But the words are there, and they must be given their full intendment. They are not conditioned by the fair trial expression.
- [75] Further, *section 16 (2)* does not empower the Court to subordinate one expression in *section 8(1)* to the other.
- [76] It does not empower the Court to make the remedy for a breach of the Right to be tried within a reasonable time the fact – if fact it be – that the accused can still have a “fair trial”, notwithstanding the breach of the reasonable time command. That would be according one element of the Right guaranteed superiority over the other, which neither sections 8(1) nor 16(2) of the Constitution, on any reasonable reading, can be said to do – either expressly, or by implication.
- [77] It, *sec. 16(2)*, does not empower the Court to use the first protection in the Right as panacea for a breach of the second protection in the Right.

[78] It, sec. 16(2), does not empower the Court to choose which of the two protected Rights expressed in s.8(1) is to be given more weight than the other, and to assign any such weight. As said before, s. 8(1) itself does not do this.

[79] What it, sec. 16(2), does is it empowers the court to do any of many things “**for the purpose of enforcing or securing the enforcement of**” the sections 2 to 15 Rights.

[80] How is the Right to be tried within a reasonable time, that Right having been declared to be breached, enforced, or secured in its enforcement by ordering that, because a ‘fair trial’ is perceived to be possible – a subjective discretionary judgment - the trial commences **after that declaration of breach?** Respectfully, that is inexplicable. It is not supported by either or both of sections 8 and 16. It puts a nuclear bomb in the midst of the Right to be tried within a reasonable time guaranteed by section 8(1) of the Constitution of the Commonwealth of Dominica, and wantonly triggers an explosion. It effectively amends or deletes that Right from the Constitution – a power which is not available to the Courts under section 16.

[81] We are guided by the admonition of the Caribbean Court of Justice in the case of **Hillare Sears and Parole Board et. al**¹⁵ as follows:

[52] “This Court has on several occasions discussed the scope of the right to the protection of the law. This Court has observed that the right to the protection of the law is broad and pervasive. ...

[53] Further, in the Belizean case of *Maya Leaders Alliance v Attorney General*, this Court pointed out that the right to the protection of the law is a multi-dimensional, broad and pervasive precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which

¹⁵ [2022] CCJ 13 (AJ) BZ

arbitrarily deprive individuals of their basic constitutional rights to life, liberty and property. The Court observed that the right went beyond questions such as access to the courts, and included the right of the citizen to be afforded “*adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary use of power.*” The right to protection of the law also requires the availability of *effective remedies.*” (italics in original).

- [82] The Right to a fair trial within a reasonable time is a Right which comprises two interdependent elemental Rights. The Right to a fair trial, which MUST be held within a reasonable time. Ceteris paribus in respect of the ‘fair trial’ aspect, a breach of the ‘*within a reasonable time*’ command most likely means that any trial held thereafter cannot be a fair trial, but even if it can be said to be that a ‘fair trial’ is thereafter possible, what of the ‘*within a reasonable time*’ breach? The matter before the Court exemplifies this. This, however, does not dispose of the question of what is the *effective* remedy for the breach of the Right to be tried within a reasonable time?
- [83] The Canadian case referred to in **Cameron** is **R v Jordan**¹⁶, is a judgment of the Supreme Court of Canada, delivered on 8 July, 2016.
- [84] **Jordan** was arrested on 17th December, 2008, and charged on 18th December, 2008. From 18 December, 2008 to 16 February 2009, he was in custody. He was admitted to bail with strict conditions on that date.¹⁷
- [85] At the start of his trial in September, 2012 Jordan brought an application for a Stay of proceedings alleging a breach of his right under s. 11(b) of the *Canadian Charter of Rights and Freedoms* (8(1) in *Dominica*) ‘*to be tried within a reasonable time*’¹⁸.

¹⁶ (2016) SCC 27, [2016] 4 LRC 469

¹⁷ In respect of the Applicant's (Lander's) uncannily similar situation, see paragraph 9 above

¹⁸ R v Jordan [2016] 4 LRC pp. 469-470

[86] In the Judgment, Canada's apex Court, the Supreme Court of Canada says this¹⁹:

"A. The right to be tried within a reasonable time is important to individuals and society as a whole.

[19] *As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: 'Justice delayed is justice denied'. An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.*

[20] *Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner which protects their interests in liberty, security of the person and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to failed memories, unavailability of witnesses or lost or degraded evidence. (As in this case before this Court).*

[21] *At the same time, we recognize that some accused persons who are in fact guilty of their charges are content to see their trials delayed for as long as possible. Indeed, there are incentives for them to remain passive in the face of delay. Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(b) (here 8(1)) was not intended to be a sword to frustrate the ends of justice (Morin [1992] 1 SCR 771 at 801 – 802).*

[22] *Of course, the interests protected by s 11(b) – (8(1) in Dominica) – extend beyond those of accused persons. Timely trials impact other people who play a role in and are*

¹⁹ At pages 479-481, paragraphs [19] – [28]

affected by criminal trials, as well as the public's confidence in the administration of justice.

- [23] *Victims of crime and their families may be devastated by criminal acts and therefore have a special interest in timely trials (R v Askov)²⁰. Delay aggravates victims' suffering preventing them from moving on with their lives.*
- [24] *Timely trials allow victims and witnesses to make the best possible contribution to the trial and minimise the 'worry and frustration [they experience] until they have given their testimony (Askov [1990] 2 SCR 1199 at 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.*
- [25] *Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J (as she then was) put it in Mori [1992] 1 SCR 771 at 810: 'delays are of consequence not only to the accused, but may affect public interest in the prompt and fair administration of justice.' Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice (see Askov [1990] 2 SCR 1199 at 1220). Failure 'to deal fairly, quickly and efficiently with criminal trials inevitable leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures' (at 1221).*
- [26] *Extended delays undermine public confidence in the system. And public confidence is essential to the survival of the system itself, as 'a fair and balanced criminal justice system simply cannot exist without the support of the community'²¹*
- [27] *Canadians (and I assure you, Dominicans) therefore rightly expect a system that can deliver quality justice in a reasonably efficient time and manner. Fairness and timeliness are sometimes thought to be in mutual tension, but this is not so. As D Geoffrey Cowper QC wrote in a report commissioned by the British Columbia Justice Reform Initiative:*

²⁰ [1990] 2 SCR 1199 at 1220 – 1221)

²¹ (Askov [1990] 2 SCR 1199 at 1221).

‘... the widely perceived conflict between justice and efficiency goals is not based in reason or sound analysis. The real experience of the system is that both must be pursued in order for each to be realized: they are, in practice, interdependent.’ (See A Criminal Justice System for the 21st Century (2012), p 75.)

[28] *In short, timely trials further the interests of justice. They ensure that the system functions in a fair and efficient manner; tolerating trials after long delays does not. Swift, predictable justice, ‘the most powerful deterrent of crime’ is seriously undermined and in some cases rendered illusory by delayed trials’ (McLachlin CJ ‘The Challenges We Face’, remarks to the Empire Club of Canada, published in (2007) 40 UBC LR 819 at 825).” (Italics added to differentiate the quoted paragraphs from the paragraphs of this judgment).*

[87] The State submitted that the Applicant had not shown how (a) the unavailability of the Medical Records and (b) the delay has caused him prejudice.

[88] At paragraph 19 of its submissions the State says, in answer to the Applicant’s complaint about the unavailability of the Medical Records, that:

“19. Without a proper articulation of where the prejudice lies exactly there is no basis to stay the proceedings.”

[89] At paragraph 21. d.:

“The accused has not identified how the purported delay has actually prejudiced his defence in any way, namely whether it has affected his capacity to adduce evidence on his own behalf, cross examine witnesses and present any positive defence.”

[90] The comment this Court make on paragraph 21. d is that it is quite audaciously mindboggling of the State to submit that a delay of 14 years and 5 months can be called “*the purported delay*”. This manifests the ‘*culture of complacency*’ referred to in **Jordan**.

[91] In *Jordan*²², the Canadian Supreme Court states:

[33] Second, as the parties and interveners point out, the treatment of prejudice has become one of the most fraught areas in the s 11(b) jurisprudence. It is confusing, hard to prove and highly subjective. As to the confusion prejudice has caused, courts have struggled to distinguish between ‘actual’ and ‘inferred’ prejudice. And attempts to draw this distinction have led to apparent inconsistencies, such as that prejudice might be inferred even when the evidence shows that the accused suffered no actual prejudice. Further, actual prejudice can be quite difficult to establish, particularly prejudice to security of the person or fair trial interests. Courts have also found that ‘it may not be always easy’ to distinguish between prejudice stemming from the delay versus the charge itself (*R v Pidskalny*)²³. And even if sufficient evidence is adduced, the interpretation of that evidence is a highly subjective enterprise.

[34] Despite this confusion, prejudice has, as this case demonstrates, become an important if not determinative factor. Long delays are considered ‘reasonable’ if the accused is unable to demonstrate significant actual prejudice to his or her protected interests. This is a problem because the accused’s and the public’s interests in a trial within a reasonable time does not necessarily turn on how much suffering an accused has endured. Delayed trial may also cause prejudice to the administration of justice.”

[92] The Court then went on to modify the presumptive ceilings, and the route thereto set in *Morin*²⁴. More will be said of this later in this judgment. However, the Court said this:

[54] Third, although prejudice will no longer play an explicit role in the s 11(b) analysis, it informs the setting of the presumptive ceiling. Once the ceiling is breached, we presume that accused persons will have suffered prejudice to their Charter protected liberty, security of the person and fair trial interests. As this court wrote in *Morin* [1992] 1 SCR 771 at 801: ‘**prejudice to the accused can be inferred from prolong delay**’.²⁵ This is not, we stress, a **rebuttable presumption**; once the ceiling is breached, an

²² *R v Jordan* [2016] 4 LRC at pages 481-482, paragraphs [33] – [34]

²³ 2013 SKCA 74, (2013) 299 CCC (3d) 396 at [43])

²⁴ [1992] 1 SCR 771

²⁵ (see also *Godin* [2009] 2 SCR 3 at [37]).

absence of actual prejudice cannot convert an unreasonable delay into a reasonable one²⁶."

[93] The Canadian Supreme Court says this:

"Perhaps more significantly, the absence of prejudice can in no circumstances be used to justify delays after the ceiling is breached. Once so much time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient cause for the prolonged delay²⁷."

[94] The Court set new 'presumptive ceilings', summarized as follows:

"[105] The new framework for s 11(b) can be summarized as follows: There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.

Once the presumptive ceiling is exceeded, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.

Below the presumptive ceiling, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings and (2) the case took markedly longer than it reasonably should have²⁸."

[95] So that the Canadian Supreme Court has set time specific ceilings over which there will be a presumption that the trial has not been conducted within a reasonable time.

²⁶ Ibid at page 485 paragraph [54]

²⁷ At page 490, paragraph [81]

²⁸ At page 494 paragraph [105]

- [96] There is no requirement for the Applicant to prove, by any standard, that he has suffered prejudice by the delay. It is either there has been an unreasonable delay, or there has not.
- [97] That 'requirement' of proving prejudice is a smokescreen intended to obfuscate the real issue: what is the remedy for the breach of the Right to be tried within a reasonable time?
- [98] With the greatest respect, the thinking of those who seek to have the Applicant prove that he is prejudiced by the delay, is to condition that Constitutional Right on the Citizen proving something, even where his Right has been declared breached, which proof the Constitution does not require of him.
- [99] Where courts have held this to be the case are instances of Judicial amendments to a constitutional Right which cannot be supported by the Constitution itself.
- [100] To require an applicant who alleges that his Right to be tried within a reasonable time has been breached to show, even when the breach has been declared, that he has been prejudiced by the very delay he complains of, is not to enforce, or to secure the enforcement of the Right breached. It is to dilute that which the Constitution orders enforced.
- [101] In **Prakash Boolell v State**²⁹ quoted in **Urban St. Brice v The Attorney General of St. Lucia**³⁰ Lord Carswell said this: *"[i]f a criminal trial is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay."* Justice of Appeal (now retired) The Honourable Davidson Baptiste, delivering the Court's unanimous judgment said that *"Lord Carswell said that this represents the law of Mauritius. In my judgment, it also represents the law of St. Lucia, having regard to the identical nature of the respective provisions."* The section in the

²⁹ [2006] UKPC 46

³⁰ (2020) SLUHCVP2018/0036

Constitution of the Commonwealth of Dominica is in identical terms to those of Mauritius and St. Lucia, so that this is too the law of Dominica.

- [102] The Canadian Supreme Court's system of presumptive ceilings shows that the Right to a trial within a reasonable time is recognized as being what it was intended to be by the framers of the Canadian Charter; a right which is a fundamental hallmark of a free and democratic society, and is constitutionally required to be upheld, and where breached, strictly enforced by the courts. It is not a Right that is subject to the palliative of 'yes it has been breached, but you can still get a fair trial'.
- [103] Indeed, no constitutionally guaranteed Right is to be so subjected, and to arrive at that, *section 8(1)* must be interpreted as it is not written.
- [104] The refrain that a permanent stay "is an exceptional remedy" only to be used in the rarest of circumstances can only be applicable where the Prosecution conducts its cases in accordance with the Constitution and, to allow an inordinate delay in bringing a case to trial is not to adhere to the command of *section 8(1)* that an accused shall be tried within a reasonable time. Chronic institutional delay on the part of the State; inadequate resources deployed in the judicial system cannot be countenanced and prayed as justification for delay.
- [105] The Dominica Constitution, in *section 8(1)*, guarantees the right to be tried within a reasonable time, same as the Canadian Charter and, indeed the Jamaican Charter of Fundamental Rights and Freedoms. The principles which found the Canadian Supreme Court's decision are no less applicable in interpreting and enforcing *section 8(1)* rights in the Commonwealth of Dominica, and it is the constitutional obligation of the Court to fashion a remedy for the purpose of enforcing or securing the enforcement of these Rights. There is no remedy, short of abdicating the Court's obligation, that can enforce or secure the enforcement of the Right to be tried within a reasonable time – absent presumptive ceilings like in Canada – other than a permanent stay. The reasonable time has expired. It cannot be retrieved. It is gone.

Over. Time lost is never regained. That is an immutable Law of Nature. Anything else; including any formulaic differentiation on 'fair trial' assumptions, degrades the guaranteed Right to be tried within a reasonable time, and subordinates it to the fair trial Right. The Constitution does not admit of that.

[106] The time has come when the scatter – shot, subjective approach to determining what is “*within a reasonable time*” must, like Julius Caesar was from the Senate of Rome, be retired from the hallowed halls of Justice. In doing so, the ‘yes, but ...’ tendency to subordinate this elemental Right to be tried within a reasonable time to the Right to a fair trial, must be banished across the Rubicon. Clarity and certainty must be the order of the constitutional day.

[107] The Canadian Supreme Court’s introduction of the concept of presumptive ceilings is not alien to the jurisprudence of the Eastern Caribbean. In fact, in ***Pratt and Morgan v Attorney General for Jamaica***³¹ the Privy Council did just that.

[108] The “...Board, sitting as an expanded bench of seven, held that undue delay in carrying out the execution of a prisoner lawfully sentenced to death rendered it unlawful to proceed to the implementation of that penalty. Ordinarily, it held, a period of more than five years would amount to such undue delay, so that the prisoner could no longer be executed.” per Lord Hughes in ***Lendore and Others v The Attorney General of Trinidad & Tobago***³².

[109] Then there is the Judgment of the Court of Appeal of the Eastern Caribbean in **Urban St. Brice**³³.

[110] In **Urban St. Brice**, Baptiste, JA states:

“Section 16(2)(b) of the Constitution [of St. Lucia, identical to Dominica’s 16(2)] is flexible in terms and admits of a wide discretion enabling the court to deploy an appropriate remedy to meet the justice of the case. The section

³¹ [1993] UKPC 37; [1994] 2 AC 1

³² [2017] UKPC 25, at paragraph 1

³³ *Ibid* at fn. 26

empowers the court to make declarations and orders, to issue such writs and give such directions as it may consider appropriate for the purpose of securing the enforcement of the right violated. When devising an appropriate remedy, the court must consider all the circumstances of the case. The court, in essence, has to look at the whole picture. In appropriate circumstances [presumably where it has found the Right to have been breached], a declaration by the court will articulate the fact of the violation of the right, but in most cases, more will be required than words. In my judgment, merely granting a declaration of the violation of the reasonable time guarantee would be inadequate given the circumstances of this case – more will be required³⁴.”

[111] Baptiste JA continues:

“In applying the relevant learning referred to earlier, the function of granting relief is intended to serve to vindicate the constitutional right. In some cases, a declaration on its own would be all that is needed. It is entirely within the court’s discretion under section 16 to grant the declaration of violation as a vindication of St. Brice’s constitutional right. I am of the view, however, that in the circumstances of this case, the finding of violation would not itself afford just satisfaction to St. Brice as it would not provide an emphatic vindication of the right violated. A declaratory remedy coupled with the exceptional remedy of a permanent stay of the criminal proceedings, particularly having regard to the gravity of the offence, [murder], would, in my judgment, provide an emphatic vindication of the breach of the reasonable time guarantee³⁵.”

[112] Mr. St. Brice had been charged with murder in 2002 and up to 2020 the charge had not been finally disposed of.

[113] Baptiste JA, referred to:

- a) the English Common Law case of **R v Horseferry Road Magistrates Court, ex p Bennett**³⁶, per Lord Lowry at page 74 F., as authority for the principle that “... the jurisdiction to grant a stay must be exercised carefully, sparingly and only for compelling reasons”.

³⁴ At pages 15 – 16, paragraph [29]

³⁵ Ibid at fn 26. At page 22, paragraph [41]

³⁶ [1994] 1 AC 42 At

- b) **R v DS**³⁷, per Burnett LJ at paragraph 50, for the principle that “The staying of criminal proceedings requires clear and compelling justification. Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule.”
- c) **The Queen v Scott Crawley and Ors**³⁸, per Sir Brian Leveson P at paragraph 18, for the principle that: *“There is an undoubtedly strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Therefore, ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort.”* [None of (a), (b) or (c) are of constitutional authority.]
- d) **Gibson v The Attorney General of Barbados**³⁹, for the guidance “Given the high level of public interest in the determination of very serious crimes, it will only be in exceptional circumstances that a person accused of murder will be able to obtain a remedy of a permanent stay or dismissal for a breach of the reasonable time guarantee.” [This pronouncement does two things i. it assumes that the reasonable time guarantee is somehow a pliable lesser guarantee, and ii. that the seriousness of the offence somehow adapts the right guaranteed – the more serious the offence, the less value the guarantee. This too is unsupported by sections 8 or 16. The principled approach of the Canadian Supreme Court in **Jordan** commends itself for adoption]
- e) That dreaded **Attorney General’s Reference**⁴⁰ *“The public interest in the final determination of criminal charges, require that a charge should not be stayed or dismissed if any lesser remedy would be appropriate*

³⁷ [2020] EWCA Crim 285

³⁸ [2014] EWCA Crim 1028

³⁹ [2010] CCJ 3 AJ

⁴⁰ (No. 2 of 2001)

in all the circumstances.” [This is the U.K.’s Attorney General’s reference to its highest Court, the Supreme Court. Although it references the European Convention on Human Rights, which was the framework for the written Constitutions Fundamental Rights and Freedoms in the Caribbean, the jurisprudence emanating out of the European Courts on the Convention are not binding authority on our courts, and must be viewed in the context of the evolution of their jurisprudence, which differs from that of the West Indian courts which have a long history of interpreting and applying our written Constitutions. This pronouncement ought, therefore, to be viewed in that context.]

- f) And, for the expressed diminution of the “within a reasonable time” right by the Privy Council, there is **Boolell v State** (ibid) *“An appropriate remedy should be afforded for a breach of the reasonable time guarantee, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair, or (b) it was unfair to try the defendant at all.”* [As discussed earlier in this judgment, there is nothing in either of sections 8 or 16 of the Dominica Constitution which superimposes this “fair trial” assumption upon, and over the *Right to be tried within a reasonable time*. Sections 8 and 16 do NOT say that in order for there to be an effective remedy for a breach of the right to be tried within a reasonable time, it must also be that the applicant cannot get a fair trial. While the rights are interdependent, they are also independent, in that a breach of the reasonable time right can give rise to an unfair trial claim, but the fair trial right, unless time run has been unreasonable, does not raise reasonable time implications, as discussed above. The ‘interdependence’ is, for the most part, a one-way street]

g) Based upon the foregoing, Baptiste JA stated:⁴¹

“From the authorities, it is seen that the threshold for a stay of criminal proceedings is undoubtedly very high. In a nutshell, the remedy is exceptional; it is one of last resort and must be used sparingly, carefully and for compelling reasons.” [There can be no more ‘compelling reason’ than where a person charged with a criminal offence is not tried for 5, 6, 7, 8, 10, 15 or 17 years, as the Canadian Supreme Court has shown in their reasoned Judgment in **Jordan**.]

[114] Baptiste JA states:

“Should a permanent stay be granted in the circumstances of this case? On the one hand, I recognize that a permanent stay may well reward St. Brice who would have escaped being brought to justice. [Presumption of Innocence?] On the other hand, it does nothing for him if innocent [as presumed by the Constitution], in that he cannot regain the over 17 years spent in custody on remand awaiting trial and retrial for murder. Not only has there been an inordinate delay in disposing of the murder retrial, but critically St. Brice has been in custody since November 2002. ... It could not have been contemplated or countenanced that an accused would be in custody for over 17 years awaiting trial or retrial for murder. St. Brice has had the shadow of the proceedings ‘hanging over his head’ from November 2002.”⁴²

[115] In this case Lander was charged on 15 November, 2008, bailed on June 15, 2010, with strict conditions; has had this charge ‘hanging over his head’ ever since; has seen 7 of the 17 State witnesses become unavailable; has seen his Medical Psychiatric Records lost to Hurricane Maria, and therefore deprive him of a ‘Fitness Hearing’, and of a M’naghten defence. I granted Lander the Permanent Stay sought.

[116] Given this Court’s experience in the Criminal Law spanning over three decades, both as Defence Counsel and Prosecution Counsel, and in the context of the foregoing, and bearing in mind the Privy Council’s “*presumptive ceiling*” in **Pratt and Morgan**; and considering the **Jordan** presumptive ceilings, Mr. Lander’s trial on indictment should have been completed within a period of six years from the date when he was charged. After the passage of six years a trial could not be held “*within*

⁴¹ At page 18, paragraph [31]

⁴² Urban St. Brice (2020) SLUHCVP2018/0036, at paragraph [32]

a reasonable time” as is mandated by *section 8(1) of the Constitution of the Commonwealth of Dominica*, and this too undergirds my reasons for the grant of the Permanent Stay.

[117] Likewise, a summary trial of a Criminal or Quasi-criminal nature should be completed within 24 months of the defendant being charged. Outside of that period the right to be tried within a reasonable time would be infringed. In both cases, unless the Prosecution can establish the same objective no-fault bases as are required in **Jordan** at the time of the collision with the presumptive ceilings, a permanent stay should be granted. (see paragraph [94] above for those bases). If the necessary bases are established to the satisfaction of the court, then the case should be tried within 8 months of that date for an indictable offence, and 4 months for a summary offence.

[118] These are the Reasons for the grant of the Permanent Stay.

Thomas WR Astaphan, K.C. J
High Court Judge (Ag.)

By The Court

Registrar