

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV 2019/0023

MYRON GREEN

V

COMMISSIONER OF POLICE

APPEARANCES

The applicant Myron Green was unrepresented, formerly by Mr David Brandt.

Mr Jean Kelsick appeared as amicus, also representing interested co-defendants Tuit, Tuit, and Greenaway.

Mr Oris Sullivan, the Director of Public Prosecutions, appeared for the Respondent.

2020: AUGUST 14

RULING

On whether a Magistrates Court trial should be stayed for delay

- 1 **Morley J:** Arising out of an incident in Little Bay on 22.12.17, four young men were charged with affray and as follows, requiring trial:
- a. Myron Green, with wounding Dimitri Tuitt and assaulting Dion Tuitt;
 - b. Dimitri Tuitt, with having an offensive weapon (cutlass);
 - c. Dion Tuitt, with assaulting Myron Green and having an offensive weapon (stick);
 - d. Norville Greenaway, with assaulting Green and having an offensive weapon (stick)

- 2 It can be seen the case shows two camps engaging each other, Green v Tuitt, Tuitt & Greenaway, broadly the former represented by Counsel Brandt, and the latter by Counsel Kelsick. A fifth, Quincy Isaacs, was also charged with offences, in the Green camp, but has been dealt with separately at the High Court from 18.06.18.
- 3 The four have still not been tried, and the question arises if their case should be stayed for breach of their constitutional right to a trial 'within a reasonable time', per **s7 Montserrat Constitution**, which says:

Provisions to secure protection of law

7(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

[Underlining added]

- 4 At the magistrates Court, according to the log, the case proceeded as follows:
- a. 27.12.17 – bail application.
 - b. 04.01.18 – bail application.
 - c. 29.01.18 – hearing.
 - d. 15.02.18 – prosecution not ready.
 - e. 05.03.18 – prosecution not ready.
 - f. 28.05.18 – prosecution not ready, trial dates set for 14 and 18.06.18.
 - g. 07.06.18 – prosecution not ready.
 - h. 12.06.18 – prosecution not ready.
 - i. 18.06.18 – Isaacs separated and sent to the High Court, defence counsel absent.
 - j. 17.07.18 – prosecution not ready.
 - k. 14.08.18 – magistrate ill.
 - l. 15.08.18 – prosecution not ready, Dion Tuitt off island, further trial date set for 22.10.18.
 - m. 22.10.18 – prosecution not ready, preliminary points decided, further trial date set for 27 and 28.12.18.

- n. 27.12.18 – prosecution not ready owing to change of counsel at the ODPP¹.
 - o. 14.01.19 – defence counsel Kelsick for Tuitt, Tuitt and Greenaway applied to adjourn owing to Greenaway being absent, granted, then defence counsel Brandt sought the case against Green stayed for delay.
- 5 Distilling the history, it has not always been clear what has been meant by ‘prosecution not ready’ but the log suggests there were specifically the following four trial dates set - 14.06.18, 22.10.18, 27.12.18 and 14.01.19 - where it appears the first three dates were vacated owing to the prosecution not being ‘ready’, and the last because Greenaway was absent. However, it should also be noted, by affidavit from Immigration Officer Eunice Pond dated 30.07.20, it appears Dion Tuitt as a student was off island 08.01-03.05.18 and 03.09-18.12.18, meaning he was absent for the trial date 22.10.18.
- 6 On one interpretation, two trial dates were vacated by the prosecution, two by the defence.
- 7 It is to be further noted that by an affidavit of 30.07.20 Court Clerk Desiree Furlong explained in 2018 there were 313 cases filed before the Magistrates Court and each is usually completed in 6-8 months.
- 8 On 14.01.19, with Greenaway absent, the trial adjourned a fourth time, now 13 months old, Counsel Brandt for Green argued for a stay for delay, which in an elegant judgment Learned Chief Magistrate Chatoor, with able assistance from Senior Magistrate Weeratunga, ruled was not a ‘frivolous and vexatious’ application, so that under **s20(3) Montserrat Constitution** the question of whether to stay was sent to be decided by the High Court.
- 9 What happened next was unfortunate. The file was sent to the Court of Appeal, and when the error was spotted, the referral to the High Court was logged into the Registry on 30.05.19, four months late.
- 10 What happened next was unacceptable. From what has been reported to the court by the Registrar, the file just sat in a filing cabinet for 14 months.

¹ Office of the Director of Public Prosecutions.

- 11 Finally Counsel Kelsick enquired of its whereabouts by email, copying this judge, on 13.07.20, in total 18 months after the referral. The case of Tuitt et al could not proceed until the referral by Green had been decided and understandably Counsel Kelsick was puzzled as to outcome. Counsel Brandt, facing personal difficulty, was no longer acting in the case and so had not pursued it, while Green being unrepresented would not have been best placed to arrange its listing.
- 12 The file was sought, eventually found, and called by the judge into the list for the next day, 14.07.20, with further review on 23.07.20, so that there has been argument on 30.07.20, with helpful submissions filed, to determine for today, 14.08.20, whether the proceedings should be stayed for delay in all the circumstances as they have now evolved.
- 13 As at now, the case from 27.12.17 is 32 months old, when it ought to have been triable within 6-8 months, maybe a little more, but certainly before 32 months pass, while 14 months is attributable to woeful oversight by the High Court Registry.
- 14 I am satisfied the delay to 14.01.19 is not ground for stay. In what began as a five-handed trial, reducing to four-hands, there being competing camps, with at least one defendant a student needing to travel, another defendant off island on another date, and change of counsel in the ODPP, there being four trial dates vacated it appears equally by both sides, it is not unreasonable the case might be difficult to fix, so that it might take longer than 6-8 months to start.
- 15 I would however have expected the case tried in 2019.
- 16 But it was not tried then because from May for 14 months the High Court Registry placed the file into a filing cabinet and did nothing about it.
- 17 I will approach the case assuming prejudice has not arisen, as this has not been much argued, meaning in theory it might yet be possible to conduct a fair trial, so that the narrow question is what should be the consequence of losing the file, and whether specifically this administrative

blunder gives rise to stay of the proceedings under the doctrine of 'abuse of process' first established under **DPP v Connelly 1964** AC1254.

- 18 To my mind the jurisprudence has developed in recent years so that stay for delay absent prejudice is permissible, especially where dealing with arguably minor offending as here, being matters tried summarily. The growth of constitutional law, with attendant enforcement of rights, has led to a focus on whether the administration of justice has been brought into disrepute. In this case by losing the file it would appear it has, through no fault of the prosecution, but through fault of the Registry.
- 19 It is self-evident a third party observer would be appalled to learn a file was left in a filing cabinet for 14 months from 30.05.19, so that trial 'within a reasonable time', usually 6-8 months, already delayed up to 14.01.19, had then been wholly undermined. I remind myself of earlier decisions in **R v Larrydow Jacobs et al 2019**² and **R v Wayne Miguel 2020**³, in which in both cases there was a review of precedent on delay, in depth in the latter.
- 20 In particular in *Wayne Miguel* supra, where a simple fraud trial was delayed 10 years at the High Court, still without fixture, and so stayed, having reviewed the authorities, considering abuse of process the court said:

40. In **Gibson v AG Barbados 2010** CCJ 3 the leading court of the Caribbean made observations about stay for delay, including absent prejudice, in particular at paras 48, 49, 58, and 63:

48. The public have a profound interest in criminal trials being heard within a reasonable time. Delay creates and increases the backlog of cases clogging and tarnishing the image of the criminal justice system. ...

49. Even more telling than the societal interests at stake are the consequences to an accused of a breach of the reasonable time guarantee. This is evident in the case of a defendant who is not guilty. That person is deprived of an early opportunity to have his name cleared and is confronted with the stigma, loss of

² ANUCHR 2015/0090, 2015/0093, 2016/0075, 2017/0022, 2017/0050

³ ANUHR 2013/0085 (& ANUHCv 2020/0016)

privacy, anxiety and stress that accompany exposure to criminal proceedings. But a defendant facing conviction and punishment may also suffer, albeit to a lesser extent, as he is obliged to undergo the additional trauma of protracted delay with all the implications it may have for his health and family life. By deliberately elevating to the status of a constitutional imperative the right to a trial within a reasonable time, a right which already existed at common law, the framers of the Constitution ascribed a significance to this right that too often is under-appreciated, if not misunderstood....

58. A finding that there has indeed been unreasonable delay in bringing the accused to trial must be made on a case by case basis... One must not lose sight of the fact, however, that it is the responsibility of the State to bring an accused person to trial and to ensure that the justice system is not manipulated by the accused for his own ends. Even where an accused person causes or contributes to the delay, a time could eventually be reached where a court may be obliged to conclude that notwithstanding the conduct of the accused the overall delay has been too great to resist a finding that there has been a breach of the guarantee.

63. But equally, we do not agree that a mere breach of the reasonable time guarantee could never yield a permanent stay or dismissal of the charge and that instead such relief should be reserved only for instances where the trial will be unfair or the accused can show prejudice. ..[T]he Constitution affords the court flexibility, power and a wide discretion in fashioning a remedy that is just and effective taking into account the public interest and the rights and freedoms of others. No conceivable remedy, including a permanent stay or dismissal, ought to be removed from the range of measures at the disposal of the court if the relief in question will prove to be appropriate...

41. The test in **R v Maxwell 2011** 1 WLR 1837 is the court can stay ... where a stay is necessary to protect the integrity of the criminal justice system. In echo, in **Warren v AG Jersey 2011** UKPC 10, Lord Kerr at para 83 quoted the judgment of Lord Steyn in **R v Latif 1996** 1WLR104 that 'a stay should not be ordered for the purpose of punishing or disciplining prosecutorial or police misconduct. The focus should always be on whether the stay is required in order to safeguard the integrity of the criminal justice system'.

44. Analysis suggests the doctrine of abuse of process has evolved since **DPP v Connelly 1964** supra in light of a growing appreciation and enforcement of human

rights and their capture by Convention and Constitutions. In other words, the test is now focusing more on a 'right' infringed, being here 'trial within a reasonable time', so that stay for abuse may be available in expanded situations not limited to *Connolly* supra and cases pre-2000, though still unusual yet no longer so narrowly defined nor so unusual to invoke.

47. ...in **R v Larrydow Jacobs et al 2019** this court observed there can be a stay for delay, though without a finding of prejudice, where five uncomplicated indictments had without detailed explanation taken 42, 42, 36, 25 and 19 months to file...

49. ...a stay for delay can arise, rarely, absent prejudice, in consequence of a constitutional right to trial in a reasonable time, and may do so more readily if an offence is not the most serious like murder.

- 21 In the instant case, four young men, at least one a student, have waited overlong for their summary trial, owing to poor performance by the High Court Registry, and as such, irrespective of whether prejudice has arisen, to protect from disrepute the integrity of the criminal justice system in my judgement the proceedings should be stayed, consistent with the developing jurisprudence, as to continue would be to abuse the court's process in that it would ignore a delay where the time taken to come to trial has not been 'reasonable', as required under the **Constitution**.
- 22 To put it simply, it is not reasonable for the Registry to leave a summary file lying in a filing cabinet for 14 months. The Court acts as an authority and if it does not manage its business correctly, this is as much an affront to the administration of justice as it would be if the error lay with the prosecution. In any event, here it does not lie with the defendants, and their interests must be properly protected, as the public would expect.
- 23 More formally, the import of this ruling is as follows:
- a. The High Court finds, though the application to the Learned Magistrate was not frivolous and vexatious, the delay in this multi-handed case to 14.01.19 does not qualify as

unreasonable under the **s7 Montserrat Constitution**, so that the stay sought by Counsel Brandt on 14.01.19 would not have followed;

- b. The mistake in referring the Learned Magistrate's inquiry to the Court of Appeal, though unfortunate, is of no separate consequence;
- c. However, the loss of the file by the Registry from 30.05.19 to 13.07.20 is of consequence, in that it brings the administration of justice into disrepute, requiring stay of the proceedings, in that it has meant that there has not been a trial 'within a reasonable time' as required under *s7 supra*;
- d. The application by Myron Green to stay the proceedings for delay is granted, though not for the reasons originally contemplated;
- e. The stay extends to the proceedings concerning Dimitri Tuit, Dion Tuit and Norville Greenway, as argued by Counsel Kelsick, as their trial in parallel has been equally unreasonably delayed, awaiting the unreasonably delayed outcome of the Green application; and
- f. The stay means the proceedings against the four are at an end, unless reversed by the Court of Appeal.

24 It should be understood this ruling is no criticism of the prosecution.

25 There shall be no order as to costs.

26 Delay to criminal trials was said by Barrow J of the CCJ as the keynote speech of the CAJO⁴ conference in September 2017 to be the most significant failing of criminal justice in the paradise idyll of the Caribbean jurisdictions. Where it arises, unreasonably as here, it must be pointed out and there must be consequences, lest the system will never improve. It is hoped this judgment will mark an advance, and a vigilance to safeguard public confidence in the integrity of the criminal justice system. Files must not be left forgotten lying around.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

⁴ Caribbean Association of Judicial Officers.

14 August 2020